

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

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S.C. SUPREME COURT

THOMAS E. FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002335

APPENDIX

ROBERT M. PACHAK
Appellate Defender

ALAN WILSON
Attorney General

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

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

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WITNESSES

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(NO WITNESSES CALLED)

EXHIBITS

1	NO.	DESCRIPTION	ID.	EV.
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(PROCEEDINGS, MARCH 30, 2016)

MR. SMITH: Your Honor, may it please the court, we are here on five matters on Thomas Foster, who is represented by Mike Morin of the private bar, on Indictment 2015-GS-42-1224. The recommendation is concurrent on pending charges. No recommendation as to the probation. The State is dismissing an FTC theft and some other charges, Your Honor.

Also on Indictment 15-GS-42-1225 is resisting arrest A. No recommendation. That's concurrent.

2015-GS-42-1845, failure to stop for blue lights, no injury or death, second offense. Again, no recommendation besides concurrent sentences.

2015-GS-42-1846, unlawful neglect of a child or helpless person. Again, no recommendation besides concurrent sentences, Your Honor.

2015-GS-42-1847, financial transaction card fraud per the enhancement. Your Honor, again, the only recommendation is concurrent sentences.

THE COURT: You are Mr. Foster?

THE DEFENDANT: Yes, sir.

THE COURT: Please raise your right hand and let the Clerk of Court swear you in.

THOMAS FOSTER, having been first duly sworn, testified as follows:

1 THE COURT: Mr. Foster, it is your intent to enter
2 a plea to the charges that were announced by the solicitor?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: How old are you, sir?

5 THE DEFENDANT: 33.

6 THE COURT: How far did you go in school?

7 THE DEFENDANT: I have a GED.

8 THE COURT: How far did you go before you dropped
9 out?

10 THE DEFENDANT: 10th. 10th grade.

11 THE COURT: Are you married, single, divorced, or
12 widowed?

13 THE DEFENDANT: I'm married.

14 THE COURT: Do you have children?

15 THE DEFENDANT: Yes, I do, sir.

16 THE COURT: How many?

17 THE DEFENDANT: I have six.

18 THE COURT: How old is your oldest?

19 THE DEFENDANT: My oldest is 15.

20 THE COURT: And your youngest?

21 THE DEFENDANT: Seven months.

22 THE COURT: Do you have a job outside the home, or
23 did you have one prior to your arrest?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: What were you doing?

1 THE DEFENDANT: I was working at Concept
2 Packaging, sir.

3 THE COURT: Military?

4 THE DEFENDANT: No, sir.

5 THE COURT: How long have you been in jail on
6 these charges?

7 THE DEFENDANT: I have been in about -- 56 days.

8 THE COURT: Within the last 24 hours have you
9 consumed any type of substance that is adversely affecting
10 your ability to understand what we are doing today?

11 THE DEFENDANT: No, sir.

12 THE COURT: Have you ever received any type of
13 substance abuse treatment for drug or alcohol problem?

14 THE DEFENDANT: No, sir.

15 THE COURT: Are you satisfied with the work that
16 your lawyer has done?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Have you made the decision to enter
19 the pleas today freely and voluntarily?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Sir, I need for you to understand that
22 under the law you are presumed innocent of these charges and
23 you do have a right to have a jury trial on any or all of
24 these charges.

25 At any jury trial that would take place it would

1 be the State that has the burden of proof and the State
2 would have to convince all twelve members of a jury that you
3 are, in fact, guilty beyond a reasonable doubt.

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And do you understand that you have a
6 right to that jury trial?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And do you wish to have a jury trial
9 on these cases?

10 THE DEFENDANT: No, sir.

11 THE COURT: Sir, I need for you to understand that
12 there are other very important Constitutional Rights that
13 you are entitled to but that you have to give up in order to
14 enter these pleas. You have to give up your right to
15 confront, to cross-examine the State's witnesses. You also
16 have to give up your right of present evidence which you or
17 your lawyer might feel would establish a defense, and you
18 have to give up your right of subpoena, as well as your
19 right to remain silent. Do you understand all those rights?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And do you wish to give up all those
22 rights?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Sir, if you would please listen to the
25 solicitor. He is going to give us the facts behind these

1 cases and then I'll have some more questions for you.

2 MR. SMITH: Your Honor, the first incident
3 occurred on January 21st, 2013. The defendant presented a
4 financial transaction card belonging to William Bare at
5 Wilco in the amount of \$68.17, at Walmart for \$898.88, and
6 at Auto Center of Greenville for \$394.33. Mr. Bare had not
7 given Mr. Foster permission to use his card in the amount
8 totaling more than \$500 in a six month period.

9 The second event occurred on August 11th.

10 He was never arrested for that. They had warrants
11 out.

12 On August 11th, 2014, Deputy Miller responded to
13 CMC Recycling in Spartanburg County in reference to a
14 suspicious transaction. The employee stated that a homeless
15 man had come in attempting to sell a car. The car had been
16 brought there by a tow truck company that had been contacted
17 by a man on a cell phone and told them to pick up the car
18 from an apartment complex and bring it to the recycling
19 center. The owner denied the transaction. He had seen a
20 gold car that had been dropped by the homeless man. That
21 car ended up returning to the scene while Deputy Miller was
22 on the scene. He made contact with the driver of the
23 vehicle, Thomas Foster. Mr. Foster's wife was in the
24 passenger's seat and his one year old baby was in the back
25 seat of the car during this transaction. He started asking

1 questions about what he was doing there, why he hadn't gone
2 into the business and dropped off the homeless man. Mr.
3 Foster seemed agitated, possibly because of the transaction,
4 possibly because he knew he had warrants for the financial
5 transaction card incident that had occurred before. He
6 ultimately put the car into drive and drove off at a high
7 rate of speed.

8 Deputy Miller is here. He does wish to address
9 the court later. He basically started his car and activated
10 the blue lights for just a short amount of time to get the
11 charge of failure to stop for a blue light and then
12 discontinued and told any other officers that encountered
13 the vehicle to not pursue further because of the infant
14 child being inside the baby (sic). He did observe Mr.
15 Foster continue on driving recklessly going into the other
16 lane of travel.

17 And then on December 3rd, 2014, Sergeant Brockman
18 with the warrant team was on Drayton Road in Spartanburg
19 County when he noticed Mr. Foster in a gold car. Mr. Foster
20 was known to drive a gold car. He attempted a traffic stop
21 at the intersection the Skylyn and Drayton Road and the car
22 immediately accelerated away. The chase went onto Pineview
23 Drive and then onto Zion Hill Road. And then at the
24 intersection of Pineview Drive and Fernwood-Glendale Road
25 the suspect ran into another vehicle in the intersection.

1 He then fled on foot where he was cornered in a fenced-in
2 area. Mr. Foster squared up and took a defensive posture
3 with the officer and the officer holstered -- or took his
4 gun out, put it in the small of his back and then ultimately
5 pepper sprayed him and got control of him and he was
6 arrested for that.

7 One of the passengers of the vehicle that he
8 struck was taken to the hospital. The air bag deployed. I
9 have got pictures somewhere, but that's all for the facts.

10 We would like to address the sentencing, Your
11 Honor.

12 THE COURT: Mr. Foster, were you able to hear the
13 solicitor when he gave me the facts?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Do you believe that as he related the
16 facts to me that he is substantially correct?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And, sir, do you understand that on
19 the resisting arrest charge, that's under Subsection A, and,
20 therefore, I could sentence you up to a year on that
21 particular charge?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And, sir, do you understand that on
24 the financial transaction card fraud, value \$500 -- value
25 more than \$500 in six months, that that is a third and

1 subsequent property offense, and, therefore, I could
2 sentence you up to ten years on that charge?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And on the failure to stop for blue
5 light under Indictment 1845, that that is a second or
6 subsequent offense, and, therefore, I could sentence you up
7 to five years on that charge?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Sir, do you understand that on the
10 unlawful neglect of child case I could sentence you up to
11 ten years on that case?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And on the failure to stop for blue
14 light under Indictment 1224, that that is also a second or
15 subsequent offense, and, therefore, I could sentence you up
16 to five years on that case?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Understanding the possible sentences
19 that I could impose, do you still wish to enter these pleas?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And, sir, do you understand that by
22 entering pleas, that it will be a violation of your present
23 probation case?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: And do you still wish to enter these

1 pleas?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Sir, are you, in fact, guilty of the
4 failure to stop for blue light, second or subsequent
5 offense, as under Indictment 1224?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Are you also guilty of the child
8 neglect -- unlawful neglect of a child case?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Are you also guilty of the failure to
11 stop for blue light, second or subsequent offense, as under
12 Indictment 1845?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And are you also guilty of the
15 financial transaction card fraud, value more than \$500
16 within a six month period of time, third or subsequent
17 property offense case?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And are you also guilty of the
20 resisting arrest charge?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have all of your answers to my
23 questions been truthful and honest?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Discovery has been shared with the

1 defense?

2 MR. SMITH: It has, Your Honor.

3 THE COURT: Prior record?

4 MR. SMITH: Your Honor, he has a 1999 driving
5 under suspension, second offense; use of vehicle without
6 consent, times two; possession of a stolen vehicle greater
7 than 5,000; failure to stop for a blue light, first offense;
8 common law robbery; and an ABHAN. That he got -- he was
9 sentenced to 15 years, suspended to 12 years and five years
10 probation by Judge Cole.

11 He then has a 2008 breaking into motor vehicle;
12 petit larceny; receiving stolen goods, times two; and
13 probation revocation.

14 2011, he has a failure to stop, second offense;
15 breaking into motor vehicles; use of vehicle without
16 consent. He was sentenced to three years, suspended to 30
17 days, and five years probation.

18 And then in 2012 he has a CDV first; assault and
19 battery, times two; malicious injury to personal property;
20 and a probation revocation.

21 And that takes you about up to 2013, when the
22 incident we have here starts.

23 Have you accepted the pleas? Could I please speak
24 to sentencing?

25 THE COURT: Yes.

1 MR. SMITH: Your Honor, the incident -- the first
2 incident he had when he was 17 years old. I want to pass up
3 a couple of things. When I was clerking my judge always
4 complained you don't know who you are dealing with in front
5 of you because there's a lack of information that y'all
6 have. What he did was he was charged with carjacking of a
7 high and aggravated -- with great bodily injury. This
8 elderly woman was leaving a business. He approached her,
9 asked "how are you doing?" She said "fine, sir. How are
10 you?" He then -- as she reached to open the car door, he
11 grabbed the car door and said "I need the car, bitch," threw
12 her down to the ground. You can see from the pictures she
13 suffered injuries to her hand and arm. It broke her arm. I
14 handed up a newspaper. She actually had a billboard in
15 Spartanburg County. She did volunteer work with small
16 children making handcrafts for them. I also handed up her
17 victim impact statement from that. She actually had nothing
18 really bad to say about Mr. Foster. It was more just upset
19 that she wasn't able to continue to help children. I say
20 that because we present Mr. Foster as somebody who just
21 basically has no regard for anybody other than himself. He
22 attacked an elderly grandma when he was 17 years old. He
23 did about six years in prison on that and then immediately
24 got out and is arrested again doing similar type stuff;
25 stolen vehicle.

1 The incident with Deputy Miller, who I will call
2 up here. He can speak more in detail about what he saw that
3 day. He shows he has no regard for his own family that was
4 in the car with him. A one year old baby could have been
5 injured as a result of this.

6 And then his final incident, he shows that he has
7 no care for anybody in Spartanburg County as he drives
8 around like a wild man, ultimately going through an
9 intersection and hitting a random civilian and then that
10 still is not enough to give up. He has to go and then an
11 officer has to basically fight him and pepper spray him.

12 I'm going to hand up pictures from the -- this is
13 the car chase that ultimately ended in his arrest. The gold
14 car in the ditch is his. The silver car is the other person
15 that was hit.

16 Your Honor, there is also some stuff that happened
17 that he's not being charged with as part of this. We agreed
18 to not charge him, but that we would speak about it. Mr.
19 Foster was pro-se for a significant period of time during
20 the pendency of all these cases. And Your Honor actually
21 had some interaction with him prior to him being represented
22 by Mr. Morin. He was sending in doctor's notes while he was
23 pro-se to get out of mandatory court appearances. He sent
24 one in at the second appearance. We believe that one he was
25 actually hospitalized for his second appearance. And then

1 we believe he started from that point forward on the trial
2 docket sending in fictitious doctor's notes. He ultimately
3 sent in one, too, when he was on the trial docket in
4 November, but the period did not cover the term of court and
5 then he was picked up on a bench warrant.

6 His family member contacted the Clerk of Court's
7 office and they actually came to you to try to get him out
8 of jail. You did not let him out of jail because you
9 thought the letter was not sufficient.

10 Mr. Morin then gets in the case and we had a
11 hearing in front of Judge Kelly to rescind the bench
12 warrant. The letter was presented and he was going to let
13 him out and Mr. Foster sat there while Mr. Morin presented
14 this to the court and let him basically provide false
15 information and he didn't say anything about it and Judge
16 Kelly actually granted the motion.

17 Then we went back, went to the Clerk of Court's
18 office and we were able to contact and figure out that the
19 doctor that had signed the note had not been working at the
20 hospital for six months and that he hadn't been seen in the
21 hospital for even longer than that.

22 So he's somebody that at every point of this was
23 running. He's got a significant history of failure to stop.
24 And even once he was locked up, he continued to try to do
25 it.

1 My perspective, we are asking for a full
2 revocation and a full ten years.

3 And I know -- do you want to address the court?

4 DEPUTY MILLER: Yes, sir.

5 MR. SMITH: This is Deputy Miller.

6 THE COURT: Sir, if you would, we are making a
7 recording of everything that happens here, so please speak
8 up loud so that both the court reporter and I can hear you.

9 You can stand over here.

10 DEPUTY MILLER: All right. Thank you.

11 THE COURT: And just give us your full name when
12 you start.

13 DEPUTY MILLER: My name is Marcus J. Miller.

14 THE COURT: Yes, sir.

15 DEPUTY MILLER: I'm Deputy Mark Miller. I have
16 been with the Spartanburg County Sheriff's Office. I will
17 be just about to finish my 21st year.

18 I have been doing this job for quite awhile now
19 and very rarely have I had come to one of these and
20 testified. In this case I did feel it was necessary. I
21 have come across a few very dangerous people in my 21 years
22 of being a Class I law enforcement officer and Mr. Foster is
23 one of those people that I feel definitely poses a direct
24 threat to the people of Spartanburg County and beyond.

25 The way he accelerated and drove with that infant

1 child in the back of his car, with his wife, that he
2 presented as his wife in the car, it just showed that he had
3 no regard for their safety over a few financial transaction
4 warrants that he would have probably been out on in a few
5 hours. I believe even his license was good at that time.

6 I just said when I got behind him it was
7 extraordinarily reckless. I was behind him a very short
8 amount of time. As soon as I realized how reckless it was I
9 had no intention of pursuing longer than I had to, because I
10 was not going to place his child or his wife in danger,
11 despite what he was going to do.

12 A short time after that we got a call, maybe
13 within two or three minutes, about a reckless driving
14 matching his vehicle description going up north towards
15 Inman, going in and out of traffic. So his driving, even
16 though we were not pursuing him any more, was still
17 obviously evasive, trying to -- thinking we were going to
18 come across him.

19 Like I said, at that point I immediately called
20 all the officers on the radio and told them if they do
21 encounter that vehicle, do not pursue it. It was not worth
22 risking his family, or even him, to pursue that vehicle, or
23 the public, but that just his demeanor, everything about the
24 encounter I had with him, it set off something that I rarely
25 come across with people where they come off as truly

1 dangerous.

2 THE COURT: Thank you, sir.

3 MR. SMITH: Your Honor, I don't really have
4 anything else to add, other than I appreciate Deputy Miller
5 not escalating the situation by not chasing him. I think
6 that that was good judgment.

7 I have listened to some of Mr. Foster's jail
8 calls. I feel like he's got some sort of narcissistic
9 issue. He doesn't take responsibility for what he did.
10 He's got calls complaining about how they shouldn't have
11 pulled the gun on him and it wasn't a big deal anyway. I
12 mean, it's just -- he seems to have a lack of understanding
13 of exactly how badly he has messed up, not just with his
14 prior record, but all of these situations. I mean, these
15 are serious situations. One led to a random car accident.
16 The other is the car chase with his baby in it, but there
17 just doesn't seem to be any sort of acceptance of his
18 actions, from what I have had interaction with listening to
19 his phone calls with family members. I think his family
20 members have a perspective. I don't think he does.

21 THE COURT: Thank you.

22 And he's presently on probation?

23 PROBATION AGENT MANIGAN: Yes, Your Honor.

24 May it please the court, Mr. Foster was before
25 Your Honor on April 13th of 2011 for failure to stop for a

1 blue light and received a sentence of three years, suspended
2 to probation for five years.

3 Also breaking into a motor vehicle and use of
4 vehicle without permission, Your Honor.

5 All those sentences, he received three years,
6 suspended to five years probation.

7 Then on March the 22nd of 2012 he was before Your
8 Honor again for the offense of malicious injury to personal
9 property and he received a sentence of five years, suspended
10 to 12 months, and the balance was suspended to five years
11 probation.

12 Your Honor, he has been previously revoked on the
13 2011 cases, and he was revoked 12 months and continued on
14 supervision.

15 He is here today under Warrant Number W-42130336
16 and 0370 for the following violations:

17 He failed to report as instructed. He last
18 reported on January the 9th of 2013, despite numerous
19 attempts made by the agents to get him to report in order to
20 avoid the issuance of the warrant;

21 Failed to refrain from the violation of a federal,
22 state, or local law by being convicted of a CDV first
23 offense on June the 12th, 2012, in the Spartanburg County
24 magistrate's court and receiving a sentence of 30 days.

25 He failed to pay restitution;

1 Failed to pay supervision fee;
2 He failed to pay his fine;
3 Failed to pay the drug testing;
4 And he failed to follow the advice and
5 instructions of the supervising agent.

6 THE COURT: Yes, sir.

7 MR. MORIN: Thank you, Your Honor.

8 Your Honor, as Mr. Foster stated, he's 33 years
9 old and he has six children.

10 In addition to the employment that he stated to
11 you, he's also done various types of construction work.
12 He's had training in carpentry and he was working for an
13 asphalt company at one time.

14 Your Honor, all of these charges, while I
15 understand the officer's position and the State's position,
16 it's not unusual, unfortunately, for someone who has got a
17 warrant, they start out with one warrant and then they just
18 escalate by trying to stay away from that warrant. I can't
19 think of how many times I have heard DUS's say "well, I knew
20 I was under suspension, so I failed to stop." Well, then
21 you are sitting there talking to your client and you are
22 saying "you know, this is a 30 day charge and you just
23 increased it to a three year charge."

24 In his particular instance he knew he had that
25 failure -- this fraudulent check warrant, which carries its

1 own thing, but then by trying to avoid it, all he did was
2 create new problems. He didn't solve any of the problems
3 that he had.

4 And as you have heard his record, and it's
5 unusual, Your Honor, I haven't had this happen to me in
6 quite sometime, when I was meeting with him yesterday and he
7 started to come to the realization that he could go to jail,
8 that he's going to miss his children, that he's missed his
9 15 year old almost her entire life, he was -- he wept for
10 quite awhile.

11 Now, perhaps, as Mr. Smith says, there is some
12 video -- there is some audio where he doesn't understand it.
13 I wouldn't necessarily disagree that there was some hope
14 that he wouldn't be going to jail on these, but he's come to
15 that understanding.

16 And his intentions, when he gets this behind him,
17 is his family is -- he has an aunt. His wife is in Kansas
18 City -- or his aunt is in Kansas City. His wife is going to
19 Kansas City with their children. That's where he's
20 intending to go.

21 I know his father is present in the courtroom.

22 Stand, sir. His father.

23 He may have something to say, but he and I have
24 talked about the issues that his son has that we need to
25 take care of these things. He wants to try to help him get

1 back to where he can take care of his children and go back
2 to work and stop trying to avoid one thing into another,
3 into another, and he basically all he did was he's created
4 this giant mess that he's before you today.

5 I know he's sorry about that. I know that he
6 wants to try to take care of this and move on. He
7 understands what he's facing today.

8 We appreciate the State's recommendation of
9 current. We would ask that you consider something less than
10 that.

11 Obviously we understand the State's concerns, as
12 far as his being a danger he did create. And the State has
13 presented things that he did when he was 17, which obviously
14 were bad and he obviously spent a good bit of time and
15 missed out on some of his children because of that, but in
16 this particular instance that's where you could see -- and
17 you can see from the testimony -- from what you hear from
18 probation, as well as these charges, that he thinks he's
19 getting away from one thing, when really he's just creating
20 a new problem. And fortunately now he can take care of that
21 and move forward from here.

22 I think his father may have something to say at
23 the appropriate time, and my client may have something as
24 well.

25 THE COURT: Mr. Foster, do you agree with the

1 statements that were just made by your lawyer?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Did you say the father did wish to
4 address the court?

5 MR. MORIN: Yes.

6 If he can come forward, please. Come up here.

7 THE COURT: Sir, just come up here and stand
8 beside the police officer, if you would.

9 While he's doing that, let me ask the State, was
10 there anything from the victims in the crash?

11 MR. SMITH: No, Your Honor.

12 THE COURT: Okay.

13 MR. SMITH: They have gotten handled by so many
14 different agencies, we sent them a letter but we never heard
15 anything.

16 THE COURT: Okay.

17 Mr. Foster, I need to let you know we are making a
18 recording of everything that happens here, so please speak
19 up loud enough so that both the court reporter and I can
20 hear you, and just start by giving us your full name.

21 THOMAS FOSTER, SR.: Yeah, I just wanted to hope
22 the court would have mercy on my son and let him get this
23 behind him so he can take care of his kids, my
24 grandchildren, and move forward with his life and grow up to
25 be a productive citizen, as he needs to be.

1 THE COURT: And you are Thomas Earl Foster, Sr.?

2 THOMAS FOSTER, SR.: Yes, sir.

3 THE COURT: Okay. Thank you, sir.

4 THOMAS FOSTER, SR.: All right.

5 MR. MORIN: Thank you.

6 Your Honor, his mother was also present for
7 awhile, but she -- she got emotional and couldn't stay, but
8 she also supports her son, obviously. She lives here in
9 Spartanburg as well.

10 THE COURT: And Mr. Foster, is there anything else
11 that you would like to say or want me to know?

12 THE DEFENDANT: Yes, sir.

13 I apologize to the court, to the officer, what I
14 have done. I apologize as to what I did. I have been going
15 through a lot of problems and I just -- I pretty much suffer
16 for everything I did.

17 I ask you to have leniency on me. I ain't no
18 threat to nobody. I just made the wrong decisions out there
19 and I'm trying to be out here to raise my kids. I got
20 married, trying to raise my kids. What I did, it's been a
21 little while ago. I'm kind of just trying to get everything
22 behind me. As long as I -- a lot of these on my kids. I
23 actually raised them and be with them and take care of them
24 and everything. I just ask for leniency and have mercy on
25 me.

1 Once again, I apologize to the court; and I
2 apologize to Mr. Miller, the arresting officer out there;
3 and the solicitor's office for all what I put them through,
4 what I put them through.

5 THE COURT: Thank you, sir.

6 I'll find that there is a substantial factual
7 basis for the plea.

8 I'll find that he's in willful violation of the
9 terms and conditions of his probation as outlined by
10 probation and by entering the pleas.

11 We can go ahead and do a full revocation. Give
12 him credit for the 56 days. Allow the time that he's going
13 to serve to satisfy any monetary obligations that it can,
14 and anything that it cannot can be reduced to civil
15 judgment.

16 Concurrent with that, with the probation
17 revocation, will be the 12 month sentence on the financial
18 transaction card fraud case.

19 Consecutive to the probation revocation and to the
20 financial transaction card case will be a 10 year sentence
21 on the unlawful neglect of child;

22 A five year sentence on the failure to stop for
23 blue light cases, five years on both of them;

24 And a one year sentence on the resisting arrest.

25 They will run -- again, they will run consecutive

1 to the probation revocation, but concurrent with each other.

2 He will receive 56 days worth of credit on those
3 cases.

4 Good luck to you, sir.

5 MR. SMITH: Thank you, Your Honor.

6 (END OF REQUESTED TRANSCRIPT OF RECORD)

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" not custodial / not father
• can find

STVS Thompson

2012 Bk 141471

FORM 5

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Spartanburg)
)
Mr. Thomas Foster #2699161)
)
 Full name and prison number (if any) of Applicant.)

IN THE COURT OF COMMON PLEAS

2016-CP-42-2707

v.

State of South Carolina)

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 Spartanburg County Jail Detention Center
2. Name and location of Court which imposed sentence Spartanburg County Jail
3. Name(s) of co-defendant(s) (if any) NA
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2015 GS 4201846
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) March 30, 2016
 - (b) _____

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 CLERK OF COURT
 SPARTANBURG COUNTY
 2016 JUL 21 AM 9:01
 HOPE BLACKLEY

- (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. N/A
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. N/A
 - iii. _____
 - (c) the date of each such result:
 - i. _____
 - ii. N/A
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. N/A
 - 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: ineffective assistance counsel

M. HOPE BLACKLEY
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 SPARTANBURG COUNTY

- (a) _____
- (b) _____
- (c) _____

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

in (10):

- (a) my lawyer Micheal Merin told me it was going to
- (b) get 3-106 years, and it was not case. and all
- (c) my charges are concurrent. if have one charge
consecutive it probation violation

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

- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A

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. _____

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 SPARTANBURG COUNTY
 2016 JUL 21 AM 9:01
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iv. NA
(d) the date of each such disposition:

i. _____
ii. NA
iii. _____
iv. _____

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

i. _____
ii. NA
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?

NA

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

(a) which grounds have been presented:

i. _____
ii. NA
iii. _____

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

i. _____
ii. NA
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) NA
(b) _____
(c) _____

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

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2016 JUL 21 AM 9:01
M. HOPE BLACKLEY

- (a) your arraignment and plea? _____
- (b) your trial, if any? _____
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. _____ *Mr. Michael Moun*
- ii. _____ *P.O. BOX 161903*
- iii. _____ *Boling Spring, SC 29314*
- (b) the proceedings at which each such attorney represented you:
- i. _____
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application: *New Trial*
my sentence vacated
20. Are you now under sentence from any other court that you have not challenged?
NO

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SPARTANBURG COUNTY
2016 JUL 21 AM 9:01
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

County of Spartanburg)

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.

Mr. Thomas Foster

SWORN to and subscribed before me this 14th
day of July, 2016

Bernice Barber (L.S.)
Notary Public

My Commission Expires: 5-13-24

CLERK OF COURT
SPARTANBURG COUNTY
2016 JUL 21 AM 9:01
M. HOPE BLACKLEY

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

I, _____, 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.

Mr. Thomas Foster
Applicant

SWORN or affirmed to and subscribed before me this
14th day of July, 2016

Sheneo J. Barbee
Notary Public

My Commission Expires: 5-13-24

CLERK OF COURT
SPARTANBURG COUNTY
2016 JUL 21 AM 9:01
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Thomas E. Foster, #269961,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2016-CP-42-2707

RETURN

Respondent, making its Return to the application for post-conviction relief ("PCR") filed July 21, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the May 2015 term of the Spartanburg County Grand Jury for child neglect (2015-GS-42-1846). Michael Morin, Esquire, represented Applicant. On March 30, 2016¹, Applicant pled guilty before the Honorable J. Mark Hayes, II, as indicted². Pursuant to a recommendation by the State, Judge Hayes sentenced Applicant to imprisonment for ten (10) years³. Applicant did not appeal his conviction or sentence.

¹ Applicant's probation was revoked for failure to stop for blue lights (2008-GS-42-1229), breaking into motor vehicle (2008-GS-42-2656), use of vehicle without permission (2011-GS-42-2202), and malicious injury to personal property (2012-GS-42-1649). However, Applicant does not appear to be attacking his probation revocation in this application.

² At the same time, Applicant also pled guilty to two counts of failure to stop for blue lights (2015-GS-42-1224, 1845), resisting arrest (2015-GS-42-1225) and financial transaction card fraud (2015-GS-42-1847). However, Applicant does not list these charges in his application.

³ Judge Hayes ran the ten (10) year sentence for child neglect consecutive to Applicant's probation revocation sentence.

to guilty pleas based on ineffective assistance of counsel.” Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011).

First, the applicant must show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, he would not have pleaded guilty, but would have insisted on going to trial.” Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000).

Respondent submits that Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code Ann. § 17-27-10 *et seq.*; Rule 71.1, SCRCP. All claims should be made well in advance of the PCR hearing. Because Applicant has been

appointed an attorney, the attorney is the only individual authorized to file amendments to this application, and filings by Applicant will not be considered at the PCR hearing. See Rule 11, SCRCF. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. Rule 15(a), SCRCF.

V.

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

VI.

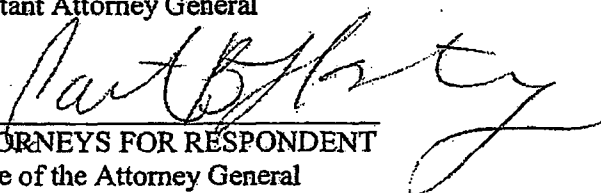
WHEREFORE, having made its Return, Respondent requests that an evidentiary hearing be held solely on the claim of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

CAITLIN BAZAN HASTINGS
Assistant Attorney General

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

February 6th, 2017

II.

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

1. Ineffective assistance of counsel, in that;
 - i. "My lawyer Michael Morin told me I was going to get 3 to 6 years and it was not case and all my charges run concurrent. I have one charge consecutive to probation violation."

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

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant "must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." Walker v. State, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014). "The two-part test adopted in Strickland also applies to challenges

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) COURT OF COMMON PLEAS NONJURY

THOMAS E. FOSTER,)
APPLICANT,)
vs.)
THE STATE OF SOUTH CAROLINA,)
DEFENDANT.)
TRANSCRIPT
OF
RECORD
2016-CP-42-2707

September 19th, 2017
Spartanburg, South Carolina

B E F O R E :

THE HONORABLE GRACE GILCHREST KNIE, Judge.

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

SUSANNAH C. ROSS
ESQ.
Attorney for the Applicant

VALERIE GIOVANOLI
ASSISTANT ATTORNEY GENERAL
Attorney for the State

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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I N D E X O F W I T N E S S E S

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E X H I B I T S

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>State's Exhibits</u>		
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P R O C E E D I N G S

THE COURT: Yes, ma'am.

MS. GIOVANOLI: Thank you, Your Honor.

This is Thomas E. Foster versus the State of South Carolina. Docket Number 2016-CP-42-2707. We're before the court on an application for post-conviction relief filed July 21st, 2016.

Applicant was indicted at the May, 2015 term of the Grand Jury for child neglect, and Michael Morin represented the Applicant.

I'm gonna go through -- this is the only conviction he's contesting in his application, but because this was sort of a global resolution of multiple charges, I'll just give you the background on what his other charges were, and how they were taking into account to come to this guilty plea.

Applicant's probation was revoked for failure to stop for a blue light, breaking into a motor vehicle, use of a vehicle without permission, and malicious injury to personal property. However, Applicant does not appear to be attacking his probation revocation in this application.

At the same time that he pled guilt to the child neglect he also pled guilty to two counts of failure to stop for a blue light, resisting arrest, and financial

1 transaction card fraud. However, Applicant, Applicant also
2 didn't list these charges in his application.

3 So, on March 30th, 2016, the Applicant pled guilty
4 before the Honorable J. Mark Hayes, II as indicted, and,
5 pursuant to recommendation by the State, Judge Hayes
6 sentenced Applicant to imprisonment for ten years, and
7 Applicant did not appeal his conviction or sentence. Judge
8 Hayes also ran the ten year child -- sentence for child
9 neglect consecutive to his probation revocation sentence,
10 and also, pursuant to a negotiation, the State also
11 dismissed other financial transaction card theft and other
12 charges.

13 And so he has alleged in his application that his
14 lawyer, Michael Morin, promised him he was going to get
15 three to six years, and he obviously got more than that.
16 So, Applicant is present and represented by Ms. Susannah
17 Ross, and the State is also present and ready to proceed.
18 And, at this point, I'll hand it over to Ms. Ross.

19 MS. ROSS: Thank you, Your Honor.

20 May it please the Court?

21 THE COURT: Yes, ma'am.

22 MS. ROSS: We'd also add that he argues he was told he
23 was looking at a three to six year sentence, and he also
24 argues that the State failed to prove custody of the child.
25 We have State v. Fowler that Applicant's presented to bring

1 to your attention to go to the fact that the child neglect
2 charge, he believes that he would not be a person in custody
3 such that they could be found guilty of that charge. And
4 there is a letter that he's referencing where it suggests
5 that he was looking at one year left on the probation when
6 it was actually much more time than he got.

7 So, at this point, if I could, I will just pass you up
8 this State v. Fowler, and go ahead and call Mr. Foster to
9 the stand.

10 MS. GIOVANOLI: If I may just put something on the
11 record?

12 THE COURT: Okay. I tell you what, sir, if you'll just
13 remain at counsel table for just a moment so that I can hear
14 the matter that the Attorney General wants to put on the
15 record.

16 Yes, ma'am, you can hand me that case.

17 MS. ROSS: Okay.

18 THE COURT: All right. I'll let you get back around to
19 counsel table. Thank you.

20 MS. GIOVANOLI: Just -- may it please the Court?

21 THE COURT: Yes, ma'am.

22 MS. GIOVANOLI: Just with regard to the late amendment,
23 the State would object to any evidence with regard to an
24 amendment that there was a failure to prove custody and
25 based on this case law. This was not pled in the

1 application nor in any amendment thereto. At this point,
2 it's, it's too late to add allegations. It prejudices the
3 State in, in regard to us being able to defend these
4 allegations. I've made no investigation as to this case or
5 the custody of, of a child allegedly.

6 I just want to put that on the record.

7 THE COURT: Yes, ma'am, Ms. Ross.

8 MS. ROSS: Well, we believe that it goes broadly to
9 ineffective assistance of counsel. In order to prove that
10 in -- during a guilty plea, one has to show that the
11 applicant was misadvised about the law or something such
12 that he or she pled guilty when otherwise would never have
13 done so. But for that bad advice, they might never have
14 pled. So, that is clearly a basic part of ineffective
15 assistance of counsel and that's the one he's alleging.

16 MS. GIOVANOLI: Just for the record, the PCR statute
17 requires that an applicant plead specific facts that support
18 his claim for relief. Ineffective assistance of counsel is
19 a broad umbrella. It can address a lot of issues, and if we
20 don't have any specific facts alleged, then we're prejudiced
21 in the sense that we can not defend those allegations.

22 So, in this case, he did make one specific allegation,
23 and that was that he was told that he would get three to six
24 years.

25 So, the State would, obviously, be going forward on

1 that allegation, but we would object to any late amendments
2 at this point at the hearing.

3 THE COURT: Okay. Ms. Ross, if I'm understanding your
4 argument correctly, what I think that you may be saying or
5 what Mr. Foster may be saying is that he was -- there were
6 assertions made to him about a range of time that he could
7 be sentenced to upon pleading guilty, and maybe, and I'm
8 stretching this a little bit, okay, but maybe, during his
9 communications with Mr. Morin, Mr. Morin may have stated to
10 him representations about what the law was on custody of a
11 child. And, if, if that is the case, I will let him testify
12 regarding what his understanding of the law was, what he was
13 told the law was, and, and I will give you some leeway in
14 that regard understanding that, that these Form 5
15 applications are not necessarily a transcript of everything
16 that he would say if he were testifying.

17 Okay?

18 MS. ROSS: Thank you, Judge.

19 Okay. I call Mr. Foster to the stand at this time.

20 THE COURT: Okay. Mr. Foster, good afternoon, sir.
21 I'm gonna let you come forward and the witness stand is over
22 here in this courtroom, and I'm gonna need to swear you in.
23 I need for you to try to raise your right-hand.

24 Okay?

25 THOMAS E. FOSTER, being first duly

Thomas Foster - Direct examination
by Ms. Ross

1 sworn, testified as follows:

2 THE COURT: Okay. Thank you, sir. You have a seat
3 right here and adjust that microphone as you need to.

4 okay?

5 THE WITNESS: Yes, ma'am.

6 DIRECT EXAMINATION

7 BY MS. ROSS:

8 Q Okay. Mr. Foster, do you understand, with the
9 post-conviction relief, if you, if you win, you're being put
10 back in the position you were in before the plea, and, while
11 you're, you're just challenging the child neglect, it would
12 put you back in position before you pled to that, and your
13 other charges could stand or the judge could see fit to just
14 throw them all out there where you're looking at everything
15 potentially consecutive at a later day?

16 A Yes, ma'am.

17 Q And you allege only the child neglect.
18 why is that?

19 why did you allege only child neglect in your
20 application for post-conviction relief?

21 A Oh, cause the rest of the time, I already done time for
22 it already.

23 Q Okay.

24 A And I didn't, didn't do the child neglect.

25 Q Okay. You didn't have a dispute, dispute with the

Thomas Foster - Direct examination
by Ms. Ross

1 other charges, but you---

2 A No, I didn't have a dispute with none of those.

3 Q Now, you allege that you were misadvised to -- tell me
4 about being told that or understanding the child neglect was
5 a misdemeanor.

6 A Okay. When I received, when I received my paperwork,
7 and I got my N.C.I.C., my motion for discovery, it said it
8 was a misdemeanor. So, when I went -- they sent me to
9 Magistrate Court. When I got in Magistrate Court, they told
10 me nah, we gone send that upstairs. So, I was like wow. I
11 mean how, how this charge is a felony?

12 Q All right. And what did your lawyer tell you -- what
13 was your thinking that those charges would carry?

14 A I didn't think it carried ten years.

15 Q All right. Did you think they would run consecutive or
16 concurrent?

17 A Concurrent.

18 Q Now, moving on, you sent me this case, State v. Fowler,
19 that talks about custody of a child.

20 who was the child in the car with you?

21 A The child was in the car was my wife's child.

22 Q And, just to give some context, you were charged with a
23 failure to stop for the blue light or fleeing from police---

24 A Yes, ma'am.

25 Q ---with your wife and child in the car?

Thomas Foster - Direct examination
by MS. ROSS

1 A Yes, ma'am.

2 Q And that is what you pled to?

3 A Yes, ma'am.

4 Q But you also pled to child neglect due to the fact that
5 the child was in the car?

6 A Yes, ma'am.

7 Q Now, I refer you to Page 8 of the transcript on when
8 they talk about the facts. The solicitor says Ms. Foster's
9 wife (sic) was in the -- and this is Line 23. Ms. Foster's
10 wife was in---

11 THE COURT: I'm sorry.

12 What page are you on?

13 MS. ROSS: I apologize. It's Page 8; Your Honor, and
14 Line 23.

15 THE COURT: Okay.

16 Q The solicitor says, in the recitation of the facts, Ms.
17 Foster's wife was in the passenger's seat and his one year
18 old baby was in the back seat during the transaction, and
19 then it goes on about the facts and about the flight.

20 Why did you agree to those facts if it was not your
21 child?

22 A Cause, at that moment in time, my vision was blurred
23 about everything. I was trying to listen to everything and
24 everything was so cloudy to me at that moment in time.

25 Q Did you think it made a difference whether it was

Thomas Foster - Direct examination
by Ms. Ross

1 actually your child or your girlfriend's child?

2 A No, that was never explained to me like that. He
3 ain't -- he would never said---

4 Q Okay. Just---

5 A All right.

6 Q No?

7 A No.

8 Q And did that child live with you?

9 A No.

10 Q Did that child -- was that child your child, your
11 biological child?

12 A No, it's not my biological child.

13 Q Were you paying child support or anything for that
14 child?

15 A No, I'm not on child support for none of, none of my
16 kids.

17 Q Now, you do have a child by the woman who was in the
18 car?

19 A Yes, I do.

20 Q what -- what's that child's name?

21 A That -- my child's name is Tazyia (phonetic).

22 Q Okay. But this child who was in the car at the time
23 was not your child?

24 A No.

25 Q And you did not have any kind of custody or

Thomas Foster - Direct examination
by MS. ROSS

1 responsibility for that child?

2 A No, none whatsoever.

3 Q Now, did you ever ask your lawyer about that or talk to
4 your lawyer about that?

5 A Well, when I, when I sit and talked to him, he never
6 explained to me about that or being proved that that's my
7 child or anything.

8 Q What it -- how exactly did he explain the child neglect
9 charge?

10 A He was talking about I was charged with child neglect
11 and that was about it.

12 Q Did you think it mattered whether it was your child or
13 not?

14 A No, cause I didn't full act -- I didn't fully
15 understand the law. I didn't understand what I was going
16 through cause everything was not explained to me how it
17 suppose to broke down to me about the child neglect.

18 Q Did he ever show you a copy of the actual law on child
19 neglect?

20 A No.

21 Q Did he---

22 A Only thing I got from him was my motion of discovery
23 and the warrants and stuff. He never explained the child
24 neglect. It was that case, I would never plead guilty to
25 the child -- I would of took a jury trial.

Thomas Foster - Direct examination
by Ms. ROSS

1 Q Did you -- did he ever talk to you about custody or
2 responsibility for the child or anything like that?

3 A No.

4 Q In the discovery, did it ever have the name of the
5 child that you recall?

6 A No.

7 Q would -- what appeared instead in discovery?
8 How was the person in the car ever identified?

9 A The only thing was identified, the officer pulled us
10 over, but we had him -- I hand him my South Carolina
11 driver's license, my wife handed her driver's license, and
12 that was it.

13 Q Now, if you had known it would make a difference
14 whether the child was yours or not or in your custody or
15 not, if you had known that would of made a difference to the
16 child neglect charge, would you have ever pled guilty to
17 that charge?

18 A No, I wouldn't pled guilty.

19 Q What would you have done, done instead?

20 A I would of took a jury trial --

21 Q Okay.

22 A -- and I would of had the State, had the State to prove
23 that was my child, and I can show that they ain't proof of
24 that. That's not my child. I don't have no legal custody
25 of that child.

Thomas Foster - Direct examination
by Ms. ROSS

1 Q okay. Now, the next issue.

2 Did you ever get a letter from your lawyer after the
3 fact telling you or giving you the understanding that you
4 were looking at a year on a probation violation?

5 A He, he told me, when I wrote him back, I asked him if
6 the -- to state how my charges is ran. He said, to my
7 understanding, when we're doing your case, that you had one
8 year remaining. And whenever we was back, went down, he
9 said I had 11 years. Once, once I got, once I got processed
10 through the SCDC, I found out that I had four years, and
11 that give me a total of years.

12 So, if I would of known that, I would never plead
13 guilty, and I would never even have took that probation
14 violation or none of that because of, at that moment in
15 time, I was in a perception that he said -- he told me I got
16 a deal for you if you plead guilty. The solicitor said he's
17 willing to drop all your charges if you plead guilty, and he
18 wrote down, in front of the judge, that I would possibly get
19 three to six years, and I was like well -- I said, well,
20 I'll take that.

21 Q Did he ever mention that the officer in the case would
22 come and give some independent testimony on how he thought
23 your case was the, was the worst he'd ever seen?

24 A No, I didn't have no clue that the, the prosecutor was
25 gonna go over -- the, the whole thing was that they was -- I

Thomas Foster - Direct examination
by Ms. ROSS

1 was going there to plead guilty, and, by me pleading guilty,
2 they was gonna -- I was getting a deal, and I plead guilty.
3 Nobody was recommending me getting no 14 years or full
4 probation revocation. The State recommending me getting a
5 full ten years.

6 Q All right.

7 A And my -- and, my agreement, is to sit down and take a
8 plea and I would of got less time.

9 Q Did you understand that the State -- you were talking
10 about the solicitor going on on Page 14.

11 Were you aware the solicitor was gonna start talking
12 about, in great detail, about a charge you picked up when
13 you were 17 years old?

14 A No, I didn't had -- did not know anything about that.
15 I mean about her -- about him going to say that -- talk
16 about my previous criminal record. He only talked about one
17 particular incident. He didn't talk about my whole entire
18 criminal, criminal record. I paid my dues for that and for
19 the -- paid my debt to society and done volunteer work
20 through all that and they was still talking about it.

21 Q All right. And it wasn't just listed as a criminal
22 record. He went into great detail---

23 A Yeah.

24 Q ---about what -- the exchange---

25 A Exactly.

Thomas Foster - Direct examination
by MS. ROSS

1 Q ---that went on?

2 A And that ain't had nothing to do with what was going
3 on. He didn't object to that or he didn't, he didn't say
4 nothing about that.

5 Q And how many years ago was that?

6 A That was over -- that would of been almost 20 years
7 ago.

8 Q And your lawyer didn't object to that or

9 Mr. Miller's---

10 A No.

11 Q ---the officer's testimony?

12 All right. I've got no further questions, but this is
13 your PCR.

14 Is there anything else that you would like to put on
15 the record?

16 A Not at this moment.

17 Q Okay. Thank you.

18 I've got nothing further.

19 THE COURT: Yes, ma'am.

20 MS. GIOVANOLI: Thank you, Your Honor.

21 THE COURT: Cross.

22 CROSS-EXAMINATION

23 BY MS. GIOVANOLI:

24 Q You're only contesting the neglect, the child neglect
25 charge because that's the charge you got the most time on,

Thomas Foster - Cross-examination
by Ms. Giovanoli

1 isn't it?

2 A Yes.

3 Q Okay. So, had you gotten to three to six years on
4 this, you wouldn't be contesting this guilty plea, would
5 you?

6 A Yes, I would, I would of contested this plea.

7 Q Okay. So, you're alleging that your lawyer promised
8 you three to six years, right?

9 A Correct.

10 Q So, had you gotten three to six years, would you be
11 here today?

12 A Three to six years, I wouldn't of took the child
13 neglect charge.

14 Q Okay. So, ultimately, you're displeased with your ten
15 year sentence, right?

16 A Yes, cause some of that I didn't do.

17 Q Okay. And you do realize that this was a global deal
18 so that, if you get your conviction vacated for the unlawful
19 child neglect, you -- it will vacate your guilty pleas for
20 everything that you pled to that day, and do you know the
21 time that you would be looking at if you were sentenced to
22 the maximum on all those charges?

23 A I already maxed -- I already maxed the time out
24 already.

25 Q okay. On what you were sentenced for?

Thomas Foster - Cross-examination
by Ms. Giovanoli

1 A what I was sentenced for, yes, the time is already
2 complete, and it's ran consecutive. I done a consecutive
3 sentence already. It's already done and maxed out.

4 Q But you weren't sentenced to the maximum of all the
5 charges, were you?

6 A Yes.

7 Q Okay. Which charges were you sentenced to the maximum
8 on?

9 A The child neglect is one. The failure to stop, that
10 was ran inconcurrent (sic). That was the maximum five
11 years. The other one was -- the other one, the max, another
12 five years, and, the probation, the whole four years.

13 Q Okay. Do you recall being put under oath at your
14 guilty plea?

15 A Yes.

16 Q Okay. And whenever the judge went through and, for
17 each offense that you were pleading guilty to, he told you
18 what the maximum sentence would be, didn't he?

19 A Yes.

20 Q Okay. And then, on Page 11, Line 18, the Court said,
21 understanding the possible sentences that I could impose, do
22 you still wish to enter these pleas, and you responded yes,
23 sir.

24 So, did you lie to the plea judge?

25 A No, I was -- my lawyer told me to go to my -- Mr. Morin

Thomas Foster - Cross-examination
by Ms. Giovanoli

1 told me to go ahead and say yes. He said, when you go in
2 there, just say yes.

3 Q So, your testimony is that your lawyer told you what to
4 say?

5 A Yes.

6 Q Even though it was a lie?

7 A Yes.

8 Q So, if you're told to lie, you'll lie?

9 A Well, basically, he told me to go in there and agree
10 with what was going on. He said he was wanting to deal with
11 you, and all your charges would be dismissed, and I told him
12 all right.

13 Q Okay. And then there -- you also testified just a
14 minute ago to Ms. Ross that, whenever the solicitor was
15 giving a recitation of the facts, she mentioned to you, I
16 believe it was Page 8, yeah, he said that your wife and --
17 let me just quote it. Mr. Foster's wife was in the
18 passenger seat and his one year old baby was in the back
19 seat of the car.

20 So, prior -- this was -- this -- he made that
21 recitation of facts and you agreed with those facts,
22 correct?

23 A Yes.

24 Q And that was prior to you being sentenced?

25 You didn't know what you were gonna receive on the

Thomas Foster - Cross-examination
by Ms. Giovanoli

1 child neglect charge?

2 A I, I really didn't fully understand anything.

3 Q Sure.

4 But, at that point, you had the opportunity to clarify
5 when he asked you if you were in agreement with those facts,
6 and you didn't feel that it was important to tell them---

7 A No, I never was---

8 Q ---that it wasn't your child?

9 A It wasn't important because I was under the impression
10 that I was pleading three to six years.

11 Q But it's important now that you got ten years?

12 A All of it's important. Ain't one particular thing
13 that's not important. Everything is important to me.

14 Q But it wasn't important at the time that you -- when
15 you had the opportunity to---

16 A But I was told---

17 Q ---get it right?

18 A I was told that I was getting three to six years. So,
19 I was taking that.

20 Q Okay. So, you're only contesting this conviction
21 because you got ten years?

22 A Yes.

23 Q Okay. So, does -- you're displeased with your
24 sentence, not your lawyer?

25 A I'm displeased with my sentence and my lawyer but for

Thomas Foster - Cross-examination
by Ms. Giovanoli

1 letting them talk about my criminal, criminal record. Then
2 he had -- he was talking about things that never concerned
3 my case. They -- wasn't nothing, nothing he said concerning
4 what I had did. He talking about what I did when I was 17
5 years old.

6 Q You mentioned that -- you talked about what you did
7 when you were 17, but you didn't mention all of your
8 criminal history.

9 You've got a pretty extensive, extensive criminal
10 history, do you not?

11 A No, I do not.

12 Q well, what is your -- how many criminal convictions do
13 you have?

14 A Three.

15 Q Three?

16 A Yes.

17 Q Do you realize that you pled to one, two, three, four,
18 five, six, seven, eight, nine just on this day?

19 A By my paperwork I had, I plead to five.

20 Q Okay. And you also had -- and you're telling me you
21 only had three convictions?

22 A well, three convictions that I went to prison for.

23 Q Okay. So, now we're qualifying your convictions.

24 How many convictions, in total, do you have?

25 A Three.

Thomas Foster - Cross-examination
by Ms. Giovanoli

1 Q So -- okay. So, have you ever been convicted of
2 criminal domestic violence?

3 A No.

4 Q Okay.

5 A It was dismissed.

6 Q Okay. So, in June of -- June 12th of 2012 you weren't
7 convicted of---

8 A June---

9 Q ---criminal domestic violence?

10 A Say that again.

11 Q June 12th, 2012. You got 30 days in county.

12 A Oh, no, I was already incarcerated when that happened.
13 I was in the Department of Corrections. They just run that
14 concurrent. I didn't even show up for Court.

15 Q Well, they can't sentence you on something that you
16 haven't been convicted of.

17 Have you been convicted of that?

18 A Yes, I have.

19 Q Okay. Have you been convicted, been convicted of
20 breaking into a motor vehicle?

21 That was January 2nd of 2012.

22 A That was a probation violation stemming from 2008. It
23 was all included.

24 Q Okay. But it is a probation---

25 MS. ROSS: This relates to his prior record, judge.

Thomas Foster - Cross-examination
by Ms. Giovanoli

1 MS. GIOVANOLI: Well, he just testified that he'd only
2 had three convictions. I think it's valid for impeachment
3 purposes.

4 THE COURT: I think I have the, the record --

5 MS. GIOVANOLI: Okay.

6 THE COURT: -- as part of the documents that you gave
7 me. Thank you though.

8 Q Okay. So, moving along.

9 So, your testimony was that you had a child with the
10 woman that was in the car, with the one -- the child that
11 was in the car was not your child?

12 A No, it was not mine.

13 Q How many children do you have?

14 A I have six children.

15 Q Okay.

16 A And all my children are adults besides one.

17 MS. GIOVANOLI: Okay. I have no further questions.

18 Thank you.

19 MS. ROSS: Just briefly on redirect.

20 REDIRECT EXAMINATION

21 BY MS. ROSS:

22 Q When you pled to the child neglect, were you aware of
23 this State v. Fowler case that you gave to me?

24 A No, I, I found that -- I found that out after I was
25 sentenced and after I started doing research on my case and

Thomas Foster - Redirect examination
by MS. ROSS

1 I seen that---

2 Q Okay.

3 A ---and it---

4 Q But you -- just say no, you weren't aware of it.

5 A All right.

6 Q And then, once you became aware of that, that's when
7 you realized that it might of made the difference whether --
8 because your lawyer never asked you about that?

9 A Exactly. He ain't never go over the facts and sit down
10 and explain things to me.

11 Q Oh, okay. No further questions.

12 A I, I was -- all right.

13 THE COURT: Mr. Foster?

14 THE WITNESS: Yes, ma'am.

15 THE COURT: what was the name of the child in the car
16 with you at the time of this arrest?

17 THE WITNESS: His name was Marquez. Marquez.

18 THE COURT: okay. And how old is that child or was
19 that child at the time?

20 THE WITNESS: That child, at the time, he was six years
21 old. They having him as a different age.

22 THE COURT: And that was the only child in the car with
23 you?

24 THE WITNESS: Yes, ma'am.

25 THE COURT: And who is the father of that child if you

Thomas Foster - Redirect examination
by Ms. Ross

1 know?

2 But you're not the father?

3 THE WITNESS: I'm not the father. I don't know who the
4 father is.

5 THE COURT: Okay. And the mother of that child is your
6 current wife?

7 THE WITNESS: Yes, ma'am.

8 THE COURT: And was she your wife at that time?

9 THE WITNESS: Yes, ma'am.

10 THE COURT: Okay. Any questions with regard to the
11 questions that I just asked?

12 MS. GIOVANOLI: No, Your Honor.

13 MS. ROSS: I'm just gonna ask.
14 what is her name?

15 THE WITNESS: Frances.

16 MS. ROSS: Foster?

17 THE WITNESS: Frances Smith Foster.

18 MS. ROSS: No further questions.

19 THE COURT: Okay. Counsel, anything else from Mr.
20 Foster?

21 MS. GIOVANOLI: Nothing for this witness, Your Honor.

22 THE COURT: Okay. Mr. Foster, you may step down, sir.
23 watch your step.

24 okay?

25 MS. ROSS: That's the Applicant's case, Your Honor.

Michael Morin - Direct examination
by Ms. Giovanoli

1 THE COURT: Thank you.

2 Yes, ma'am.

3 MS. GIOVANOLI: State would call Mike Morin to the
4 stand.

5 THE COURT: Okay. Mr. Morin, will you raise your
6 right-hand please?

7 MICHAEL MORIN, being first duly
8 sworn, testified as follows:

9 THE COURT: Thank you, sir. Please be seated.

10 DIRECT EXAMINATION

11 BY MS. GIOVANOLI:

12 Q Mr. Morin, I know that you testified in another
13 hearing, but, just for this record, how long have you been
14 practicing law?

15 A Twenty-five years.

16 Q Okay. And how much of that has been criminal?

17 A Eighty percent or close. Eighty -- between eighty and
18 ninety percent.

19 Q Okay. Were you appointed to represent the Applicant in
20 this case?

21 A No, I was retained on this case.

22 Q Okay. And were you retained on all of the charges and
23 a probation revocation?

24 A Yes.

25 Q Okay. And that was handled on -- I believe it was

Michael Morin - Direct examination
by Ms. Giovanoli

1 March 30th, 2016?

2 A Yes.

3 Q Okay. Did you make a request for discovery on this
4 case?

5 A Yes.

6 Q And did you receive the discovery?

7 A Yes.

8 Q Did you review it with the Applicant?

9 A Yes.

10 Q Okay. Can you give me a brief overview of the evidence
11 against him with regard to the child neglect case?

12 A The police were called out to a metal place off of
13 Valley Falls Road. He was there in the car with his wife
14 and a child. There was another gentleman also either in the
15 car or near the car.

16 They were investigating whether or not they were trying
17 to scrap a car that had been stolen. He didn't have a
18 license. The license he gave wasn't valid.

19 During the investigation, he jumped back in the car and
20 sped off at a high rate of speed. This is all on video.
21 The officer got into the car, down Highway 9 -- Valley Falls
22 toward USC-Upstate. I believe he got on 585 at that point.
23 The officer stopped the pursuit, and said -- I'm thinking he
24 said on the, on the recording that there's a young child in
25 the car. So, I am going to stop. I thought that the child

Michael Morin - Direct examination
by Ms. Giovanoli

1 was in a car seat, but it might of been a booster seat, but
2 it was obviously a young child.

3 Q And when you discussed this with the client, did you
4 discuss the elements of the criminal child neglect?

5 A I recall discussing the fact because the unlawful
6 neglect, I said if you do this thing, you're endangering
7 the, the -- your child. I'll be honest, I was under the
8 impression the entire time that we were talking -- he kept
9 saying my wife, my child. So, I didn't pursue is that your
10 child. I mean that was the conversations.

11 Q So, he never---

12 A Why would I endanger my child? I can drive. I
13 wouldn't endanger my child. So --.

14 Q Okay. So, he---

15 A I don't -- you know.

16 Q You met -- he never told you that the child wasn't his?

17 A No, and I don't recall specifically saying they have to
18 prove that this is your child.

19 Q Do you have anything in the evidence that shows the
20 name of the child in the car in the discovery?

21 THE WITNESS: If I can have a moment, Your Honor?

22 THE COURT: Yes, sir. Take your time.

23 (Pause.)

24 A I don't know if I do because they didn't catch him
25 then. He just -- he was gone, and they got up with him

Michael Morin - Direct examination
by Ms. Giovanoli

1 later on another failure to stop when he was himself.

2 Q Okay.

3 A So, other than seeing the child, but --.

4 Q Did he give any statements at the time that he was
5 caught?

6 A I don't, I don't remember. I know he got out and he
7 ran and they tackled him or something, but I don't know that
8 he said anything.

9 Q Okay. Did he ever give you the name of the child that
10 was in the car?

11 A I don't know if he did or not, ma'am. I can check.
12 I'm looking at some notes and things that I had, but --.

13 (Pause.)

14 THE WITNESS: I usually work quicker than this, Your
15 Honor.

16 THE COURT: Take your time.

17 (Pause.)

18 A I don't, I don't see any notes where that was
19 specifically discussed one way or another other than I was
20 with my wife and child, but I can remember him -- I met him
21 and his dad. He said he was married. He had his mother,
22 mother of three. Six children with three women. He was
23 living with three kids when he was arrested.

24 I wrote down Court ordered support. He went to the
25 eleventh grade at Dorman, and he worked at Concept

Michael Morin - Direct examination
by Ms. Giovanoli

1 Packaging. That was in February of 2016.

2 So, I had married mom of three. Was living with three
3 kids when arrested. I didn't ask him which child -- I just
4 didn't ask him because he didn't say that's not mine, and
5 he's married to her. So, I, you know, that, that element of
6 the crime we didn't discuss that much. I, I---

7 Q Did he ever use the terminology my child?

8 A That's what he, he always used.

9 Q Okay. And you were under the assumption that he lived
10 with the wife that was in the car and also the child that
11 was in the car?

12 A And, like I say, his notes were I lived with my -- live
13 with three children. So --.

14 Q Yeah.

15 A I, I --.

16 Q Okay. And this time -- did you advise him to his right
17 to a jury trial?

18 A Yes.

19 Q Did he ever indicate a desire to go to a jury trial?

20 A No.

21 Q So, was it always his mode to get the best deal he
22 could get?

23 A Well, we, we talked about the best deal. It wasn't
24 always gonna be a plea. What happened was -- is they made
25 the offer of concurrent time, and we went over the facts of

Michael Morin - Direct examination
by Ms. Giovanoli

1 the case, and what would be shown at trial. And then we're
2 back there in the back. The day before I went there and
3 went over his rights, and I would of said okay, the judge is
4 gonna ask you this, he's gonna ask you this. And then when
5 he's -- if, if my client goes along and says no to that,
6 then I'd say okay, well, then, then it's gonna be a trial
7 because if the answer to that question is no, whether it's I
8 want to give up a right, you want to remain silent, do you
9 admit you did the charges, I usually use Judge Cole's tell
10 me what it is that you did in that situation because -- and
11 then, if they say well, I didn't do anything, then I'll say
12 okay, well, it's gonna be a trial. So --.

13 Q And he never indicated to you, to you he wanted a jury
14 trial?

15 A Well, I think, at first, we were talking about a jury
16 trial, but, as we looked at the discovery and talked about
17 the case and talked about the potential penalties, if he got
18 ten and then five consecutive and then five consecutive and
19 then probation consecutive, then, then, you know, it would
20 add up pretty quick.

21 Q According to the sentencing sheet per the unlawful
22 child neglect, the box for recommendation by the State is
23 marked. It's X'ed.

24 So, this was sort of a global resolution to a number of
25 charges, including a probation revocation, that you had

Michael Morin - Direct examination
by Ms. Giovanoli

1 negotiated with the state?

2 A All of the charges that he was pleading to, with
3 unlawful neglect being the top end---

4 Q Uh-huh. (Affirmative).

5 A ---were gonna run concurrent. The State, at least in
6 Spartanburg, does not usually -- they don't negotiate what's
7 gonna happen on a probation violation. So, I always tell my
8 clients, I'm like, you know, they'll say what's gonna happen
9 with the probation violation, and I'll say well, it's a
10 shark in the ocean, and you're in the ocean. I don't know.
11 It might swim near you. It might bite you. It might not.
12 You don't know because it depends on the other things and
13 the other factors that the judge is gonna consider.

14 They may continue you on probation. They may toll it
15 and start it when you get done with a sentence. They may
16 give you a concurrent sentence. They may do a lot of things
17 on that, but the offer that he had was zero to ten on the
18 things that he was pleading guilty to that day.

19 Q Okay. Did you ever promise him he was gonna get three
20 to six years?

21 A No. What that conversation was, he wanted me to ask
22 for probation in this case, and I said that's not realistic.
23 If we go in there and we say we want probation, and they say
24 you should get ten years, you're not getting probation on
25 this. He had two -- he had the failure to stop with the

Michael Morin - Direct examination
by Ms. Giovanoli

1 minor, and then he had another failure to stop where he
2 wrecked into another car, and he was on probation for it.

3 So, what I suggested to him was that we ask and shoot
4 for getting three to six, and then, that way, we could
5 present the judge with a realistic option for sentencing.
6 If you go in there and you say we don't want anything and we
7 want to stay on the probation, then the judge is gonna
8 ignore that. He's gonna -- I wanted the judge to be able to
9 think okay, this is reasonable and this is reasonable. If
10 you go in and you say we don't want anything, and, and you
11 saw what the State wanted, then there's really no, no choice
12 there for him. At least that's the way I approached it and
13 that's what I told him.

14 If I'd of thought that -- the only time I would of told
15 him he would of got something would of been if there was a
16 negotiated sentence, but the three to six came up as my
17 suggestion that we do that, and not ask for another
18 probation case, which was an unrealistic expectation given
19 his present violation as well as the charges that he's
20 pleading to.

21 Q Okay. Did you inform him of the maximum penalty he was
22 facing for these charges?

23 A I informed him that he could get up to ten years on the
24 charges he was pleading to. Not -- the violation of
25 probation, again, is out there.

Michael Morin - Direct examination
by Ms. Giovanoli

1 Q Okay. And have you reviewed your file in this case?

2 A Yes.

3 Q Okay. Did you have any documentation that you had
4 discussed that the potential maximum sentence he could
5 receive for child neglect?

6 A Yes.

7 Q And what was that document?

8 A For many years I used a -- what I call the plea note
9 sheet. It's a two page document where I review the -- if I
10 could put my hand on it. I just had, but I'll describe it,
11 and I'll find it. It -- in it I list what the potential
12 penalty is, what the maximum sentence he can get on the
13 charges is, and I make him sign his name to it, and I have
14 one here that he signed and I am gonna find it. I had it
15 all together.

16 Q And when you do -- may I approach the witness?

17 THE COURT: Yes, ma'am.

18 THE WITNESS: If I may stand, Your Honor?

19 THE COURT: Yes, sir.

20 Q I don't see it around here. If you---

21 A I'm pretty sure I picked it up and put it in here when
22 I walked up here. I apologize.

23 Q No, that's okay. No -- here.

24 A No, that's his intake sheet.

25 Q There it is.

Michael Morin - Direct examination
by Ms. Giovanoli

1 A There it is.

2 Q Do you mind if I have---

3 A No.

4 Q ---this marked?

5 A Go ahead.

6 Q I'll make a copy of it.

7 Can I have this marked please, for identification
8 purposes, State's 1?

9 THE COURT: All right.

10 (WHEREUPON, the document was marked as State's Exhibit
11 No. 1 for identification purposes only at this time.)

12 Q Okay. So, I'm handing you the document that's been
13 marked State's Exhibit 1 for purposes of identification.

14 what is that document?

15 A This is a document that I used called the plea
16 checklist, and basically what it does is it talks about what
17 the maximum penalty is, what the max -- what the evidence of
18 the charges are, what the plea negotiations are. I go
19 through and check off all of the rights that we've gone
20 over. I ask them a series of questions about do you want to
21 plead guilty.

22 Here, on Page 2, it says that defendant stated he
23 understood and pled -- he -- that, by pleading guilty, he
24 could receive up to blank years. I -- it's my handwriting.
25 I wrote ten. He responded he understood, I circled yes, and

Michael Morin - Direct examination
by Ms. Giovanoli

1 then he signed where it's defendant. And, on Page 2 down
2 here at the bottom, these are my notes about the things I
3 was gonna talk to the judge about when he pled.

4 So, he's 33. He's married. He has six children. He
5 works with asphalt in Kansas City. He's been in jail 56
6 days. He's been in no trouble after he got out on bond.

7 Q Okay.

8 A So---

9 Q So, you prepared this document?

10 A Yeah, that's all mine. That is his -- the only, the
11 only signature -- the only thing on there that's not his --
12 my handwriting is that right there on that defendant line
13 where he signed.

14 Q Okay. And your testimony is that you reviewed each one
15 of these things with him?

16 A Yes.

17 Q And then---

18 A I would of gone through these and then he would of
19 signed there---

20 Q Did---

21 A ---and then these other notes I would of put.

22 Q Did you witness him signing that?

23 A Uh-huh. (Affirmative.)

24 Yes.

25 Q And---

Michael Morin - Direct examination
by Ms. Giovanoli

1 A This would of been the day before when I went to the --
2 visit him in the jail.

3 MS. GIOVANOLI: At this point, the State would move to
4 admit this into evidence as State's Exhibit 1.

5 THE COURT: Allow counsel to look at it.

6 MS. GIOVANOLI: Yeah, this is what we were looking at
7 earlier.

8 (Pause.)

9 MS. GIOVANOLI: Evidence, is there any objection?

10 THE COURT: Counsel.

11 MS. ROSS: No objection.

12 THE COURT: Okay. Thank you.

13 MS. GIOVANOLI: Request to publish this.

14 THE COURT: That will be State's Exhibit No. 1.

15 (WHEREUPON, State's Exhibit No. 1 was received into
16 evidence at this time.)

17 MS. GIOVANOLI: Request to publish it to, Your Honor.

18 THE COURT: Yes, ma'am, thank you.

19 Q Okay. So -- okay. Going back, there's also some
20 testimony from the Applicant that he received a letter from
21 you. I can't remember exactly what, what the letter---

22 A In January of 2016, he wrote me a letter regarding his
23 sentencing sheets and what he had. So, I went to the
24 clerk's office, pulled the close -- the actual sentencing
25 sheets, put them together in a letter, and mailed it to him.

Michael Morin - Direct examination
by Ms. Giovanoli

1 Q Okay.

2 A Now, my office, we print it out on word, and we keep a
3 copy electronically. And it listed the, the name -- the
4 number. I think it was five, five charges. It listed the
5 warrants. It listed what the charges were as I sent it to
6 him.

7 My understanding, in January, he pled in March, but, in
8 January of that year, my understanding was that the
9 probation -- he had already served time previously on that
10 sentence, and that he only had a year left after that.

11 Now, when we pled, I didn't know what the probation was
12 gonna do. It might terminate. It might get continued. It
13 might run concurrent. I don't know. But it was my
14 understanding, at that time -- well, after that, that there
15 was only one year left on it. Now, he says that, and I
16 believe him, that DOC says there's more than that, and that
17 would of been my understanding of what he had left because,
18 when he's on probation; he had gotten a revocation and then
19 he had gotten out, and that part of it, which wasn't part of
20 the deal, was separate, would have -- I may have
21 misinterpreted what that was in January of 2017 -- '16.

22 Q Okay. But sort of, the things he was doing was
23 affecting his time as far as picking up new charges?

24 A Yeah, because it got confusing because he got put on
25 probation because he was getting probation, and then he was

Michael Morin - Direct examination
by Ms. Giovanoli

1 violating the probation, and then he was doing time, which
2 would of been -- given him credit against the time that he
3 had suspended, and then he'd got out, and then he got
4 arrested, and then he was in jail, but it was my
5 understanding that he had previous violations that reduced
6 his sentence, his exposure in the probation.

7 Q Okay. And that was based off your review of the South
8 Carolina Department of Correction records?

9 A Yes, and trying to talk to probation at the time.

10 Q Okay. And you -- did you write a letter to the
11 Applicant at a later date regarding these convictions?

12 A Yes.

13 Q And is that part of your file as well?

14 A Yes.

15 Q Okay. I'm just gonna ask you what date you wrote that
16 letter to him.

17 A I want to make sure I'm looking at the right one.

18 (Pause.)

19 A Okay. According to my records, I mailed that to him on
20 Tuesday, June 21st, 2016.

21 Q You said June 21st?

22 A June 21st, 2016.

23 Q Okay. And what were the -- what was the contents of
24 that letter to him?

25 A It says I've enclosed a copy of your five sentencing

Michael Morin - Direct examination
by Ms. Giovanoli

1 sheets and charges you pled to on March 30th before Judge
2 Hayes. I summarized them as follows:

3 And then the unlawful neglect, failure to stop,
4 resisting arrest, another failure to stop, another FTC
5 fraud, and then I said please note the higher sentence
6 received -- the higher sentence can -- received was ten
7 years. The sentencing sheets indicate all those charges run
8 concurrent, which is what the deal was. However, they are
9 consecutive to your probation violation. Judge Hayes
10 clearly marked the sentencing sheet as such and specifically
11 indicated that these are concurrent with each other.

12 As a result, you will complete the probation violation
13 before you build time, put that in quotation marks, on the
14 unlawful neglect, and then, in parenthesis, the one you
15 received the most time for as the other five are running
16 together.

17 It was my understanding that you had one year left on
18 your probation case. This would create an 11 year sentence
19 based on the fact Judge Hayes revoked your probation in
20 full, full in all capitals. Keep in mind that Judge Hayes
21 revoked your probation in full meaning behind that is --
22 behind that is you, I guess I, typo, would have to do the
23 entire original sentence minus what you've already done. It
24 appears from the enclosed inmate printout that your
25 probationary sentences, 2012-GS-42-1649 for MIPP less than

Michael Morin - Direct examination
by Ms. Giovanoli

1 10,000, had four years remaining on it. Not one.

2 As such, that would give you four years to complete
3 before beginning your ten year sentence, which you pled on
4 March 31st, 2016. This is how your time is being
5 calculated. I have included both the sentencing sheet and
6 the prior violation orders on 2012-GS-42-1649.

7 Q Okay. So, that was four years left on the probation
8 revocation?

9 A Yes, apparently, when he wrote me the letter and I did
10 the research to find out about all of that, it, it became
11 apparent, but that's the letter that I wrote him in June
12 because, when he got to the Department of Corrections, which
13 I expect he would, he met and they told him what it was and
14 he thought that was different. So then I came back and
15 redid it.

16 Now---

17 Q Was it possible that that could of changed after he
18 pled guilty?

19 A I don't think it could of changed. I think, I think --
20 normally judges will ask what the exposure on it is, and
21 that usually solves that problem, but I wasn't asked for
22 that time.

23 Q Okay. Did you---

24 A I haven't looked at the transcript, but that's probably
25 what one of the things that led to it, but --.

Michael Morin - Direct examination
by Ms. Giovanoli

1 Q And did you advise him that the probation revocation
2 could potentially run consecutive with all the other?

3 A Yes, probation said -- when you do a violation with the
4 probation, it's out there. You just don't know what it's
5 gonna do. You do your best to convince the judge to do
6 something that's beneficial to your client, but it's, it's
7 very unpredictable. It doesn't go with what the solicitor's
8 office is recommending.

9 Q You know how many times he had previously violated
10 probation according to your records?

11 A I just know that it's more than once.

12 Q Okay. No further questions. Please answer any
13 questions that counsel may have.

14 MS. ROSS: I apologize. Do you have a Kleenex up there
15 anywhere?

16 I promise I'm not crying. It sort of exploded.

17 THE COURT: Here's some water if you need it.

18 MS. ROSS: Oh, no, that's okay.

19 THE COURT: Do you need a break?

20 MS. ROSS: I just touched it and it started to water.

21 I think I'm good now.

22 CROSS-EXAMINATION

23 BY MS. ROSS:

24 Q Okay. Now, first I want to go to the letter.

25 So, is it fair to say that you initially thought he was

Michael Morin - Cross-examination
by Ms. Ross

1 Looking at one year on the probation violation?

2 A Yes.

3 Q Is it possible you advised him that, in fact, he was
4 looking at one year on the probation violation?

5 A Possible, yes.

6 Q Okay. And going to -- briefly just going to the child
7 neglect charge.

8 Did you ever specifically discuss with Mr. Foster now
9 was this child your child, did you have custody of this
10 child that was in the car?

11 A No.

12 Q Did -- was there a video of the --?

13 A Yes.

14 Q -- pull?

15 Did you ever review the video and ask is that your
16 child or---

17 A We reviewed the video, and it was a child---

18 Q Right.

19 A ---but I never stopped and said, of your six children,
20 is this one of them.

21 Q Is this one of them in the car.

22 A He kept saying wife and child. So, I took wife and
23 child to mean wife and child, but I understand.

24 Q He's asking me was the video blurry?

25 Would you agree that possibly the video was blurry?

Michael Morin - Cross-examination
by Ms. Ross

1 A Well, it wasn't in HD, but it was clearly him, and it
2 was clearly a child.

3 Q Okay. Now -- and, and just going with -- the CDV that
4 was floating out there, was that around this same time of
5 this?

6 A I don't, I don't remember that CDV floating.

7 Q Okay. So, you don't---

8 A No.

9 Q ---with regard -- but, but you, going back, you never
10 specifically asked did this -- was this your biological
11 child, did this child live, live in your home?

12 A I have, like I said, my notes indicated that he lived
13 with his wife and three children. I'm looking at a video.
14 He's saying that's his wife. I can't remember if he said
15 that's my child or if he named it by -- because I did
16 recognize the name when he said it on the stand, but I don't
17 recall going okay, that's all fine and good, but is this
18 child one of your children. I didn't do that.

19 Q Okay. All right. I've got no further questions.

20 MS. GIOVANOLI: Nothing further, Your Honor.

21 THE COURT: Okay.

22 MS. GIOVANOLI: May this witness---

23 THE COURT: Can Mr. Morin be excused?

24 MS. GIOVANOLI: Yes.

25 MS. ROSS: No objection, Your Honor.

Michael Morin - Cross-examination
by Ms. Ross

1 THE COURT: Okay. Thank you, Mr. Morin. You may be
2 excused, sir.

3 MS. GIOVANOLI: The State would rest at this time.

4 THE COURT: Okay.

5 All right. Anything else?

6 MS. ROSS: No, I think we've made the arguments clear,
7 Your Honor. It's, it's what we said in the beginning, the
8 mis-advice and we've passed up the State v. Fowler, which it
9 does suggest -- I will say it's an older case.

10 I think the statute was a bit different then, but,
11 still, under unlawful contact towards a child, which is
12 63-5-70, it sends you back to 63-7-20, but, if you review
13 that, there, there are still requirements that someone's in
14 a custodial relationship with the child, living with, or, or
15 biological parent of -- to, to support that child neglect
16 charge, and we -- Mr. Foster would argue that, based on
17 that, if he had known that, he would never have pled guilty,
18 he would of gone to trial, and shown what he testified to
19 today.

20 THE COURT: Thank you, ma'am.

21 MS. GIOVANOLI: Just like to emphasize the standard
22 here was, at the time of the plea in this case,
23 reasonableness, and I think, after Mr. Morin testified,
24 that, after reviewing the discovery, there's a child in the
25 vehicle. He indicated that I was -- why would I endanger my

Michael Morin - Cross-examination
by Ms. Ross

1 wife and my child, and he made some sort of implication that
2 the child was his. He never indicated otherwise.

3 Furthermore, it was the Applicant's intention to get
4 the best plea deal that he could. He even testified on the
5 stand that he would of been satisfied with three to six
6 years.

7 So, when you're looking at an, a defendant who's
8 looking to plead guilty, you -- counsel shouldn't be held to
9 a higher standard of investigation for purposes of a trial
10 if his client's already indicated a desire to plead guilty.

11 So, with that in mind, he did what most defense
12 attorneys would do, which is the professional norm, and
13 that's seek the best deal that he could get. Unfortunately,
14 there was no recommendation as to the probation revocation.
15 He -- Mr. Morin did advise his client that he could get a
16 consecutive probation revocation.

17 I understand that evidence is come out now that he
18 mistakenly told him that his exposure on the probation
19 revocation was one year versus four years, but, as we've
20 indicated in the return, Applicant's not even contesting the
21 probation revocation sentences. It's just the child
22 neglect.

23 So, I know that evidence has come out, but I would also
24 submit that that was still reasonable in light of the
25 circumstances. Mr. Morin testified that he contacted

Michael Morin - Cross-examination
by Ms. Ross

1 probation, and, based on SCDC records, he calculated it to
2 be one year. I think we all know that these sentencing
3 dates and times served and what time you have left and good
4 time is all kind of confusing and it's ever changing.

5 So, we would argue that there was no deficiency in that
6 regard, and, once again, Applicant's not contesting that
7 probation revocation or that sentence. He's contesting the
8 child neglect, and, also, with regard to his -- the
9 allegation that counsel promised him three to six years, we
10 would submit that his testimony, Applicant's testimony, was
11 simply not credible, especially in light of the fact that he
12 only admitted to three convictions when you can tell from
13 the record that he has numerous other convictions. Not just
14 three. On this day specifically, he pled to five.

15 Furthermore, Mr. Morin testified that he never promised
16 him three to six years, that he said it was reasonable to
17 ask the judge for three to six years, but that he advised
18 his client that his exposure was ten years on that unlawful
19 child neglect. That's also corroborated by the record.

20 The judge thoroughly went through the maximum penalties
21 that he was facing on each charge, and even asked the
22 defendant, under oath, understanding the possible sentences
23 that I could impose, do you still wish to enter these pleas
24 to which the defendant responded yes, sir, and that was
25 after he told him that ten year -- he could get up to ten

Michael Morin - Cross-examination
by MS. ROSS

1 years for various offenses.

2 The child neglect, as well as the financial transaction
3 card fraud value 500, more than \$500.00, and that was a
4 third or subsequent, and his exposure on that was up to ten
5 years as well.

6 So, we would argue that Applicant has simply failed to
7 meet his burden of proof that, that counsel was ineffective
8 in any regard, and, lastly, Applicant's testimony that it
9 was not his child was also simply not credible at this time.
10 Whenever the solicitor gave the recitation of facts, they
11 stated it was his child. He did contest those facts. He
12 only does so now, admittedly, after he's received a ten year
13 sentence.

14 So, we would submit that the Applicant has failed to
15 meet his burden of proof and counsel is not ineffective and
16 we would request that you deny and dismiss his application.

17 THE COURT: Thank you, ma'am.

18 MS. GIOVANOLI: Thank you.

19 THE COURT: Counsel -- and I, and I have looked through
20 the transcript, but I've not read it in great detail.

21 Are you-all aware of anywhere in the transcript where
22 the probation agent informs Judge Hayes of the amount of
23 time left on --?

24 MS. GIOVANOLI: I don't, I don't think that---

25 THE COURT: -- that Judge, that Judge Hayes can revoke

Michael Morin - Cross-examination
by Ms. Ross

1 in full?

2 I believe the probation agent was Agent Mannigan.

3 MS. GIOVANOLI: That's right.

4 THE COURT: And I've just read -- I've looked through
5 that briefly, and she may of said something at the
6 beginning. It just -- it was, it was not jumping out at me.

7 MS. ROSS: I don't recall her saying anything until
8 Page 19, Your Honor, Line 23.

9 If I can find my notes?

10 That's where she starts.

11 THE COURT: Okay. And if you-all -- I'm going to read
12 it.

13 MS. ROSS: Okay.

14 THE COURT: And so -- but, but if you-all don't know
15 right off the top of your heads, that's fine.

16 MS. ROSS: But, but as to that, my client was --
17 Mr. Foster was saying that, that he feels that the probation
18 matter still goes to his sentence on the child neglect as
19 well. So, he doesn't want -- I understand that that was not
20 argued, but because he feels that that's why it's more
21 onerous than it would of been due to the probation being---

22 MS. GIOVANOLI: Your Honor?

23 THE COURT: Yes, ma'am.

24 MS. GIOVANOLI: Once again, we're prejudiced. I don't
25 even have the records on that because it wasn't contested in

Michael Morin - Cross-examination
by Ms. Ross

1 his application or any amendment. And so that's not even
2 part of this record as, as it stands now. So, it's a little
3 difficult to defend aside for Mr. Morin's testimony with
4 what investigation he did with regard to the probation
5 revocation.

6 THE COURT: Thank you.

7 Okay. Anything else, counsel?

8 MS. ROSS: No, Your Honor.

9 THE COURT: All right. Mr. Foster, and, counsel, I am
10 taking this under advisement.

11 Mr. Foster, I know this is very important to you, sir,
12 and I'm going to read the record. I've got the transcript
13 here. I'm going to look at all documents that have been
14 provided to me, and I will issue an order as soon as
15 possible.

16 Okay?

17 THE APPLICANT: Yes, ma'am.

18 THE COURT: Good luck to you, sir.

19 THE APPLICANT: Thank you.

20 MS. GIOVANOLI: Thank you.

21 THE COURT: And do we need to make a copy of this for
22 Mr. Morin or for, for the Attorney General's Office or even
23 for Ms. Ross?

24 MS. GIOVANOLI: Okay. Mr. Morin has indicated that he
25 doesn't need a copy. I know that, on appeal, we usually get

Michael Morin - Cross-examination
by Ms. Ross

1 copies cause it's part of the record.

2 THE COURT: Okay.

3 MS. GIOVANOLI: Ms. Ross, would you like a copy?

4 MS. ROSS: No, I just don't.

5 MS. GIOVANOLI: Okay.

6 THE COURT: okay.

7 MS. ROSS: So, no copy is necessary.

8 THE COURT: okay. okay. Thank you-all.

9

10

11 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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Michael Morin - Cross-examination
by Ms. Ross

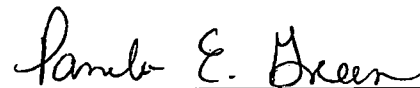
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 19th day of September, 2017.

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

January 29th, 2018



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA
 COUNTY OF SPARTANBURG

Thomas E. Foster, #269961,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2016-CP-42-2707

**ORDER OF DISMISSAL
 WITH PREJUDICE**

2017 NOV - 1 AM 11:18
 SPARTANBURG COUNTY
 CLERK OF COURT
 M. HOPE SLACKERY

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed on July 21, 2016. Respondent made its Return requesting an evidentiary hearing be convened. An evidentiary hearing into the matter was convened on September 19, 2017, at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General, represented Respondent.

Applicant testified on his own behalf. Applicant's plea counsel, Michael Morin, Esquire, ("Counsel") also testified. This Court had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, the transcript from Applicant's guilty plea, the PCR application, Respondent's Return and Applicant's records from the Department of Corrections.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the May 2015 term of the Spartanburg County Grand Jury for child neglect (2015-GS-42-1846).

Michael Morin, Esquire, represented Applicant. On March 30, 2016¹, Applicant pled guilty before the Honorable J. Mark Hayes, II, as indicted². Pursuant to a recommendation by the State, Judge Hayes sentenced Applicant to imprisonment for ten (10) years³. Applicant did not appeal his conviction or sentence.

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

1. Ineffective assistance of counsel, in that;
 - i. "My lawyer Michael Morin told me I was going to get 3 to 6 years and it was not case and all my charges run concurrent. I have one charge consecutive to probation violation."

At the start of the hearing, Applicant orally made an additional allegation that Counsel was ineffective for failing to investigate the custody of the child in Applicant's vehicle when he fled from law enforcement and began a high speed chase. Applicant was fully equipped to argue the allegation and provided copies of supporting case law to the Court. However, no notice of an amendment or additional allegation was ever given to the State until the start of the hearing. Respondent objected to the late amendment on the basis of § 17-27-50, S.C. Code Ann., Rule 71.1, SCRPC and rule 15(a), SCRPC. This Court allowed Applicant to proceed on his new allegation.

SUMMARY OF TESTIMONY

I. Applicant testified to the following:

¹ Applicant's probation was also revoked for failure to stop for blue lights (2008-GS-42-1229), breaking into motor vehicle (2008-GS-42-2656), use of vehicle without permission (2011-GS-42-2202), and malicious injury to personal property (2012-GS-42-1649). However, Applicant does not appear to be attacking his probation revocation in this application.

² At the same time, Applicant also pled guilty to two counts of failure to stop for blue lights (2015-GS-42-1224, 1845), resisting arrest (2015-GS-42-1225) and financial transaction card fraud (2015-GS-42-1847). However, Applicant does not list these charges in his application.

³ Judge Hayes ran the ten (10) year sentence for child neglect consecutive to Applicant's probation revocation sentence.

2017 NOV - 1 AM 11:48
 M. HOPE BLACKLEY
 SPARTANBURG COUNTY
 CLERK OF COURT

Applicant testified he was only contesting his conviction for unlawful child neglect. Applicant claimed his paper work for the charge indicated that it was a misdemeanor, however, the magistrate court transferred it to General Sessions. Applicant testified the basis for the charge was his wife's child was in his vehicle when he attempted to flee from law enforcement. However, Applicant claimed the child was not his biological child and the child did not live with him. Applicant explained that when the Assistant Solicitor gave his recitation of the facts and stated specifically, "Mr. Foster's wife was in the passenger's seat and *his one year old baby* was in the back seat of the car during this transaction," (emphasis added) he agreed with the facts as presented and did not object because based on Counsel's advice, Applicant believed he would only get 3-6 years.⁴ (Plea Tr. p. 8, ll. 23-25; p. 10, ll. 15-17). However, contrary to the facts presented in the record, Applicant testified at the PCR hearing that the child in the car was his wife's six year old son, Marquis. Applicant claimed his wife's child did not live with him and his wife, but he did not know who the father was. Applicant admitted he had six children and one of those children with his wife who was in the car, but claimed the child in the car was not his.

Applicant also testified his lawyer misinformed him about how much time he had left to serve on his probation revocation before his consecutive sentence for unlawful child neglect would begin. Applicant claims Counsel promised him he would only get 3-6 years and had he known he would be subject to 14 years, he would not have pled guilty. Applicant also complained that the Assistant Solicitor brought up an incident in which he broke a grandmother's

⁴ Applicant did not provide an explanation for his failure to object when the Assistant Solicitor also stated "he shows he has no regard for *his own* family that was in the car with him. A *one year old baby* could have been injured as a result of this." (Plea Tr. p. 15, ll. 3-5). The Assistant Solicitor also stated "the car chase with *his baby* in it," with no objection from Applicant. (Plea Tr. p. 19, l. 16). (Emphasis added).

arm while throwing her out of her car and stealing it during his guilty plea to enlighten the judge as to what type of person Applicant was.

II. Counsel testified to the following:

Counsel has been practicing law for 25 years; 80% of which has been criminal law. Applicant retained Counsel in this case. Counsel recalled Applicant was being investigated for scrapping stolen cars. When police pulled Applicant over and approached his car to talk to him, a child was seen in the back seat. Applicant sped off to run away from the police once the police started asking questions regarding the crime. When Applicant met with Counsel to discuss his case, Applicant never mentioned the child was not his or did not live with him. Counsel recalled Applicant saying "my wife" and "my child," which never gave him reason to ask otherwise. Counsel's notes also indicated Applicant lived with his wife and three children. Counsel reviewed the discovery with Applicant.

Counsel testified Applicant wanted to plea to the best deal he could get. Applicant wanted Counsel to ask for probation, but Counsel explained to Applicant that such a request would be unreasonable and that asking for 3-6 years was more reasonable. Counsel recalls investigating how much time Applicant had to serve for his probation revocation by reviewing Applicant's records and determined he had one year left. However, because of Applicant's misconduct that led to him violating his probation, serving time for the violation, being released from detention, then being arrested again, the amount of time he had left to serve was affected. When Counsel realized Applicant actually had four years left to serve, he informed him via letter after his guilty plea. Counsel advised Applicant that his probation revocation sentence could be run consecutive to all other sentences, since there was no recommendation from the State as to the probation revocation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient. Applicant has failed to do so.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive

relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874

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(Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, at 137-38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

Counsel promised 3-6 year sentence

Applicant only contests his sentence for unlawful child neglect, for which he received the most time (ten years) during his global plea to five total charges and probation revocation from four previous charges. Applicant specifically alleged Counsel promised him he would receive a 3-6 year sentence. This Court finds Applicant's testimony not credible. Counsel credibly testified he advised Applicant, who wanted Counsel to request only probation, that it would be more reasonable to ask for 3-6 years. This Court agrees with Counsel's assessment in light of

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the number of charges Applicant faced, the seriousness of those charges, the fact Applicant was already on probation for other crimes when he committed the offenses, and his criminal history.

Additionally, during Applicant's guilty plea, the plea judge advised him he could sentence him up to ten years for unlawful child neglect. (Tr. p. 11, ll. 9-12). After advising him of the possible sentence, he asked Applicant if he still wished to plead guilty, to which Applicant responded, "yes, sir." (Tr. p. 11, ll. 18-20). Applicant also admitted he was in fact guilty of unlawful child neglect. (Tr. p. 12, ll. 7-9). In addition to being under oath at his guilty plea hearing, he also told the plea judge all of his answers were truthful and honest. (Tr. p. 12, ll. 22-24).

This Court finds Applicant's self-serving and contradictory testimony offered at the PCR hearing has not established a valid reason to allow him to depart from the truth of his statements made at the guilty plea proceeding. See Dalton; Crawford; Edwards. Applicant intelligently and voluntarily pled guilty based upon the sound and competent advice from his experienced and learned counsel. Applicant has failed to prove Counsel was either deficient in his representation or that absent any alleged deficiency, he would not have pled guilty. Therefore, this allegation is denied and dismissed with prejudice.

Failure to investigate

Applicant alleged counsel failed to investigate the custody of the child present in his car when he fled from law enforcement. See State v. Fowler, 322 S.C. 157, 470 S.E.2d 383 (1996) (Limiting the definition of "legal custody" as required in unlawful child neglect statute.). To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he been more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could

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have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

This Court finds Applicant’s assertion that the child in his vehicle when he attempted to flee law enforcement was not biologically his and that he did not have custody over the child is simply not credible. Evidence of this lack of credibility can be found in the record. Not only did Applicant agree to the accuracy of the Assistant Solicitor’s recitation of the fact, which included, “Mr. Foster’s wife was in the passenger’s seat and *his one year old baby* was in the back seat of the car during this transaction,” (emphasis added), but he did not object at various other statements made during the proceeding that the baby was his. (Tr. p. 8, l. 23; p. 15, ll. 3-5; p. 19, l. 16). Applicant’s assertion that he did not correct the statements by the Assistant Solicitor because based on Counsel’s advice, Applicant believed he would only get 3-6 years is again, not credible. This Court finds Counsel’s testimony credible that Applicant made statements like, “Why would I endanger *my* wife or *my* child?” which led Counsel to have no reason to believe Applicant did not have legal custody of the child. Counsel kept notes which also indicated Applicant told him he lived with his wife and three children.

Credibility aside, Applicant has simply failed to meet his burden of proving by a preponderance of the evidence that Counsel was deficient in this regard. Aside from his self-serving testimony, Applicant presented no other evidence to prove the child in the car at the time he fled from law enforcement was not his or he had no legal custody of the child. This Court was not presented with any police reports showing the child in the car was a six year old, as

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Applicant testified, rather than a one year old baby as represented to the plea court by the State during the plea proceedings. And Counsel testified Applicant gave him no indication custody was an issue that needed to be explored – especially in light of the fact that Applicant never expressed a desire to pursue trial, rather he wanted to plead guilty to the best possible deal he could get. Therefore, this Court finds Counsel was not deficient and Applicant was not prejudiced by any alleged deficiency. This allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 335 S. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCR. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

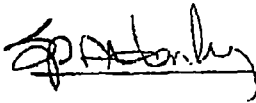
IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 31st day of October, 2017.



GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

 South Carolina

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SPARTANBURG COUNTY
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WITNESSES

Spartanburg Sheriff's Office

- 1. SENTENCED
- 2. REPORTED
- 3. CARD FILED
- 4. INDEXED
- 5. CHECKED
- 6. CHECKED

ARREST WARRANT NUMBER

TRAFFIC VIOLATIONS CODE

2014A4210103139

ACTION OF GRAND JURY

Thomas E. Foster
 Foreperson of Grand Jury
 Date: APR 10 5 19PM

VERDICT

Foreperson of Petit Jury
 Date:

DOCKET NO. 15-GS-42-1846

The State of South Carolina
 County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAY 04 2015 TERM

THE STATE vs.

Thomas E. Foster

Indictment for
 CHILD NEGLECT
 SC Code: 63-5-70
 CDR Code: 2481
 CLASS FEL/E

RETURN TO THE CLERK OF COURT
 COUNTY OF SPARTANBURG
 1100 S. MAIN ST.
 SPARTANBURG, SC 29303

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

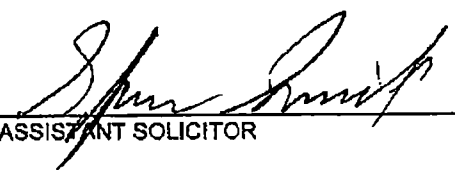
INDICTMENT

At a Court of General Sessions, convened on _____ ~~APR 30 2015~~ ,
the Grand Jurors of Spartanburg County present upon their oath:

CHILD NEGLECT

That Thomas E. Foster did in Spartanburg County on or about August 11, 2014, place a child at unreasonable risk of harm affecting the child's life, physical or mental heath, or safety, Mr. Foster had custody and/or charge of the minor child and is the child's parent or guardian, in violation of §63-5-70, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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


ASSISTANT SOLICITOR

106
STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG
STATE VS.
Thomas Earl Foster Jr

AKA:

Race: BLACK Sex: M Age: 33

DOB: SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Spartanburg, SC 29303-4005

DL#: SID#:

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was TO: Legal custodian, unlawful neglect of child or helpless person (0-10yr)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2015GS4201846

A/W#: 2014A4210103139

Date of Offense: 8/11/2014

S.C. Code § : 63-05-0070

CDR Code #: 2481

SENTENCE SHEET

CONVICTED OF or PLEADS

in violation of § 63-05-0070 of the S.C. Code of Laws, bearing CDR Code # 2481
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury (defendant's initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State

ATTORNEY: SMITH, SPENSER H 101370 SC Bar# Defendant [Signature] Attorney for Defendant [Signature] SC Bar# 65074

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: to probation revocation
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 56 days
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

PTUP days/hours Public Service Employment

Recipient:

Obtain GED
Attend Voc. Rehab. or Job Corp.

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114(BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca
Proviso 90.5 (SCJA Surcharge)	\$5
3% to County (if paid in installments)	\$ 390
TOTAL	\$ 12390

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund
Other:

Clerk of Court/ Deputy Clerk [Signature]
Court Reporter: [Signature]
SCCA/217 (03/2011)

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge [Signature]
Judge Code: 2137
Sentenc Date: 9/30/14

ARREST WARRANT

2014A4210103139 *Fury*

STATE OF SOUTH CAROLINA

County/ Municipality of

Spartanburg

125592

THE STATE

14080599

against

Thomas Earl Foster, Jr

Address:

Spartanburg, SC 29303-4005

SSN:

Sex: M Race: B Height: 6 1 Weight: 230

DL State: SC DL #: [REDACTED]

DOR: [REDACTED] Agency ORI #: SC0420000

Prosecuting Agency: Spartanburg County Sheriff

Prosecuting Officer: Marcus Miller - 0814

Offense: Children / Legal custodian, unlawful neglect of child or helpless person

Offense Code: 2481

Code/Ordinance Sec: 63-05-0070

This warrant is CERTIFIED FOR SERVICE in the

County/ Municipality of

The accused

is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant Thomas E Foster

on 12/3/14

[Signature]

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Spartanburg Magistrate
180 Magnolia Street
Spartanburg County Judicial Center
Spartanburg, SC 29306

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STATE OF SOUTH CAROLINA

County/ Municipality of

Spartanburg

LHO

AFFIDAVIT

ORIGINAL

S.C. ANNOTATED
APR 27, 2006
SCCA 518

Personally appeared before me the affiant Marcus Miller who

being duly sworn deposes and says that defendant Thomas Earl Foster, Jr

did within this county and state on or about 8/11/2014

violate the criminal laws of the

State of South Carolina (or ordinance of County/ Municipality of Spartanburg)

in the following particulars:

DESCRIPTION OF OFFENSE: Children / Legal custodian, unlawful neglect of child or helpless person

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on August 11, 2014 in the county of Spartanburg, one Thomas Earl Foster Jr did place at unreasonable risk of harm or did cause to be done unlawfully or maliciously any bodily harm to or abandonment of a minor child. Defendant had custody and/or charge of the minor child and is the child's parent or guardian.

Warrant based upon police investigation. TRH

Signature of Affiant

[Signature]

STATE OF SOUTH CAROLINA

County/ Municipality of

Spartanburg

Affiant's Address 8045 Howard Street

Spartanburg, SC 29303-

Affiant's Telephone (864)503-4500

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 8/11/2014 defendant Thomas Earl Foster, Jr

did violate the criminal laws of the State of South Carolina (or ordinance of

County/ Municipality of Spartanburg) as set forth below.

DESCRIPTION OF OFFENSE: Children / Legal custodian, unlawful neglect of child or helpless person

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant to inform its execution or as soon thereafter as is practicable

Sworn to and subscribed before me

on 8/11/2014

[Signature]

(L.S.)

Signature of Issuing Judge

John P Moore

Judge Code: 7239

Judge's Address 180 Magnolia Street

Spartanburg, SC 29306

Judge's Telephone (864)596-2564

Issuing Court: Magistrate Municipal Circuit

Affiant's Signature
[Signature]
CLERK OF COURT
SPARTANBURG COUNTY
BY *[Signature]*
DATED 12-3-15 D.C.

SCANNED