

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Pickens County

S.C. SUPREME COURT

Honorable John C. Hayes, Circuit Court Judge

\_\_\_\_\_  
KELVIN BERNARD SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001641

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

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ATTORNEYS FOR RESPONDENT

INDEX

INDEX .....i

TRIAL TRANSCRIPT.....1

APPLICATION FOR POST-CONVICTION RELIEF .....20

RETURN .....27

POST-CONVICTION RELIEF HEARING TRANSCRIPT.....33

ORDER OF DISMISSAL.....49

INDICTMENTS .....55

SMITH'S MENTAL EVALUATION.....61

STATE OF SOUTH CAROLINA  
COUNTY OF PICKENS

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA, )  
 )  
 PLAINTIFF, )  
 )  
 -VS- )  
 )  
 KELVIN BERNARD SMITH, )  
 )  
 DEFENDANT. )  
 \_\_\_\_\_ )

2014-GS-39-00659 & 0661 - 0662

EXCERPT OF  
TRANSCRIPT OF RECORD

DECEMBER 15, 2014  
PICKENS, SOUTH CAROLINA

BEFORE:

THE HONORABLE EDWARD W. MILLER

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

BRANDI HINTON, ASSISTANT SOLICITOR

ATTORNEY FOR DEFENDANT:

TEAL JOHNSON, ESQUIRE

SUSAN W. HUDGINS  
CIRCUIT COURT REPORTER

INDEX

WITNESS

PAGE NO.

CERTIFICATE OF REPORTER ----- 19

COURT REPORTER'S NOTE: (The guilty pleas of Eric Popp,  
Danyelle Atkinson, Zackery Bishop and Joseph Miller were taken  
along with this plea)

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
C-1	Mental Evaluation	14	

1           **THE COURT:** You got jail days?

2           **MS. HINTON:** Yes, Your Honor. Three hundred and  
3 twenty-four on Smith. One on Popp. Forty-three on  
4 Atkinson. One seventy-six on Bishop. And two twenty-one on  
5 Miller.

6           **MADAME CLERK:** 2014-GS-39-661, the State versus Kelvin  
7 Smith, pleading to criminal sexual conduct, first degree.  
8 2014-GS-39-662, pleading to burglary, first degree. 2014-  
9 GS-39-659, pleading to kidnapping.

10           2014-GS-39-2253, the State versus Eric Popp, pleading  
11 to driving under the influence.

12           2014-GS-39-1661, the State versus Danyelle Atkinson,  
13 pleading to burglary, second degree. 2014-GS-39-1660,  
14 pleading to grand larceny.

15           2014-GS-39-2528, the State versus Zackery Bishop,  
16 pleading to petty larceny. 2014-GS-39-2527, pleading to  
17 driving under suspension. 2014-GS-39-2526, pleading to  
18 habitual traffic offender. 2014-GS-39-2713, pleading to  
19 habitual traffic offender.

20           2014-GS-39-2530, the State versus Joseph Miller,  
21 pleading to burglary, second degree. 2014-GS-39-2532,  
22 pleading to financial transaction card theft. 2014-GS-39-  
23 2535, pleading to burglary, second degree.

24           Raise your right hands, please. Do you solemnly swear  
25 or affirm that the testimony you're about to give is the

1 truth, the whole truth and nothing but the truth so help you  
2 God? Mr. Smith?

3 MR. SMITH: Yes.

4 MADAME CLERK: Mr. Popp?

5 MR. POPP: Yes.

6 MADAME CLERK: Ms. Atkinson?

7 MS. ATKINSON: Yes.

8 MADAME CLERK: Mr. Bishop?

9 MR. BISHOP: Yes, ma'am.

10 MADAME CLERK: Mr. Miller?

11 MR. MILLER: Yes, ma'am.

12 MADAME CLERK: Thank you.

13 THE COURT: Last twenty-four hours have you had any  
14 drugs, alcohol or medication? Smith?

15 MR. SMITH: No.

16 THE COURT: Popp?

17 MR. POPP: Yes, sir.

18 THE COURT: What?

19 MR. POPP: Bipolar medication.

20 THE COURT: Okay. In the last three days have you had  
21 the right amount?

22 MR. POPP: Yes, sir.

23 THE COURT: Does it limit your ability to understand  
24 what's going on?

25 MR. POPP: No, sir.

1 THE COURT: Atkinson?

2 MS. ATKINSON: No, sir.

3 THE COURT: Bishop?

4 MR. BISHOP: No, Your Honor.

5 THE COURT: Miller?

6 MR. MILLER: No, sir.

7 THE COURT: Ever been treated for substance abuse or  
8 mental illness? Smith?

9 MR. SMITH: Yes, sir.

10 THE COURT: What?

11 MR. SMITH: PTSD and bipolar.

12 THE COURT: You supposed to be on medication?

13 MR. SMITH: Yes, sir.

14 THE COURT: And you're not.

15 MR. SMITH: Yes, sir.

16 THE COURT: Well, you haven't had it in the last  
17 twenty-four hours?

18 MR. SMITH: Yes, sir.

19 THE COURT: Okay. Have you had the right amount?

20 MR. SMITH: Yes, sir.

21 THE COURT: Does it limit your ability to understand  
22 what's going on?

23 MR. SMITH: No, sir.

24 THE COURT: Any competency issues, counselor?

25 MS. JOHNSON: Your Honor, we had him evaluated, and he

1 was found competent by the Department of Mental Health.

2 **THE COURT:** Okay.

3 **MS. JOHNSON:** We would like to ---

4 **THE COURT:** Well, we can rely on that. Treatment?  
5 Popp, who treats you?

6 **MR. POPP:** My doctor in Ohio.

7 **THE COURT:** Yeah. Competency issues, counselor?

8 **MR. DeJONG:** No, sir.

9 **THE COURT:** Atkinson?

10 **MS. ATKINSON:** No, sir.

11 **THE COURT:** Bishop?

12 **MR. BISHOP:** No, sir.

13 **THE COURT:** Miller?

14 **MR. MILLER:** No, sir.

15 **THE COURT:** Okay. Popp, Bishop, and Miller, you each  
16 have at least one indictment that has not been presented to  
17 the Grand Jury. You have an absolute right to require the  
18 State to present those cases to the Grand Jury where they  
19 would have to prove more probably than not that a crime was  
20 committed and you're the one that did it. You want to give  
21 that right up, which would let you go forward today? Popp?

22 **MR. POPP:** Yes, sir.

23 **THE COURT:** Bishop?

24 **MR. BISHOP:** Yes, sir.

25 **THE COURT:** Miller?

1           **MR. MILLER:** Yes, sir.

2           **THE COURT:** Smith, ---

3           **MR. SMITH:** Yes, sir.

4           **THE COURT:** --- the first indictment alleges you did in  
5 Pickens County, January 25, 2014 engage in a sexual battery  
6 with **VICTIM** [REDACTED] when you used aggravated force to  
7 accomplish the battery. This carries up to thirty years in  
8 prison. It's a violent offense, which impacts parole  
9 eligibility. And it's a most serious offense. And if you  
10 get convictions for two or more most serious offenses you're  
11 eligible for life in prison without parole. You understand?

12           **MR. SMITH:** Yes, sir.

13           **THE COURT:** I'm sorry?

14           **MR. SMITH:** Yes, sir.

15           **THE COURT:** You've got to speak up a little bit, okay?  
16 The next indictment alleges you did in Pickens County,  
17 January 25, 2014 unlawfully enter the dwelling of **VICTIM**  
18 [REDACTED] in Easley, South Carolina. Burglary, first, carries  
19 fifteen years to life. It is violent and most serious.  
20 Understand?

21           **MR. SMITH:** Yes, sir.

22           **THE COURT:** And finally, your last indictment alleges  
23 you did in Pickens County, January 25, 2014 unlawfully  
24 seize, abduct, confine, inveigle, deploy or carry away **VICTIM**  
25 [REDACTED]. And kidnapping carries up to thirty years. It is

1 a violent and most serious offense. You understand that?

2 **MR. SMITH:** Yes, sir.

3 **THE COURT:** Mr. Popp, you're here on an indictment that  
4 alleges you did, Pickens County, August 1, 2014 drive a  
5 motor vehicle under the influence of alcohol, drugs or any  
6 combination thereof, which materially and appreciably  
7 impaired your ability to drive. You refused. And this  
8 carries forty-eight hours to thirty days or four hundred  
9 dollars. You understand that?

10 **MR. POPP:** Yes, sir.

11 **THE COURT:** Ms. Atkinson, your indictment alleges you  
12 did in Pickens County, March 11 of this year unlawfully  
13 enter the dwelling of Daniel Patterson in Pickens, South  
14 Carolina, burglary, second, non-violent. Ten years. You  
15 understand that?

16 **MS. ATKINSON:** Yes, sir.

17 **THE COURT:** Next indictment alleges you did, Pickens  
18 County, March 11 of this year unlawfully steal the property  
19 of Daniel Patterson, quantity of guns, a .58 caliber rifle,  
20 a Ruger .22 rifle, a Marlin 30-30, a Winchester 30-30, 20-  
21 gauge shotgun, a .50 cal rifle, a British 303, a Remington  
22 30-06, an Elroy Bursa pistol. Carries five years. You  
23 understand that?

24 **MS. ATKINSON:** Yes, sir.

25 **THE COURT:** Mr. Bishop, your indictment alleges you

1 did, Pickens County, June 17 of this year operate a motor  
2 vehicle while your license was suspended after having been  
3 declared a habitual traffic offender. Five years. You  
4 understand?

5 **MR. BISHOP:** Yes, sir.

6 **THE COURT:** Next indictment alleges you did in Pickens  
7 County, July 25 of this year steal a Datsun 280Z belonging  
8 to Jane Morgan. Third property offense, ten years. You  
9 understand that?

10 **MR. BISHOP:** Yes, sir.

11 **THE COURT:** Next indictment alleges you did, Pickens  
12 County, February 22, 2014 drive a motor vehicle while your  
13 license was suspended, third or subsequent offense. Sixty  
14 days? Hang on.

15 **MS. HINTON:** I think it's up to ninety days, Your  
16 Honor.

17 **THE COURT:** Up to ninety days and a thousand dollars,  
18 no suspension or you can get up to six months HIP. You  
19 understand that?

20 **MR. BISHOP:** Yes, sir.

21 **THE COURT:** And finally, indictment alleges you did in  
22 Pickens County, February 22 of this year operate a motor  
23 vehicle while your license was suspended after having been  
24 declared a habitual traffic offender. It's another five.  
25 You understand that?

1           **MR. BISHOP:** Yes, sir.

2           **THE COURT:** Miller, first indictment alleges you did,  
3 Pickens County, between March 1 and 8 of this year  
4 unlawfully enter the dwelling of Bryce Collin Moyers on --  
5 in Clemson, South Carolina. Burglary, second, non-violent,  
6 ten years. You understand that?

7           **MR. MILLER:** Yes, sir.

8           **THE COURT:** Next indictment alleges Pickens County,  
9 April 4 of this year unlawfully took a SRP Federal Credit  
10 Union debit card belonging to Jenna Richard. That's five  
11 years. You understand that?

12           **MR. MILLER:** Yes, sir.

13           **THE COURT:** Next one alleges that you did in Pickens  
14 County on or about March 16 of this year unlawfully enter  
15 the dwelling of Jenna Richard, Clemson, South Carolina.  
16 It's another ten years. You understand that?

17           **MR. MILLER:** Yes, sir.

18           **THE COURT:** To each of you, understanding the nature of  
19 the charges against you and the maximum possible punishment,  
20 how do you want to plead? Smith?

21           **MR. SMITH:** Guilty, sir.

22           **THE COURT:** Atkinson?

23           **MS. ATKINSON:** Guilty.

24           **THE COURT:** Popp?

25           **MR. POPP:** Guilty.

1           **THE COURT:** Bishop?

2           **MR. BISHOP:** Guilty.

3           **THE COURT:** Miller?

4           **MR. MILLER:** Guilty.

5           **THE COURT:** Is that your free and voluntary decision?

6           Smith?

7           **MR. SMITH:** Yes, sir.

8           **THE COURT:** Popp?

9           **MR. POPP:** Yes, sir.

10          **THE COURT:** Atkinson?

11          **MS. ATKINSON:** Yes, sir.

12          **THE COURT:** Bishop?

13          **MR. BISHOP:** Yes, sir.

14          **THE COURT:** Miller?

15          **MR. MILLER:** Yes, sir.

16          **THE COURT:** Do you each understand you have an absolute  
17          right to a trial by jury where you'd be presumed innocent  
18          unless and until the State could prove you guilty beyond any  
19          reasonable doubt of each and every element of each offense  
20          you're charged with? You'd have a right to confront and  
21          cross examine the witnesses and the evidence put up against  
22          you by the State.

23                 You'd have a right to compel in court all relevant and  
24          competent evidence in your own defense or you can remain  
25          silent. Your silence cannot be held against you. And you

1 can never be compelled to incriminate yourself. You  
2 understand all those rights? Smith?

3 MR. SMITH: Yes, sir.

4 THE COURT: Popp?

5 MR. POPP: Yes, sir.

6 THE COURT: Atkinson?

7 MS. ATKINSON: Yes, sir.

8 THE COURT: Bishop?

9 MR. BISHOP: Yes, sir.

10 THE COURT: Miller?

11 MR. MILLER: Yes, sir.

12 THE COURT: Are you guilty? Smith?

13 MR. SMITH: Yes, sir.

14 THE COURT: Popp?

15 MR. POPP: Yes, sir.

16 THE COURT: Atkinson?

17 MS. ATKINSON: Yes, sir.

18 THE COURT: Bishop?

19 MR. BISHOP: Yes, sir.

20 THE COURT: Miller?

21 MR. MILLER: Yes, sir.

22 THE COURT: Totally satisfied with your lawyer? Smith?

23 MR. SMITH: Yes, sir.

24 THE COURT: Popp?

25 MR. POPP: Yes, sir.

1           **THE COURT:** Atkinson?

2           **MS. ATKINSON:** Yes, sir.

3           **THE COURT:** Bishop?

4           **MR. BISHOP:** Yes, sir.

5           **THE COURT:** Miller?

6           **MR. MILLER:** Yes, sir.

7           **THE COURT:** Have you had enough time to review the  
8 evidence the State has against you? Smith?

9           **MR. SMITH:** Yes, sir.

10          **THE COURT:** Popp?

11          **MR. POPP:** Yes, sir.

12          **THE COURT:** Atkinson?

13          **MS. ATKINSON:** Yes, sir.

14          **THE COURT:** Bishop?

15          **MR. BISHOP:** Yes, sir.

16          **THE COURT:** Miller?

17          **MR. MILLER:** Yes, sir.

18          **MS. HINTON:** Thank you, Your Honor. As to Mr. Smith,  
19 as Ms. Johnson alluded to, we did have an evaluation done on  
20 him. We would like to make that a Court's exhibit.

21                 (Whereupon Court's exhibit 1 was marked)

22          **MS. HINTON:** Your Honor, the facts are that on January  
23 the 25th of 2014 the victim, **VICTIM** [REDACTED], was collecting  
24 trash within her house and saw the Defendant, who was an ex-  
25 boyfriend of hers, standing on the back porch. She became

1 fearful, ran to her closet in her bedroom, shut the door,  
2 called 911.

3 She hears Mr. Smith enter her residence and then come  
4 to her bedroom. All this is caught on 911. He enters, he  
5 has a knife, he rips her out of the closet, tells her that  
6 he's going to kill her, throws her on the bed, proceeds to  
7 rape her. You can hear all of this on the 911 tape.

8 She's shouting for help, asking him to stop, identifies  
9 him by name. He proceeds to rape her and then smacks her  
10 across the face. She tries to leave several times, he won't  
11 let her.

12 He then picks up the phone, and once he lets her go,  
13 and you hear him dial three numbers, we assume that's him  
14 dialing 911. 911 identifies that they're already on the  
15 line.

16 He proceeds to confess to everything that he's done and  
17 then gets in a verbal stand-off with police officers and  
18 tells Ms. **VICTIM** to tell them that they're going to have to  
19 kill him, he's not coming out alive. Many, many units  
20 responded to the residence, Your Honor. There was semen  
21 found within Ms. **VICTIM** belonging to Mr. Smith. As I  
22 stated, all this was found on a recording.

23 This is a negotiated plea, Your Honor. We are asking  
24 for twenty years. I believe the Defense is in agreement  
25 with that.

1           The victim is present, Your Honor. The victim advocate  
2 would like to address the Court when appropriate. And he  
3 does have a prior record.

4           **THE COURT:** All right. Was all that accurate?

5           **MR. SMITH:** Yes, sir.

6           **THE COURT:** You understand I can't change the sentence  
7 if I accept the plea, you understand that, and you agree to  
8 it?

9           **MR. SMITH:** Yes, sir.

10          **THE COURT:** Okay. All right. What does the victim  
11 want to tell me?

12          **VICTIM ADVOCATE:** Yes, Your Honor. The victim, **VICTIM**  
13 **██████████**, is present in the courtroom today and has asked me  
14 to address the Court on her behalf.

15           She would like Your Honor to know that this is not the  
16 first time that this Defendant has gotten violent with her.  
17 When this Defendant is clean and off drugs, he's a  
18 completely different person, but unfortunately after several  
19 attempts to get clean he has yet to be successful.

20           She is in constant fear of him and his actions. Even  
21 when he is behind bars he has made contact with her. She  
22 feels that not only he is a danger to himself, but the  
23 community at large because he had no regard for law  
24 enforcement during this incident.

25           Your Honor, she is respectfully asking that Your Honor

1 consider the twenty year negotiated sentence. She feels  
2 that this is more than fair given his prior record and his  
3 actions for this crime. And she would also respectfully ask  
4 that Your Honor place a no contact order as well. Thank  
5 you.

6 **THE COURT:** All right.

7 **MS. JOHNSON:** May it please the Court.

8 **THE COURT:** Um-hum (affirmative).

9 **MS. JOHNSON:** Your Honor, as the victim advocate  
10 alluded to, this incident is the result of my client being a  
11 crack addict for fourteen years, and he came off a crack  
12 binge.

13 **THE COURT:** I'm going to go along with it. Anything  
14 else you want to tell me?

15 **MS. JOHNSON:** No, Your Honor, but my client does -- he  
16 would like to apologize. I've told him to direct his  
17 comments ---

18 **THE COURT:** You've got to talk to me. What do you want  
19 to tell me?

20 **MR. SMITH:** Your Honor, I'd like to apologize for my --  
21 for my actions and apologize to the victim because, you know  
22 what I'm saying, she didn't deserve this. You know, like  
23 she said, when I'm sober, I'm a totally different person,  
24 even when I relapse. I had almost two years clean, and I  
25 relapsed. So ...

1           **THE COURT:** Okay. All right. Well, ---

2           **MR. SMITH:** I'm very sorry.

3           **MS. HINTON:** Your Honor, we are dismissing one  
4 possession of a weapon during a violent crime.

5           **THE COURT:** Okay. All right.

6           **MS. HINTON:** Thank you, Your Honor.

7           **THE COURT:** Twenty years on everything, concurrent.  
8 Credit for the time he's entitled to.

9           **MS. HINTON:** And no victim contact, Your Honor?

10          **THE COURT:** Well, I can't do that. I mean, he's going  
11 to be in prison. He's going to serve eighty-five percent.  
12 And there's no way to do that.

13          **MS. HINTON:** Okay. Thank you, Your Honor.

14          **THE COURT:** Okay.

15          **MS. JOHNSON:** Thank you, Your Honor.

16                               (Hearing Ended at 3:10 pm)

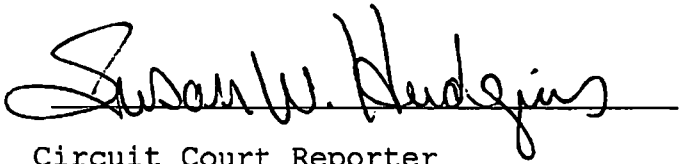
17                               (End of Requested Excerpt of Transcript of Record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the 15th day of December 2014.

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

October 3, 2015



Susan W. Hudgins

Circuit Court Reporter

STATE OF SOUTH CAROLINA  
2015 JUL 28 PM 3:52  
FORM 52

COUNTY OF

*Kelvin B. Smith*

Full name and prison number (if any) of Applicant

v.

State of South Carolina

CLERK OF COURT  
PICKENS COUNTY  
SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

2015-CP-39-916

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

- 1. Place of detention *Perry Correctional Inst. SC 29669*
- 2. Name and location of Court which imposed sentence *430 Oaklawn Rd. Pickens SC*
- 3. Name(s) of co-defendant(s) (if any) *General Sessions Pickens County*

(2014)

- 4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: *Not known*

- (a) *2014A3910500012* — *2014GS39-0662 Ind\**
- (b) *" " " 0013 (MB) 2014GS39-0661 Ind\**
- (c) *" " " 0014* — *2014GS39-0659 Ind\**

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

- (a) *December 2014*
- (b) \_\_\_\_\_

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

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

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

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

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

no

8. If you answered "yes" to (7), list:

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

i. n/a

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

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

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

i. n/a

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

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

(c) the date of each such result:

i. n/a

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

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

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

n/a

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

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

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

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

(a) n/a

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

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

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

*Applicant not Freely and Voluntarily enter a guilty plea due to being heavily medicated at the time + ineffective assistance of Counsel*

- (a) Applicant at time of guilty plea was taken de facto and Remmon and Rispendo.
- (b) Counsel ineffective for allowing Applicant to plead guilty
- (c) \_\_\_\_\_

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

- (a) at guilty Plea Applicant was not Competent to answer to Court concerning charges against Applicant
- (b) \_\_\_\_\_
- (c) Counsel failed to fully evaluate condition of Applicant as to his understanding of the law and facts;

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? NO

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. \_\_\_\_\_ n/a
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

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

- (c) the disposition thereof:
  - i. \_\_\_\_\_ n/a
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

iv. \_\_\_\_\_  
(d) the date of each such disposition

- i. \_\_\_\_\_ *N/A*
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

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

- i. \_\_\_\_\_ *N/A*
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

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

no

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

(a) which grounds have been presented

- i. \_\_\_\_\_ *N/A*
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- i. \_\_\_\_\_ *N/A*
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- (a) none
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

*yes*

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

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. Teal Johnson
- ii. 365 E. North St.
- iii. Rm 123 Greenville, SC 29601

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

- i. Teal Johnson
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

New Trial

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

no

STATE OF SOUTH CAROLINA )  
 )  
County of )

VERIFICATION

I, \_\_\_\_\_, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof, that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Ms. B. G.

SWORN to and subscribed before me this 23  
day of July, 2015.

Tamara C. Powell (L.S.)  
Notary Public

My Commission Expires: September 25, 2023

2015 JUL 28 PM 3 53  
CLERK OF COURT  
PICKENS COUNTY  
SOUTH CAROLINA



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2015-CP-39-0916
COUNTY OF PICKENS	)	
	)	
Kelvin Bernard Smith,	)	
S.C.D.C. No. 268079,	)	
	)	
Applicant,	)	
	)	<b>RETURN</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed July 28, 2015 the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. The Pickens County Grand Jury indicted the Applicant at the September 2014 term of General Sessions for Kidnapping (2014-GS-39-0659), First-Degree Criminal Sexual Conduct (2014-GS-39-0661), and First-Degree Burglary (2014-GS-39-0662). Teal Johnson, Esquire represented the Applicant.

On December 15, 2014, the Applicant pled guilty as indicted. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 20 years imprisonment for kidnapping, 20 years for first-degree criminal sexual conduct, and 20 years for first-degree burglary. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Pickens County Clerk of Court regarding the subject convictions, the Applicant's records from the South

Carolina Department of Corrections, and the guilty 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 failed to fully evaluate condition of the Applicant as to his understanding of the laws and facts.
2. Involuntary guilty plea.
  - a. The Applicant was heavily medicated at the time of the plea.

## 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).

#### IV.

The Applicant's assertion that his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that 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) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

When determining issues relating to guilty pleas, the court will consider the entire record,

including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

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

V.

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

VI.

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 12, 2016



STATE OF SOUTH CAROLINA  
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

KELVIN BERNARD SMITH, )  
 )  
 APPLICANT, )  
 )  
 -VS- )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 RESPONDENT. )  
 \_\_\_\_\_ )

2015-CP-39-00916

TRANSCRIPT OF RECORD

DECEMBER 9, 2016  
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE JOHN C. HAYES, III

APPEARANCES:

ATTORNEY FOR APPLICANT:

R. MILLS ARIAIL, JR., ESQ.

ATTORNEY FOR RESPONDENT:

PATRICK SCHMECKPEPER  
ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS  
CIRCUIT COURT REPORTER

INDEX

<u>WITNESS</u>		<u>PAGE NO.</u>
KELVIN SMITH		
DIRECT BY MR. ARIAIL	-----	4
CROSS BY MR. SCHMECKPEPER	-----	9
TEAL JOHNSON		
DIRECT BY MR. ARIAIL	-----	10
CROSS BY MR. SCHMECKPEPER	-----	13
KELVIN SMITH		
DIRECT BY MR. ARIAIL	-----	15
CERTIFICATE OF REPORTER	-----	16

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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(No Exhibits Were Presented During This Hearing)



KELVIN SMITH - DIRECT EXAMINATION BY MR. ARIAIL

5

1 Direct Examination by Mr. Ariail:

2 Q. Mr. Smith, how you doing today?

3 A. Okay.

4 Q. Good. You heard the charges that were read to the  
5 Court. And Ms. Johnson, represented you -- represented you  
6 on those charges, correct?

7 A. Yes, sir.

8 Q. Okay. Prior to -- you pled guilty on these charges --  
9 you were incarcerated for the arrest for these charges. Did  
10 you stay in on bond pending these charges?

11 A. Yes, sir.

12 Q. Okay. So you didn't get out?

13 A. No, sir.

14 Q. Okay.

15 A. I didn't have any bond.

16 Q. You didn't have any bond?

17 A. No.

18 Q. Okay. Now when you -- you got appointed Ms. Johnson,  
19 correct?

20 A. Yes, sir.

21 Q. Okay. And then she represented you. And did y'all  
22 have discussions about the case?

23 A. Yes, sir.

24 Q. How many times did y'all -- do you think you talked to  
25 her about the case?

KELVIN SMITH - DIRECT EXAMINATION BY MR. ARIAIL

1 A. Probably twice.

2 Q. Twice? Did you understand -- did she show you the  
3 discovery and evidence they were going to present against  
4 you?

5 A. Yes, sir.

6 Q. Okay. Did you understand what you were facing if you  
7 went to trial?

8 A. Yes, sir.

9 Q. Okay. At any time did you get a plea offer to be able  
10 to plead guilty to these charges?

11 A. No, sir.

12 Q. No one ever extended you an offer?

13 A. No, sir.

14 Q. Okay. Did she ever relay that, I mean, did she ever  
15 tell you, well, they're not willing to offer anything or  
16 give you any information about that?

17 A. Yes, sir.

18 Q. What did she say?

19 A. She said they wasn't willing to offer anything.

20 Q. Okay. So it'd be basically to plead straight up?

21 A. Yeah.

22 Q. Okay. Did you not want to plead?

23 A. No, sir.

24 Q. You wanted a trial?

25 A. No, sir. I mean, I did want to plead. I was -- I

KELVIN SMITH - DIRECT EXAMINATION BY MR. ARIAIL

7

1 wanted a lesser plea.

2 Q. You ---

3 A. I wanted her -- I wanted her to hold out, you know, to  
4 even get a lesser plea.

5 Q. Okay. So you asked her to go back and get you a, I  
6 guess, a recommendation or something with the solicitor's  
7 office, is that correct?

8 A. Yes, sir.

9 Q. Okay. And she was not able to do that, correct?

10 A. No, sir.

11 Q. Okay. So you had a discussion with her about I can't  
12 get a recommendation, you're going to have to plead straight  
13 up, is that right?

14 A. Yes, sir.

15 Q. Okay. And you decided to plead guilty instead of go to  
16 a trial, is that correct?

17 A. Yes, sir.

18 Q. Okay. Now did she explain to you about what you could  
19 get if you went to plead guilty?

20 A. Yes, sir.

21 Q. Okay. So you understood going into it what, you know,  
22 the maximum/minimum you could get, is that correct?

23 A. Yes, sir.

24 Q. Okay. What are you saying that, you know, she did that  
25 was ineffective in regards to your plea or representation of

KELVIN SMITH - DIRECT EXAMINATION BY MR. ARIAIL

1 you?

2 A. I just felt like she could have went back to the State  
3 and got me a lesser plea.

4 Q. Okay. Did she tell you it's up to the State as to what  
5 they want to offer for your case?

6 A. No, sir.

7 Q. Okay. Did she tell you that, you know, she has no --  
8 no control over what the recommendation is or what the  
9 State's willing to offer?

10 A. Yes, sir.

11 Q. Okay. Did y'all talk about, you know, did she tell  
12 you, well, I just can't go back and get them to give you  
13 something, they've got to offer it to you?

14 A. No, sir.

15 Q. Okay. So you're saying your ground for her is that you  
16 wanted her to get you a better plea offer?

17 A. Yes, sir.

18 Q. Are there any other things that you want to bring up  
19 that you're saying she didn't do for you or was ineffective  
20 in regards to representation?

21 A. No, sir.

22 Q. All right. That's it?

23 A. Yes.

24 Q. Okay.

25 **MR. ARIAIL:** I have no further questions, Your Honor.

**KELVIN SMITH - CROSS EXAMINATION BY MR. SCHMECKPEPER**

9

1           **THE COURT:** Cross.

2           **MR. SCHMECKPEPER:** Briefly, Your Honor.

3           **Cross Examination by Mr. Schmeckpeper:**

4           Q. Good morning, Mr. Smith. You realize this was a  
5 negotiated plea, right?

6           A. Yes, sir.

7           Q. So she did get you a plea offer, correct?

8           A. Excuse me?

9           Q. So she -- she did get you a plea offer, right?

10          A. She didn't?

11          Q. She did, right?

12          A. Oh, yeah. Yeah, she got me a plea offer.

13          Q. Because, I mean, the maximum sentence for burglary,  
14 first degree, is life, right?

15          A. Oh, I don't know what -- what it is -- what it carries.

16          Q. It's fair to say your sentence was twenty years on each  
17 count to run concurrently, but for these negotiations you  
18 could have gotten much more time?

19          A. I guess so.

20          Q. And you just wish -- you just wanted less time than you  
21 got?

22          A. Yes, sir.

23          **MR. SCHMECKPEPER:** I have no further questions.

24          **MR. ARIAIL:** Nothing further, Your Honor.

25          **THE COURT:** All right. You can step down and have a

TEAL JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

10

1 seat with your attorney. Call your next witness.

2 **MR. ARIAIL:** I'd call Ms. Johnson to the stand.

3 **MADAME CLERK:** Ms. Johnson, please place your left hand  
4 on the Bible and raise your right hand.

5 **Teal Johnson,** being duly  
6 sworn testified as follows;

7 **MADAME CLERK:** Thank you. Please state your full name  
8 for the record.

9 **MS. JOHNSON:** It's Teal, T-e-a-l, Alease, like a lease  
10 on a house, Johnson.

11 **Direct Examination by Mr. Ariail:**

12 Q. Ms. Johnson, how are you doing today?

13 A. Doing well. How are you doing?

14 Q. Good. Doing great.

15 A. You represented my client in regards to this case,  
16 correct?

17 A. I did.

18 Q. Okay. Now, I guess, during your representation did you  
19 discuss the evidence with him in this case?

20 A. Numerous times.

21 Q. Okay. And he understood what he was looking at if he  
22 went to trial in this matter?

23 A. He did.

24 Q. Okay. Now he decided at some point, I guess, a  
25 decision to plead guilty. Before that did you have any

TEAL JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

11

1 discussions with the solicitor's office about a plea  
2 negotiation?

3 A. Absolutely. I looked in my file. I've got emails  
4 where I discussed with the solicitor trying to get a better  
5 offer.

6 Q. Right.

7 A. Going to the mat for him. She was firm at thirty. And  
8 then we got her down to twenty. I think I was trying to get  
9 ten to fifteen, but her first offer was thirty or straight  
10 up in front of the judge of my choice.

11 Q. Okay. And you got him down to, it looks like it was a  
12 twenty year negotiated sentence for him, is that correct?

13 A. That's correct.

14 Q. Okay. Now was he aware of what a negotiated sentence  
15 was when he went to plead?

16 A. I actually, because it was such a serious case, I took  
17 extra time with him and got him to do like a -- just a  
18 colloquy, like what the judge would ask him, before court.  
19 And, you know, I was adamant that he knew what a negotiated  
20 sentence was. I said we can either go a negotiated twenty  
21 or straight up.

22 Q. Okay. And he understood straight up could be ...

23 A. Anything.

24 Q. Yeah.

25 A. Right. Sky's the limit.

TEAL JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

12

1 Q. Sky's the limit and he knew what he was facing on the  
2 kidnapping and all the other ---

3 A. Right.

4 Q. --- CSC? So ---

5 A. I explained to him a negotiated sentence was ironclad,  
6 either the judge was going to take it or not take it.

7 Q. Okay. And he was aware that it's not like you were  
8 going to go in on some recommendation and you could argue  
9 for less than the recommendation, but he knew he's either  
10 getting twenty or it was not going forward, is that correct?

11 A. Well, looking back at my notes it was either a  
12 negotiated twenty ---

13 Q. Um-hum (affirmative).

14 A. --- or straight up ---

15 Q. Okay.

16 A. --- if he wanted to plead.

17 Q. Got it.

18 A. And he wanted to plead. And I said, well, you've got  
19 to make a decision. We can -- the best we can do is fifteen  
20 because of the burg, first.

21 Q. Okay.

22 A. You've got a negotiated twenty. So it's your call.

23 And, you know, I know that I explained in detail what a  
24 negotiated plea was or is.

25 Q. Okay. And at the time of the plea and time of your

**TEAL JOHNSON - CROSS EXAMINATION BY MR. SCHMECKPEPER**

13

1 discussions was -- you believe he understood what he was  
2 doing?

3 A. Absolutely. He was actually down at the Department of  
4 Mental Health on some kind of -- I want to say commitment  
5 order, emergency commitment order. While he was down there  
6 I had him evaluated.

7 Q. Right.

8 A. And he came back competent and criminally responsible.

9 Q. Okay. And at the time of this plea, the time you  
10 entered into negotiations about a negotiated sentence do you  
11 believe he understood and was of clear mind to understand  
12 what he was doing?

13 A. Yes.

14 Q. Okay.

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

16 **MR. SCHMECKPEPER:** Thank you, Your Honor.

17 **Cross Examination by Mr. Schmeckpeper:**

18 Q. Good morning, Ms. Johnson.

19 A. Good morning.

20 Q. Now you mentioned that you told him there was a  
21 negotiated plea or a negotiated twenty years straight up,  
22 which the best case scenario was fifteen because of the  
23 burg, first, correct?

24 A. Right.

25 Q. How likely was the fifteen?

TEAL JOHNSON - CROSS EXAMINATION BY MR. SCHMECKPEPER

14

1 A. Not likely. Just the facts of the case or given the  
2 facts of the case and also he had, I don't want to say an  
3 extensive record, but he did have a record. And I just felt  
4 like that was out of question.

5 Q. And just briefly, what were the facts of the case for  
6 the record?

7 A. The facts of the case were that he was recorded having  
8 sexual intercourse, raping a female friend of his on the 911  
9 -- on a 911 call. And then there was a like stand-off  
10 situation with police. It was -- it was not a pleasant  
11 factual scenario for us.

12 Q. Thank you.

13 **MR. SCHMECKPEPER:** I have no further questions.

14 **MR. ARIAIL:** Nothing further, Your Honor.

15 **THE COURT:** All right. You can step down and be  
16 excused. We appreciate your time.

17 **MS. JOHNSON:** Thank you, Your Honor.

18 **THE COURT:** Thank you.

19 **MR. ARIAIL:** Your Honor, after I sat back down my  
20 client said he had one more point that he ---

21 **THE COURT:** All right. He ---

22 **MR. ARIAIL:** --- wanted to bring up.

23 **THE COURT:** --- can come back up.

24 **MR. ARIAIL:** If you'd just put on the record, Your  
25 Honor. It's going to be very brief.

KELVIN SMITH - DIRECT EXAMINATION BY MR. ARIAIL

15

1 Kelvin Smith, having been  
2 previously sworn testified as follows;

3 THE COURT: All right. You're still under oath, Mr.  
4 Smith.

5 Direct Examination by Mr. Ariail:

6 Q. Mr. Smith, I had sat down and you had one more item  
7 that you wanted to bring up for the Court to put on the  
8 record, is that correct?

9 A. Yeah. I just wanted to mention that I have been  
10 receiving letters from the victim. And she has, you know  
11 what I'm saying, let me know that she's forgiven [sic] me  
12 and that she still loves me. And she's sent in a visitation  
13 form to visit me. And she's now ---

14 MR. SCHMECKPEPER: Your Honor, I apologize. I just  
15 object to the relevancy.

16 THE COURT: I overrule your objection. Go ahead.

17 A. She's now on my visitation list to come see me.

18 MR. ARIAIL: Thank you, Your Honor.

19 THE COURT: Any cross?

20 MR. ARIAIL: Nothing, Your Honor.

21 THE COURT: You can step down. I'll take this one  
22 under advisement.

23 MR. ARIAIL: Thank you, Your Honor.

24 (Hearing Ended at 11:40 am)

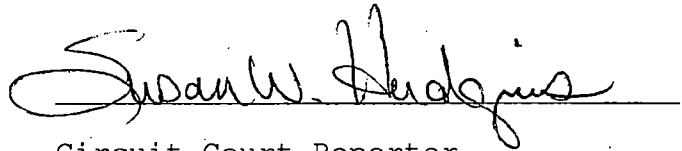
25 (End of Requested Transcript of Record)

## Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the 9th day of December 2016.

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

September 16, 2017

  
Circuit Court Reporter

2016 DEC 22 PM 2 46

STATE OF SOUTH CAROLINA )  
CLERK OF COURT )  
PICKENS COUNTY )  
COUNTY OF PICKENS )  
SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-39-0916

Kelvin Bernard Smith,  
SCDC No. 268079,

Applicant,

vs.

ORDER

State of South Carolina,

Respondent.

Applicant filed this application for Post-Conviction Relief July 28, 2015. This matter was heard December 9, 2016. Applicant was represented by R. Mills Ariail, Jr., Esquire. The State was represented by Patrick Schmeckpeper, Esquire.

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. Applicant was indicted by the September 2014 term of the Pickens County Grand Jury for Kidnapping (2014-GS-39-0659, First-Degree Criminal Sexual Conduct (2014-GS-39-0661), and First-Degree Burglary (2014-GS-39-0662). Teal Johnson, Esquire represented the Applicant.

On December 15, 2014, the Applicant pled guilty as indicted. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 20 years imprisonment for kidnapping, 20 years for first-degree criminal sexual conduct, and 20 years for first-degree burglary. The Applicant did not appeal.

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

1. Ineffective assistance of counsel.
  - a. Counsel failed to fully evaluate condition of the Applicant as to his understanding of the law and facts.
2. Involuntary guilty plea.
  - a. The Applicant was heavily medicated at the time of the plea.

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. *See Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant alleges ineffective assistance of counsel as a ground for relief. 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*, 286 S.C. at 442, 334 S.E.2d at 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

9/11/89

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*, 466 U.S. at 688, 104 S. Ct. 2052 (1984)).

Applicant also alleges that his guilty plea was given involuntarily. A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that 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) (citations omitted). An Applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); *Bennett v. State*, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). Specifically, the accused must be made aware of his right to a trial by jury, his right to remain silent, and his right to confront the witnesses against him. *Boykin*, 395 U.S. at 243, 89 S. Ct. at 1712. In addition to the requirements of *Boykin*, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999). A criminal defendant's knowing and voluntary waiver of statutory rights in a guilty plea must be established by a complete record and may be evidenced by colloquy between the court and the defendant, between the court and defendant's counsel, or

113  
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both. *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented during the PCR hearing. See *Harris v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984).

Applicant testified at the post-conviction relief hearing that he met with counsel twice to discuss the case prior to trial. Applicant testified that he was shown discovery and evidence during these meetings. Applicant further testified that he knew what he was facing if he went to trial. Applicant also testified that he understood the maximum and minimum sentences that accompanied the charges against him.

Applicant testified that he never received a plea offer during the pendency of his trial. Applicant testified that his understand was that the Solicitor was not willing to offer anything and that, if he were to plead guilty, he would have to plead "straight-up." Applicant stated that he wanted to plead guilty, that he wanted his attorney to hold out to get a lesser plea, and that he believed his attorney could have gone to the Solicitor to get a lesser plea. Applicant also testified that he was not aware that the Solicitor's office, not his attorney, was in control of whether offers were made and what any offer would consist of. Applicant testified on cross exam that he was aware that he could have gotten more time than he received, but that he believes he could have gotten a better deal.

Trial counsel testified that she discussed the evidence in the case with Applicant numerous times and that Applicant knew what he was facing if he went to trial. Trial counsel testified that she discussed a plea with the Solicitor's office in an attempt to get a deal for her client. Trial counsel stated that the Solicitor was firm at a thirty year sentence, but that trial counsel was able to negotiate down to twenty years. Trial counsel stated that, were Applicant to plead straight up,

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the best he could hope for was fifteen years. Additionally, trial counsel stated that a fifteen year sentence was unlikely in light of Applicant's prior record.

Trial counsel further testified that she took extra time to make sure Applicant understood what a negotiated plea was. Trial counsel testified that she sent Applicant for a competency evaluation and that Applicant was found mentally competent to stand trial and to understand his criminal culpability.

Applicant claims that his guilty plea was entered involuntarily. This argument is without merit. The transcript of Applicant's guilty plea clearly indicates that Applicant was advised of the nature of the charges he faced as well as the penalties associated with those charges. (Plea Record p. 8, l. 4 through p. 9, l. 2). The record also shows that Applicant was fully advised of his constitutional rights as required by *Boykin*. (Plea Record p. 12, l. 16 through p. 13, l. 3). Applicant's claim that he was heavily medicated during the guilty plea was not substantiated through evidence or testimony at the post-conviction relief hearing and, therefore, this Court cannot fully analyze the veracity of the claim. As the colloquy between the plea court and the defendant shows that Applicant was fully advised of the consequences of his plea, this court finds that his plea was knowingly, voluntarily, and intelligently given.

Applying the *Strickland* and *Cherry* standard to trial counsel's representation, I find that trial counsel provided to Applicant representation within the range of competence required in criminal cases. I find trial counsel's performance in his representation of Applicant reasonable under professional norms. Trial counsel met with Applicant multiple times to discuss the case with him and worked diligently to get the best deal she could for Applicant. Further, trial counsel stated that she had Applicant's competency evaluated and spent extra time explaining to him what a

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negotiated plea is. The fact that Applicant believes trial counsel could have gotten a better deal is not sufficient to find that trial counsel was ineffective. This claim is without merit.

I find Applicant has failed to carry his burden of proof and failed to prove trial counsel was ineffective or that his guilty plea was made involuntarily. Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

December 14<sup>th</sup>, 2016  
Greenville, South Carolina

*John C. Hayes, III*  
John C. Hayes, III  
Presiding Judge

2016 DEC 22 PM 2 46  
CLERK OF COURT  
PICKENS COUNTY  
SOUTH CAROLINA

WITNESSES

Keith Littleton

Pickens County Sheriff's Office

1/26/2014

ARREST WARRANT NUMBER

2014A3910500014

ACTION OF GRAND JURY

TRUE BILL

SEP 09 2014

*[Signature]*  
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-39-<sup>BBH</sup> 0659

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

SEP 09 2014 TERM 2014

THE STATE

vs.

KELVIN BERNARD SMITH

Indictment for

0095

KIDNAPPING

VIOLATION § 16-03-0910

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

INDICTMENT FOR  
KIDNAPPING

At a Court of General Sessions, convened on **SEP 09 2014** the Grand Jurors of Pickens  
County present upon their oath:

That KELVIN BERNARD SMITH did in Pickens County, on or about the 25th day of January, 2014, unlawfully  
seize, abduct, confine, inveigle, decoy or carry away M [REDACTED] F [REDACTED], without the authority of law. This is in  
violation of §16-3-910 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.

B. Hutton  
SOLICITOR

WITNESSES

Keith Littleton

Pickens County Sheriff's Office

1/26/2014

ARREST WARRANT NUMBER

2014A3910500013

ACTION OF GRAND JURY

~~RUE 09~~

~~Date~~

SEP 09 2014

*[Signature]*  
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-39-0661  
BBH

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

SEP 09 2014

TERM 2014

THE STATE

vs.

KELVIN BERNARD SMITH

Indictment for

0160

CRIMINAL SEXUAL CONDUCT FIRST DEGREE

VIOLATION § 16-03-0652

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

INDICTMENT FOR  
CRIMINAL SEXUAL CONDUCT FIRST DEGREE

At a Court of General Sessions, convened on SEP 09 2014 the Grand Jurors of Pickens

County present upon their oath:

That KELVIN BERNARD SMITH did in Pickens County, on or about the 25th day of January, 2014, engage in sexual battery, with M. [REDACTED] F. [REDACTED], and used aggravated force to accomplish this sexual battery. This is in violation of South Carolina Code of Laws Section 16-3-652 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.

B Hunter  
SOLICITOR

**WITNESSES**

Keith Littleton

Pickens County Sheriff's Office

1/26/2014

**ARREST WARRANT NUMBER**

2014A3910500012

**ACTION OF GRAND JURY**

**TRUE BILL**

Date:  SEP 09 2014

*DDJR*  
Foreperson of Grand Jury

**VERDICT**

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-39-0662

BBH

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

SEP 09 2014 TERM 2014

THE STATE

vs.

KELVIN BERNARD SMITH

Indictment for

0079

BURGLARY FIRST DEGREE

VIOLATION § 16-11-0311

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

INDICTMENT FOR  
BURGLARY FIRST DEGREE

At a Court of General Sessions, convened on **SEP 09 2014** the Grand Jurors of Pickens

County present upon their oath:

That KELVIN BERNARD SMITH did in Pickens County, on or about the 25th day of January, 2014, willfully and unlawfully enter the dwelling of M [REDACTED] F [REDACTED] located at [REDACTED] Easley, SC, without consent and with the intent to commit a crime therein and while being armed with a knife. This is in violation of §16-11-311 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.

B Hunter  
SOLICITOR

# SCDMH South Carolina Department of Mental Health

**COURT'S**  
 EXHIBIT NO. 1  
 IDENTIFICATION/EVIDENCE  
 DKT.#  
 DATE: 12/15/14

**DMH** South Carolina Department of Mental Health  
**HIPAA (PHI) FAX COVERSHEET**

DMH Mailing Address -  
 Forensic Evaluation Services/CBHS  
 7901 Farrow Rd., Building 6,  
 Columbia, SC 29203  
 (803) 935-5600  
 (803) 935-5599 Fax

To: Brandi Hinton, Esq.	TELEPHONE	FAX
From: Tamika Lee		(864) 898-5586
Date: 09/04/2014	NO. PAGES INCLUDING THIS PAGE	TIME See Date Stamp

- Urgent    
  For Review    
  Please Comment    
  Please Reply    
  Please Recycle

**SUBJECT:**  
 CST Report: K. Smith

**MESSAGE:**  
 Please see attached report.

cc: Teal Johnson, Esq., Fax: (864) 898-5579

THIS COMMUNICATION IS INTENDED ONLY FOR THE ADDRESSEE AND IS NOT TO BE DISSEMINATED TO ANY OTHER ENTITY TO WHICH IT IS NOT APPLICABLE. (ALCOHOL AND DRUG ABUSE) 100, S.C. CODE MESSAGE IS NOT THE MESSAGE. ANY DISSEMINATION OF THE INFORMATION SUBJECT THE V RECEIVED THIS BY TELEPHONE ADDRESS IDENT COPIES OF THIS

*Court's exhibit*

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# State of South Carolina Department of Mental Health

**MENTAL HEALTH COMMISSION:**

Abeon Y. Evans, PsyD, Chair  
Joan McCrea, Vice Chair  
Beverly Cardwell  
Jane G. Jones  
Edward Rutledge, PhD  
J. Duxton Terry  
Sharon L. Wilson

Division of Inpatient Services  
G. Werber Bryan Psychiatric Hospital  
Forensic Evaluation and Treatment Services  
7901 Farrow Road, Building 43  
Columbia, SC 29203  
Information: 803/935-6566

September 4, 2014

**STATE DIRECTOR**

Brandi Hinton  
Assistant Solicitor  
214 E. Main St.  
Pickens, SC 29671

Re: The State of South Carolina vs. Smith, Kevin  
DMH Case #: 202-3097  
Pickens County, Court of General Sessions

Dear Assistant Solicitor Hinton:

In accordance with the court order issued by the Honorable Edward Miller, a competency to stand trial evaluation was conducted by the South Carolina Department of Mental Health, pursuant to S.C. Code Ann. § 44-23-410 (1976).

Please see the attached report for the results of this evaluation.

This 9 page document is certified to be the original court-ordered evaluation report issued pursuant to S.C. Code Ann. § 44-23-410 (1976).

9/4/14  
Date

Jeffrey E. Musick, PhD ABPP  
Jeffrey E. Musick, Ph.D., ABPP  
Chief Psychologist  
Forensic Evaluation Services  
Department of Mental Health

cc: Toal Johnson, Attorney at Law, 214 E, Main St., B-240, Pickens, SC 29671

JM/tl

**MISSION STATEMENT**  
To support the recovery of people with mental illnesses.



CAPACITY TO STAND TRIAL EVALUATION  
FORENSIC EVALUATION SERVICE  
SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH (SCDMH)

DATE OF EVALUATION: May 31, 2014

PRESIDING EXAMINER: Richard L. Frierson, M. D., Professor of Clinical Psychiatry,  
University of South Carolina School of Medicine

SECOND EXAMINER: Elizabeth Whetstone, LISW-CP

DIAGNOSES:    **AXIS I:**    Depression, Not Otherwise Specified  
                                  Cocaine Dependence, in a controlled environment  
                                  Alcohol Dependence, in a controlled environment  
                                  Malingering of Psychotic Symptoms, Cognitive Deficits, and  
  Knowledge Deficits Related to Competency to Stand Trial  
                  **AXIS II:**    Antisocial Personality Disorder  
                  **AXIS III:**    No Diagnosis

OPINION REGARDING CAPACITY TO STAND TRIAL: Has capacity.

DISPOSITION: Mr. Smith is currently an inpatient at Bryan Psychiatric Hospital Forensic Services.

IDENTIFYING INFORMATION: Kelvin Smith is a 42-year-old African American male who was seen at the Forensic Evaluation Center pursuant to a court order from the Pickens County Court of General Sessions. This court order requests an evaluation of his competency to stand trial pursuant to State v. Blair, 275 S.C. 529, 273 S.E. 2d 536 (1981) and S.C. Code Ann. §44-23-410 (1976). He is currently charged with Burglary, First Degree, Criminal Sexual Conduct, First Degree, Kidnapping, and Possession of a Weapon during the Commission of a Violent Crime. According to the court order, it was issued for the following reasons: "The dependent is presently housed at the Department of Mental Health on emergency papers submitted by the Pickens County Detention Center. Defense counsel was also informed that the defendant has a prior psychiatric history."

Prior to participating in the evaluation, Mr. Smith was informed about the limitations of confidentiality. He was informed that the evaluation was court ordered. He was informed that the evaluators were employed by the South Carolina Department of Mental Health and were not being paid by his attorney or the solicitor. He was also informed that after the evaluation was completed, a report would be prepared and sent to his attorney, the solicitor, and the judge in the case. Finally, he was informed that the evaluators could be called to court to testify at a hearing related to his competency to stand trial.

SMITH, KELVIN B.

2023097

ADMITTED: 05/30/2014

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH  
FORENSIC EVALUATION SERVICE 1 64738

## SOURCES OF INFORMATION:

1. The Court Order requesting the evaluation from the Pickens County Court of General Sessions received by the Forensic Evaluation Service on July 15, 2014.
2. Arrest Warrant #2014A3910500012 for Burglary, First Degree.
3. Arrest Warrant #2014A3910500013 for Criminal Sexual Conduct, First Degree
4. Arrest Warrant #2014A3910500014 for Kidnapping.
5. Arrest Warrant #2014A3910500015 for Possession of a Weapon During a Violent Crime.
6. Incident Report related to the alleged offense.
7. Statement of Mavis Francia.
8. Medical records from Self Regional Medical Center dated December 8, 2003 through January 2, 2004.
9. Medical records from Grady Memorial Hospital in Atlanta, Georgia dated April 3, 2010.
10. Medical records from Georgia Regional Medical Center in Atlanta, Georgia dated April 8, 2010 through April 14, 2010.
11. Medical records from Greenville Mental Health Center dated May 14, 2010 through August 5, 2010.
12. Medical records from the Anderson-Oconee-Pickens Mental Health Center dated January 10, 2004 through May 16, 2004.
13. Medical records from St. Francis Hospital in Greenville, South Carolina dated January 22, 2014.
14. Medical records from Cannon Memorial Hospital dated May 15, 2014.
15. A social history obtained by Benjamin Watson, LMSW.
16. Recording of a 911 call related to the alleged offense.
17. Letters that the defendant allegedly wrote to Ann Lonkey and Arleen Smith
18. South Carolina Law Enforcement Division Sexual Assault Protocol.
19. National Crime Information Center (NCIC) Report for the defendant.
20. Medical records from Bryan Psychiatric Hospital Forensic Services dated May 30, 2014 to today's date.
21. A two hour and fifteen minute clinical forensic interview on July 21, 2014.
22. A psychological consultation completed on August 19, 2014 by Sandra Stader, Ph.D. for assessment of potential malingering.

**CLINICAL AND PSYCHIATRIC HISTORY:** At the time of this evaluation, Mr. Smith was currently hospitalized at Bryan Psychiatric Hospital Forensic Services on emergency detention papers and a probate court commitment from Pickens County. According to the records, on May 14, 2014, he attended a family court hearing in Pickens County where he found out that his wife was planning to divorce him and that she did not want for him to have contact with their small child. Apparently, on May 15, 2014, he made lacerations to his neck, wrist and forearm and was sent to Cannon Memorial Hospital where he required sutures. He was then placed on emergency detention orders until a bed became available at Bryan Psychiatric Hospital Forensic Services. According to their records, he is currently receiving treatment with two medications. He is prescribed olanzapine (Zyprexa<sup>®</sup>), an antipsychotic medication, and valproic acid (Depakote<sup>®</sup>), a mood stabilizing medication. Mr. Smith

SMITH, KELVIN B.

2023097

ADMITTED: 05/30/2014

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH  
FORENSIC EVALUATION SERVICE 2 64738

was observed making very odd statements about a prophecy and a preoccupation with the number 8. He complained of poor sleep and racing thoughts on admission. The provisional diagnosis given by Bryan Psychiatric Hospital Forensic Services was Bipolar Disorder, Most Recent Episode Depressed and Cocaine Abuse. They also noted Antisocial Personality Disorder Traits.

On today's date, he reports that things are going fairly well for him in the hospital. He reports that he had made a really bad suicide attempt prior to his hospitalization because his wife wouldn't let him see his daughter. He alleges that his wife lied about him on the witness stand on May 14, 2014 and that he felt devastated. He reports feeling that he was ready to die at the time.

He also reports that he continues to have intrusive bad thoughts about prior traumatic events. These include being abused by his biological mother and also witnessing the death of a 10 or 11-year-old friend when he was the same age and the friend was run over by a car. He reports that he is sleeping approximately four hours a day. He reports a good appetite, but lost ten pounds in the hospital. He complains that he is not given enough food. He reports that he stays hungry. He reports fleeting suicidal thoughts that come and go, but he was not experiencing suicidal thoughts at the time of this evaluation. He reports, "I feel like if I'm stabilized and get on a program, I'll be able to overcome some of it." He denied homicidal ideation. He initially reported auditory hallucinations, but when questioned very carefully, he states that he cannot differentiate whether these are his own thoughts or actual voices. This type of description is not consistent with psychotic hallucinations. He denied visual hallucinations. He described his current mood as depressed and anxious. He also reports poor energy. Although he has been assigned a diagnosis of Bipolar Disorder in the Bryan Psychiatric Hospital Forensic Service, I am unable to obtain a history of manic symptoms which is a requirement for a diagnosis of Bipolar Disorder. (He denies periods of decreased need for sleep. He denies periods of promiscuity or spending sprees. He denies periods of pressured speech. The longest time that he has experienced euphoric mood is for one day. In order to meet diagnostic criteria for Manic, one has to have a euphoric predominately irritable mood for several days.)

His psychiatric history is remarkable for a prior hospitalization at Self Regional Health Care for one month at the end of 2003. At that time, he was reportedly depressed and had insomnia. However, according to that record, the entire time that he was in Self Regional, he was focused on finding a place to live. The discharge diagnosis was Polysubstance Abuse, Posttraumatic Stress Disorder, and Antisocial Personality traits.

His next known psychiatric contact was at Grady Memorial Hospital in Atlanta on April 3, 2010. According to that record, he had been bingeing on crack cocaine for one to two weeks. He believed that he had been poisoned by a crack cocaine dealer. He was endorsing suicidal and homicidal thoughts. He was also noted to be talking and whispering to people that were not seen by others. He was placed on emergency detention papers and eventually sent to Georgia Regional Medical Center on April 8, 2010. He remained there for six days and received the discharge diagnosis of Substance Induced Mood Disorder, Cocaine Dependence, and Alcohol Dependence.

SMITH, KELVIN B.

2023097

ADMITTED: 05/30/2014

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH  
FORENSIC EVALUATION SERVICE 3 64738

He had an open case at the Greenville Mental Health Center from May 14, 2010 through August 5, 2010. According to that record, he had been referred by the director of Turning Point Ministries because the defendant reportedly seemed depressed. However, the discharge diagnosis from Greenville Mental Health Center was Antisocial Personality Disorder, Cocaine Abuse, and Cannabis Abuse.

A case was opened at the Anderson-Oconee-Pickens Mental Health Center on January 10, 2014, approximately two weeks before the alleged offense. He was living in a group home. He came to the mental health center complaining of anxiety and hopelessness. He was assigned the diagnosis of Polysubstance Dependence.

Three days before the alleged crime, he was seen in the Emergency Room at St. Francis Hospital in Greenville. At that time, he complained of suicidal ideas and depression. He had been fired from his job and was separated from his wife. He reported being angry because he could not see his daughter. He was kept for several hours until the suicidal ideation diminished. He was referred to outpatient treatment at the mental health center. He was given a diagnosis of Depression, Not Otherwise Specified, Alcohol Abuse, and Personality Disorder.

His next psychiatric contact was while he was incarcerated. The Anderson-Oconee-Pickens Mental Health Center saw him on March 19, 2014. At that time, he complained that other inmates were picking on him and calling him a rapist. He denied suicidal or homicidal thoughts and he denied psychotic symptoms such as delusions or hallucinations. He remained incarcerated until his suicide attempt on May 15, 2014 for which he has been hospitalized since.

**ALCOHOL AND SUBSTANCE USE HISTORY:** Mr. Smith reports a longstanding addiction to crack cocaine. He has also used powder cocaine. He reports that he would spend \$50 to \$200 daily on cocaine. He has spent more than intended. He has had legal difficulties related to his use of cocaine and this made numerous unsuccessful attempts to quit using. He has experienced tolerance to the effects of cocaine. He would clearly meet diagnostic criteria for Cocaine Dependence. The specifier *in a controlled environment* is added to reflect that he is currently incarcerated and doesn't have access to this drug.

Additionally, he reports that he could consume a liter of alcohol in a day. He reports tolerance to the effects of alcohol and reports that his drink of choice is vodka. He denied drinking every day and denied withdrawal symptoms. However, he has sustained physiological tolerance to alcohol and therefore would meet diagnostic criteria for Alcohol Dependence, in a controlled environment.

He reports that he has also used cannabis, but has never been addicted and he did not use it very frequently. He denies the use of other illicit substances such as opioids, ecstasy, over-the-counter medications, prescription medications or IV drugs.

**MEDICAL HISTORY:** He denies a history of prior surgeries. He denies medical illnesses. He denies allergies.

SMITH, KELVIN B.

2023097

ADMITTED: 05/30/2014

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH  
FORENSIC EVALUATION SERVICE 4 64738

**FAMILY HISTORY:** His mother, Vivian Brown, is 62 years of age and apparently has been diagnosed with Bipolar Disorder. She has experienced psychiatric hospitalizations and is currently taking psychiatric medications. His father has no history of mental illness. He has one half sister and two half brothers by his father. He has two half sisters by his mother. There is a strong family history of suicide. He reports that he has four cousins and an uncle that all committed suicide.

**SOCIAL HISTORY:** He was born in Greenville, South Carolina. He denies problems with his birth or delivery. He denies a history of developmental delays. He was raised by his maternal grandmother. He reports that his maternal grandmother did not like the way that his mother treated him. However, he denies that there was DSS involvement. He does report that his biological mother would choke him and hit him and that he experienced physical and mental abuse from her. He reports occasional nightmares about her abuse, but does not report other symptoms of Posttraumatic Stress Disorder. He also had a traumatic event during his childhood where a school aged friend was run over by a car while they were crossing the street together. He has had intrusive thoughts and nightmares about that even as well. He did not report avoidance behaviors or an increase in autonomic arousal suggestive of Posttraumatic Stress Disorder.

Mr. Smith attended public school and graduated from Greenville High School. He reports that he did fairly well, but failed the 4th grade. He was in trouble during his school years for fighting and cursing. He states that he was suspended on several occasions. Records from the Greenville Mental Health Center report that he had reported gang involvement and cruelty to animals. He was also found to be unable to adapt to the Army. After graduating high school, he went to Hamline University in St. Paul, Minnesota to study business administration. He then followed several women that he met around the east coast and has lived in Philadelphia, New Jersey, Miami, and Atlanta. He has been married on two occasions. The first marriage lasted for three years. He reports that his first wife's parents did not like him because they were Caucasian and he was black. He reports that his first wife's family disowned her and this eventually led to the end of their relationship. He has a daughter from this marriage who is studying as a foreign exchange student in Madrid, Spain. His second marriage has lasted one and a half years to Meredith. He has a young daughter who he has never seen or held, Zita Katherine Smith.

His employment history reveals that he has mainly worked in restaurants. The longest job he had was for one year at a Subway. He has also worked at higher end restaurants, but reports chronic difficulties getting along with supervisors. He has also worked in landscaping and demolition.

He has been to prison on three occasions. He states that he was sentenced to ten months for Violation of Probation in 2000. In 2009, he was returned to prison for Violation of Probation for a Criminal Domestic Violence charge. Finally, he received nine months for Shoplifting in 2012.

**MENTAL STATUS EXAM:** Mr. Smith was felt to be somewhat disingenuous on mental status examination. He reported deficits that were not observed at other times throughout the interview. He presented neatly groomed with no abnormal movements. His speech was normal in rate, tone and

SMITH, KELVIN B.

2023097

ADMITTED: 05/30/2014

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH  
FORENSIC EVALUATION SERVICE 5 64738

68

volume. He was able to register three objects, but could recall none of them after five minutes. He reported, "I can't remember nothing [sic]". This appeared to be inconsistent with his memory during other parts of the examination. He was alert, but stated that it was Wednesday rather than Thursday and June rather than July. He was oriented to place and year. His fund of knowledge was in the average range. He made errors on a test of concentration. For example he spelled the word *world* backwards as "drolw." He also made several near miss answers when asked to subtract serial sevens from 100. This appeared suspicious for malingering. He demonstrated a limited ability to think abstractly as evidenced by his interpretation of a simple proverb. His judgment to a hypothetical situation was poor. He described his mood as "nervous." On a scale of 1 to 10 with 1 being severely depressed and 10 being euphoric, he rated his mood as a 2. He denied current suicidal or homicidal ideas. He denied auditory or visual hallucinations. He did not report delusional thinking. He does have magical thinking related to the number 8, but it is unclear whether this is of delusional intensity and given the results of psychological evaluation it should be viewed cautiously as evidence of mental illness. It is unclear whether this may be malingering. His thinking was logical and goal directed without loosening of associations or flight of ideas. We found no evidence of disturbed thought processes or thought content.

**RESULTS OF PSYCHOLOGICAL EVALUATION:** Because of his performance on the initial competency assessment as well as his performance on mental status examination, he was referred for psychological testing to assess for the possibility of malingering. He was administered three tests that each are designed to detect feigning in a variety of ways. Results from testing indicated on a cognitive measure of memory function that he was feigning impairment that was unlikely even among clinical populations with severe memory impairment. Additionally, on a self report of clinical symptoms, he obtained elevated scores on eight primary scales which measure different ways that respondents may feign psychiatric symptoms. His overall test results were indicative of feigning. Finally, he was administered a measure assessing his response style when asked questions regarding legal and courtroom knowledge. His score on this test was also suggestive of feigning as his score was lower than scores typically obtained by individuals who have genuine mental health issues. Thus, his understanding and ability to participate in the legal process is likely better than what he portrayed during the evaluation.

**DIAGNOSTIC FORMULATION:** The rationale behind the diagnoses of Cocaine Dependence and Alcohol Dependence are contained in the Substance Use History section of this report.

It would appear that Mr. Kelvin Smith's suicide attempt on May 15, 2014 was an acute reaction to his family court hearing related to his marriage and custody of his daughter. Thus, one consideration would be a diagnosis of Adjustment Disorder with Depressed Mood. However, there are other times where he has reported depressive symptoms and his depressive symptoms appeared to be longstanding. It is unclear as to what extent they may be a consequence of his longstanding drug use. In any event, we are diagnosing him with Depression, Not Otherwise Specified to reflect his depressed mood, difficulty sleeping, suicidal ideation, and low energy.

SMITH, KELVIN B.  
2023097

ADMITTED: 05/30/2014

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH  
FORENSIC EVALUATION SERVICE 6 64738

We are also assigning a diagnosis of Malingering Psychotic Symptoms, Cognitive Deficits, and Legal Knowledge Deficits. This has been the result of both a clinical impression and his performance on psychological testing to specifically look at these issues.

Finally, Mr. Smith has a history of childhood conduct disorder with frequent suspensions from school, stealing, cruelty to animals, and other antisocial behaviors. His legal history as an adult is very long as reflected by his National Crime Information Center Report. He has repeatedly engaged in activities that are grounds for arrest. He reports chronic problems with his supervisors at work (authority figures). He It is our opinion that he would meet the diagnostic criteria for Antisocial Personality Disorder.

**OPINION REGARDING COMPETENCY TO STAND TRIAL:** Mr. Smith's initial approach to our competency assessment did not appear to be an honest and genuine approach. For example, he claimed he did not know any of the charges that he was facing. He was educated about his charges. He stated that he believes that they are serious. Although he did not know the potential sentence he could receive, he reported that his attorney would be the person that he would ask. He understood that his attorney was appointed by the court. He states that the job of his attorney is "to talk to the judge about your behavior." He stated that his lawyer was looking out for his interest. He stated that the solicitor was "just like a lawyer - they speak bad or good about you." This was a surprising answer given his educational level and his long legal history. He was educated about the role of the solicitor. He states the job of the judge is "to decide your fate." He states that the judge could secure his freedom, send a defendant to the Department of Mental Health, or send a defendant to the Department of Corrections. He was aware of the basic function of a jury in the courtroom. However, although he was aware of the unanimous requirement for a jury verdict, he believed that there were ten persons on a jury rather than twelve. He was able to state and define the pleas of *guilty* and *not guilty*. He states a plea bargain is when "they offer you this deal to see if you will take it." He understands the advantage of taking a plea bargain would be a lighter sentence and he understood that he would have to enter a guilty plea in order to accept a plea bargain. He was able to define evidence as "stuff they might have to show the court." He gave examples of evidence to be a gun or a picture of holes that were knocked the wall. He states a witness is "someone telling something against you or on your behalf." He states if someone was lying about him in the courtroom, he would speak to his attorney. Therefore, he was able to solve a hypothetical problem involving the courtroom. He was able to state his desired outcome in his case. He was able to define the requirements of probation. He states probation is when "they give you a chance to prove that you are worthy of remaining free." He understood that persons on probation have to pay a supervisory fee, cannot do drugs, must submit to a random drug screen, and have to report every month to a probation officer. He states that he has met with his attorney on two occasions and can tell her everything he remembers about the allegations against him.

At the end of the evaluation, we asked him to define the role of a solicitor or prosecutor and states, "try to slam you." Thus, he demonstrated an ability to retain information that was presented to him.

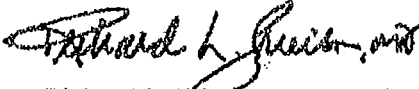
SMITH, KELVIN B.

2023097

ADMITTED: 05/30/2014

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH  
FORENSIC EVALUATION SERVICE 7 64738

It is our opinion that Mr. Smith has a sufficient factual and rational understanding of the legal system and the present ability to assist his attorney in his defense if he so chooses. Therefore, it is our opinion that he is currently competent to stand trial pursuant State v. Blair, 275 S.C. 529, 273 S.E. 2d 536 (1981) and S.C. Code Ann. §44-23-410 (1976).



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RLF/cj

D: 08/30/14  
RT/EM: 09/02/14  
F/EM: 09/04/14 (RLF)

SMITH, KELVIN B.  
2023097

ADMITTED: 05/30/2014

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH  
FORENSIC EVALUATION SERVICE 8 64738