

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Paul M. Burch, Circuit Court Judge

RECEIVED

MAY 14 2018

S.C. SUPREME COURT

KELVIN O'NEAL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000020

APPENDIX

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STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

STATE OF SOUTH CAROLINA,)

PLAINTIFF,)

vs)

KELVIN DANIER O'NEAL)

DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
OF THE TWELFTH JUDICIAL CIRCUIT

2010-GS-21-00467

2012-GS-21-00899

FLORENCE, SOUTH CAROLINA

JULY 16, 2014

TRANSCRIPT OF RECORD

BEFORE: THE HONORABLE MICHAEL G. NETTLES

FOR THE STATE:

SOLICITOR EDWARD L. CLEMENTS, III, ESQUIRE

FOR THE DEFENSE:

CHEVERON T. SCOTT, ESQUIRE

TRANSCRIPT PROVIDED TO: OFFICE OF THE ATTORNEY GENERAL

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OFFICIAL COURT REPORTER

SOUTH CAROLINA JUDICIAL DEPARTMENT

1 SOLICITOR: May it please the Court, Your Honor. The
2 State would call the case of The State of South Carolina
3 versus Kelvin Danier O'Neal. He is standing here with his
4 attorney Mr. Cheveron Scott. He is entering a plea, Your
5 Honor, to charges on two indictments, Your Honor. The first
6 indictment, Your Honor, is indictment 2012-GS-21-899. He is
7 pleading guilty to accessory after the fact of murder. This
8 plea is without negotiations or recommendations.

9 He is also pleading guilty on indictment 2010-467, which
10 is PWID cocaine base. He is pleading guilty to that, Your
11 Honor, without negotiations or recommendations.

12 THE COURT: Mr. Scott, do you represent Mr. O'Neal?

13 MR. SCOTT: I do, Your Honor.

14 THE COURT: Have you explained to him the offense of
15 intent to distribute cocaine base, accessory after the fact
16 of murder, the elements of each offense, the potential
17 defenses, and his constitutional rights?

18 MR. SCOTT: I have, Your Honor.

19 THE COURT: How does he wish to plead?

20 MR. SCOTT: It's my understanding he wishes to plead
21 guilty.

22 THE COURT: And do you agree with his decision to do so?

23 MR. SCOTT: After reviewing the totality of the
24 circumstances and the circumstantial evidence, I believe it's
25 in his best interests, yes, Your Honor.

THE STATE OF SOUTH CAROLINA VERSUS KELVIN DANIER O'NEAL

1 THE COURT: Does he understand the elements of each of
2 these offenses, the potential defenses, and his
3 constitutional rights?

4 MR. SCOTT: He does, Your Honor. We have gone over that.

5 THE COURT: All right. And does he understand the
6 penalty for accessory after the fact of murder?

7 MR. SCOTT: He does, Your Honor.

8 THE COURT: And what is that?

9 MR. SCOTT: I'm sorry?

10 THE COURT: And what is the penalty?

11 MR. SCOTT: Zero to fifteen.

12 THE COURT: All right. Let's place Mr. O'Neal under
13 oath, if we could.

14 (Clerk of Court administers the oath to Mr. O'Neal)

15 THE COURT: Mr. O'Neal, are you under the influence of
16 any drugs or alcohol here today?

17 MR. O'NEAL: No, sir.

18 THE COURT: Are you experiencing any kind of physical or
19 mental problem that could prevent you from understanding
20 what's going on here today?

21 MR. O'NEAL: No, sir.

22 THE COURT: Pay very close attention as the State
23 summarizes the facts that bring us here today.

24 MR. CLEMENT: Your Honor, on the first -- Mr. O'Neal
25 also had another indictment 2010-GS-21-339, which was an

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1 indictment for trafficking cocaine base, trafficking cocaine,
2 and possession with the intent to distribute marijuana. Your
3 Honor, that case has been dismissed. Your Honor, it's not
4 dismissed pursuant to this plea. It was dismissed because I
5 found out from law enforcement that they had mistakenly
6 destroyed some of the evidence on this case. Also, Your
7 Honor, it was not as strong a case. Basically, it was drugs
8 that were found in a residence that belonged to Travis
9 DeLaine, but also, there was evidence by mail and stuff that
10 Mr. O'Neal lived there, as well, so that was the basis for
11 the charge. But law enforcement destroyed some of the drugs
12 by accident and we dismissed that case.

13 Also, Your Honor, on the accessory after the fact of
14 murder, he was also indicted for conspiracy. Your Honor, we
15 had plenty of testimony he was around when things went into
16 place, but there was no evidence, actually, that he agreed to
17 anything, himself, prior to this and so that's why we are
18 dismissing the conspiracy charge. We do not feel like we can
19 prove that case.

20 On the PWID cocaine base indictment, there was also a
21 resisting arrest. We talked to law enforcement about that.
22 They said to drop the resisting arrest with his plea to
23 possession with intent to distribute cocaine base, which we
24 are doing.

25 Other than that, there are no negotiations or

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1 recommendations from the State. We have the victim's family
2 here on the murder, Your Honor. You are aware, I'm sure you
3 remember, this was a case that was a death penalty case, but
4 it ended up pleading, Your Honor, where the State tried or
5 were going to try Montez Barker and LaRoss Graham and Phnelze
6 Delaine for the murder of Billy Hall and Tonya Poston. They
7 were, Mr. Hall was a CI and he got killed because Mr. Phnelze
8 Delaine, who was Mr. O'Neal's cousin, contracted with LaRoss
9 Graham. LaRoss Graham got Montez Barker and they killed them
10 out on a road in Florence County. Ms. Tonya Poston -- and her
11 father, Your Honor, Mr. Billy Poston, is here in the
12 courtroom. If he would raise his hand. (Mr. Poston complies)
13 He's right there and they also killed Mr. Billy Hall and his
14 mother and father, Bill and Carol Hall, are present. They
15 have their arms lifted there and also, his brother, Jerry
16 Hall, is present, Your Honor. At the appropriate time, I'd
17 ask the Court to inquire if they wish to speak and hear from
18 them if they wish to speak.

19 Your Honor, with all that preliminary information, let
20 me give you the facts of this case. Your Honor, in regards to
21 2012-899, Mr. Montez Barker was the shooter. Mr. LaRoss
22 Graham is the one that contracted with Mr. Phnelze Delaine to
23 murder Billy Hall and Tonya Poston. After that was done, Mr.
24 Graham and Mr. Barker left them in the roadway in the ditch
25 and drove back to an area in east Florence where they ended

1 up burning up Ms. Poston's vehicle. Mr. Montez Barker had on
2 an ankle bracelet. He had not been out of prison long and had
3 on an ankle bracelet so they were able to track his movements
4 and also track phone conversations and text messages and
5 check those records and compare those times to the time on
6 the ankle bracelet and they were able to trace all the
7 movement and what exactly happened and the time frame.
8 Mr. Graham left Mr. Barker and hid the vehicle and got a ride
9 from Anthony Wingate, who cooperated with the State and pled
10 guilty. He was also kind of what I call a "do boy" for Mr.
11 Delaine, which Mr. O'Neal was, as well. Mr. Delaine was Mr.
12 O'Neal's cousin. Mr. Wingate picked up LaRoss Graham and
13 brought him back to a studio. Mr. Delaine had a studio, he
14 was a rapper. He had a studio out near McLeod Park in the
15 west Florence area right off 76 and he went to the studio
16 there and he told Mr. Delaine that it was all taken care of
17 and everything had been done and Mr. Delaine got Mr. O'Neal
18 to get the payment and bring it back and make the payment to
19 Mr. Graham and that was his participation in this scenario.
20 We believe that when there were discussions about what was
21 going on and Mr. Delaine had pending drug charges and thought
22 that Mr. Hall was going to testify against him and felt like
23 he needed to get rid of him and talked about that, we believe
24 some of those conversations took place around or near Mr.

1 O'Neal. We don't know and couldn't prove exactly what
2 knowledge he had prior to this happening or that he had any
3 participation prior to what happened, but what we do know by
4 Mr. Wingate's statements and his willingness to testify and
5 by Mr. Graham's statement and his willingness to testify is,
6 that Mr. O'Neal went and got the money and provided the
7 payment to Mr. Graham and he did this at Mr. Delaine's
8 behest. Those are the facts of that case.

9 THE COURT: All right.

10 MR. CLEMENTS: Your Honor, if you are ready for me to go
11 forward with the next indictment?

12 THE COURT: Yes, sir.

13 MR. CLEMENTS: Your Honor, on indictment 2010-467, a
14 search warrant was being executed by an officer of the
15 Florence County Sheriff's office and the target, I believe in
16 that was Mr. Delaine, as well, and on this occasion
17 there were a lot of people there at the residence when this
18 occurred and Mr. O'Neal came up and got startled and ran and
19 threw down some drugs and the drugs were seen when he threw
20 them down under a car and they were retrieved by officers of
21 the Florence County Sheriff's office and submitted to SLED
22 analysis and it came back to be crack cocaine and it was a
23 sufficient amount that could have been used in distribution.

24 As far as Mr. O'Neal's prior criminal history, he's got
25 a DUS with license not suspended for DUI, it looks like a

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1 first and second offense on that. Those are his only
2 convictions that we have, Your Honor. And again, we have the
3 trafficking and crack cocaine, trafficking in cocaine and
4 PWID marijuana from September, 2009, that we have dismissed.

5 THE COURT: All right. Mr. O'Neal you've heard those
6 facts. Are they true and accurate?

7 MR. O'NEAL: Yes, sir.

8 THE COURT: Are you, indeed, guilty of accessory after
9 the fact of murder?

10 MR. O'Neal: Yes, sir.

11 THE COURT: Are you guilty of possession with intent to
12 distribute cocaine?

13 MR. O'Neal: Yes, sir.

14 THE COURT: You need to answer up a little bit so I can
15 hear you.

16 MR. O'Neal: Yes, sir.

17 THE COURT: All right. You are standing before me
18 pleading guilty, but you don't have to plead guilty to
19 anything. You could exercise your right to a jury trial. In
20 that process, the jury would determine whether not the State
21 could actually prove you guilty beyond a reasonable doubt. I
22 would charge the jury, as a matter of law, that you are
23 presumed to be innocent. No one could require that you take
24 the witness stand, however, if you wanted to, you could. You
25 could subpoena witnesses on your behalf. In addition to that,

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1 you and your lawyer could cross-examine the State's
2 witnesses, have an opportunity to eyeball them and confront
3 them as they testified against you. Do you realize that by
4 pleading guilty you are giving up all these rights?

5 MR. O'Neal: Yes, sir.

6 THE COURT: Do you still wish to plead guilty?

7 MR. O'Neal: Yes, sir.

8 THE COURT: Are you, indeed, guilty?

9 MR. O'Neal: Yes, sir.

10 THE COURT: All right. Plea negotiations, none, other
11 than what he's pleading to and the dismissal of charges that
12 you mentioned?

13 MR. CLEMENTS: Yes, sir, Your Honor. That wasn't
14 pursuant to negotiations. That was pursuant to the fact that
15 I found out evidence had been destroyed and I felt like I was
16 ethically bound to dismiss that case.

17 THE COURT: All right. And is that your understanding
18 Mr. Scott?

19 MR. SCOTT: It is, Your Honor.

20 THE COURT: All right. Mr. O'Neal, are you satisfied
21 with your lawyer?

22 MR. O'Neal: Yes, sir.

23 THE COURT: Have you understood all your conversations
24 with him?

25 MR. O'Neal: Yes, sir.

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1 THE COURT: Do you need any additional time to confer
2 with him?

3 MR. O'Neal: No, sir.

4 THE COURT: All right. Any complaints against him,
5 whatsoever?

6 MR. O'Neal: No, sir.

7 THE COURT: All right. Has anybody promised you
8 anything, threatened you, mistreated you in any way, shape,
9 or form to get you to plead guilty here today?

10 MR. O'Neal: No, sir.

11 THE COURT: Is it your decision to plead guilty?

12 MR. O'Neal: Yes, sir.

13 THE COURT: Are you guilty?

14 MR. O'Neal: Yes, sir.

15 THE COURT: Have you understood all my questions?

16 MR. O'Neal: Yes, sir.

17 THE COURT: Have your answers been truthful?

18 MR. O'Neal: Yes, sir.

19 THE COURT: Do you understand that you have ten days to
20 appeal any decision that I might render here today?

21 MR. O'Neal: Yes, sir.

22 THE COURT: Based on your testimony, I find that there is
23 a substantial, factual basis for your plea. Your decision was
24 freely and voluntarily entered into, knowingly and
25 intelligently, with the consent of competent counsel with

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1 whom you say you are satisfied. I will accept your plea. And
2 Mr. Clements, the shooter that was going to be tried on a
3 capital murder case that, apparently, resolved itself, what
4 did he receive, life?

5 MR. CLEMENTS: He got life, Your Honor. Mr. Delaine got
6 life, as well.

7 THE COURT: Okay.

8 MR. CLEMENTS: And Your Honor, I don't think in the
9 recitation of the facts that I gave you the dates of the
10 events. On the accessory after the fact of murder, that
11 murder occurred on September 1, 2009 and that day is the day
12 that Mr. O'Neal went and got the payment and brought it back
13 and provided it to Mr. Graham. The drug offense was on
14 October 7, 2009, which all that took place during the
15 investigation of this murder.

16 THE COURT: All right. Be glad to hear from the victims
17 if they would like to speak. It's not necessary, but I'd like
18 to hear from them if they would like to speak.

19 MR. CLEMENTS: Thank you, Your Honor. I'd ask that each
20 one stand and state their name for the record as they address
21 the Court.

22 MR. HALL: Judge, I just want to ---

23 THE COURT: And your full name, sir?

24 MR. HALL: Billy Lee Hall, the father of Billy Hall.

25 THE COURT: Yes, sir. I'll be glad to hear from you.

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1 Yes, sir.

2 MR. HALL: I don't know any of these people that were
3 here, but I do know that they have created a lot of burden
4 and sadness on this family and I think you can be the judge
5 of that better than I can, but whatever you give them, I'll
6 accept that. I thank you.

7 THE COURT: Very good. Thank you for being here. I'm
8 sorry for your loss.

9 MS. HALL: I'm Carol Hall, Billy Hall's mother. I just
10 can't begin to tell you what we've been through since all
11 this happened. We feel that anybody involved in this should
12 receive the maximum sentence possible and the sentences be
13 run concurrent.

14 THE COURT: Very good. Thank you.

15 MR. POSTON: Your Honor, my name is William Stafford
16 Poston. My daughter was Natalia Poston and I respectfully
17 request is that for the accessory to murder, the maximum
18 sentence be imposed, especially in light of the scripture
19 lighted up behind you and just to me, you are the judge, but
20 there is a distinct difference between murder and being
21 involved with a murder and having drug charges.

22 THE COURT: Thank you. Anything further?

23 MR. CLEMENTS: No, Your Honor.

24 THE COURT: All right. Mr. Scott, I'll be glad to hear
25 from you and your client and anybody else who would like to

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1 speak.

2 MR. SCOTT: May it please, Your Honor. As the Solicitor
3 told you, these incidents took place in 2009, approximately
4 five years ago. I can tell this Court that at that time, this
5 young man was 21 years of age. I did not know him, but in
6 February of this year, a young man who I helped before, he
7 recommended that I speak to this young man. I spoke with him
8 and found out he's from my hometown, he's from the
9 neighborhood I lived in. I know his family. I've been knowing
10 them his whole life and I can tell you today, that this young
11 man, from 2009, is not the young man that stands before you
12 today.

13 During the time since that time, I would note to the
14 Court that he has not been in any kind of trouble,
15 whatsoever, number one. Number two, I would submit to this
16 Court that in the process of him standing before you today,
17 he has done a lot of things in order to rehabilitate himself
18 and one of the things that he did and one of the things that
19 I do whenever I get a client now is, I have him participate
20 in community service through my Building Starts foundation,
21 which works for at risk black males in Darlington County.
22 You are probably aware of a number of my stories where one
23 actually just signed with the NFL last month. And this
24 young man, what he has done since February, he's met with me
25 every time I've asked him to. He's also talked to -- I have

1 two very troubled young men and this young man has been very
2 instrumental in me getting and turning them around and he has
3 learned from his mistakes and I would also note that his
4 involvement was pursuant to his cousin. His cousin is Mr.
5 Delaine. That's the one who was the kingpin of all of this
6 and he had bad judgment at twenty-one. He admits that before
7 this Court. He has admitted his guilt in regards to that,
8 but what he's asking this Court to do is, to understand that
9 this young man has already started the road to
10 rehabilitation. He's also, at twenty-one, he was a high
11 school drop out. He had no plans on doing anything, but since
12 all of this happened, he's gone back and one of the things
13 I'm most proud of him is that he's gone back and he's gotten
14 his high school diploma. And I'm also proud of the fact that
15 he has two small children that he is currently taking care
16 of. He also has employment through a landscaping company
17 where it's not a lot of money, but it's honest money and he
18 understands that there is a lot to be said about doing things
19 the right way and he's started on the road of doing things
20 the right way. And Your Honor, I truly believe that when we
21 have an opportunity to give a second chance to a young man
22 who has distributed the characteristics that he has and that
23 I have seen in these last six months, I believe that it is
24 appropriate and I would respectfully request that this Court
25 consider a probationary period based on the rehabilitation

1 that he's already done and also based on, Your Honor, in
2 September, 2011, he was actually put on a monitor and he has
3 had a monitor ever since then that he's also had to pay for
4 on top of all the other things that he's been doing and Your
5 Honor based on those facts and based on where he is right
6 now, we would respectfully request that this Court would
7 consider a probationary period and then if Your Honor deems
8 fit, give him the keys to the jail. Make it as long a
9 probationary period as you can, because I truly believe that
10 you won't be seeing him in this courtroom again and I don't
11 normally say that about a defendant, but I've spent so much
12 time with this young man over the course of the last three
13 months, in particular, that I feel very comfortable and very
14 confident that this young man has learned his lesson, that
15 this young man will be a productive member of society in this
16 particular matter. With him is his mother, who I've
17 known for a very long time. We also have his father, his
18 fiancé and some other family members. If you would stand.
19 (They comply) They are also here in support of him and they
20 are supporting him because they know the kind of young man
21 this young man has become since all of this happened and,
22 Your Honor, at this point I think that Kelvin just wants to
23 say a few words to you in regards to this matter.

24 THE COURT: Be glad to hear from you. Yes, sir.

25 MR. O'NEAL: Your Honor, I mean, I've been through a lot

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1 the last couple of years. I've changed my life. I'd do
2 anything for a second chance. I want to proceed on the right
3 track so that I can take care of my kids.

4 THE COURT: Anything else, Mr. Scott? Would you like to
5 say anything? Yes, ma'am.

6 MS. O'NEAL: Mr. Scott said it all.

7 THE COURT: And your name?

8 MS. O'NEAL: Linda O'Neal.

9 THE COURT: Mr. O'Neal, I've taken into consideration
10 what your very fine lawyer has had to say on your behalf and
11 you are to be commended for not getting into any trouble
12 since then. It's been a considerable amount of time, but on
13 the other hand, these are very, very, very serious matters
14 that you were involved in and you were running with a fast
15 crowd and you saw where that led. Two people have been killed
16 and you were in it up to your eyeballs. I wish that I could
17 forgive all that by your course of conduct since then, but
18 you understand that you've got to accept responsibility for
19 your part in this. You understand that, don't you?

20 MR. O'NEAL: Yes, sir.

21 THE COURT: Hopefully, when you get out, once you've
22 paid your debt to society, I anticipate that you will be able
23 to pick up and do what's right. On indictment 2010-GS-21-
24 0467, possession with intent to distribute, the sentence of
25 the Court is that you be committed to the State Department of

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1 Corrections for a period of twelve years. The sentence will
2 run concurrent.

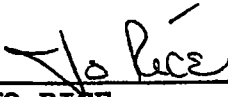
3 With regard to indictment 2012-GS-21-00899, the sentence
4 of the Court for accessory after the fact of murder is that
5 you be committed to the State Department of Corrections for a
6 period of 12 years. Sentences will run concurrent. Good luck
7 to you.

CERTIFICATE

I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TWELFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, IN THE COURT OF GENERAL SESSIONS FOR FLORENCE COUNTY, SOUTH CAROLINA ON, JULY 16, 2014, AT THE FLORENCE COUNTY COURTHOUSE, TO THE BEST OF MY SKILL AND ABILITIES.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

JANUARY 11, 2015



JO RICE

THE STATE OF SOUTH CAROLINA VERSUS KELVIN DANIER O'NEAL

FORM 5

STATE OF SOUTH CAROLINA)

County of Florence)Kevin Daniel Oneal 360657)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

20 14 CP 21 3100APPLICATION FOR
POST-CONVICTION RELIEF2014 NOV -3 PM 2:05
COMBEE REC'D - SHEPARD
CCCT JUDITH, S.C.
FLORENCE

FILED

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 Water Lee Correctional Institution
2. Name and location of Court which imposed sentence Florence Court house
Irby Street
3. Name(s) of co-defendant(s) (if any) Travis Delane, Anthony
Wingate, Martez Barker, Laross Graham
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-21-0467
 - (b) 2010-GS-21-00899

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 7-16-14 12 years Non-Violent Concurrent
- (b) 7-16-14 12 years Non-Violent Concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty YES
- (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?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Florence County General Session Court
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Counseling
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) I was not correctly prepared for sentencing
- (b) Failure to investigate
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

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

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

(a) which grounds have been presented:

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

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

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

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

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

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

(a) your arraignment and plea? yes
 (b) your trial, if any? N/A
 (c) your sentencing? yes
 (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?

Direct appeal / Motion of Reconsideration

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. James Ervin
 ii. Cheveron T. Scott P.O. 80
Darlington, SC, 29540
 iii. _____

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

i. James Ervin / Bond hearing
 ii. Cheveron T. Scott / Plea and sentencing
 iii. _____

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

New trial

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

NO

STATE OF SOUTH CAROLINA)

County of Florence)

VERIFICATION

FILED
2014 NOV -3 PM 2:05
CORRIE REEL-SHELDON
CCJP & OS
FLORENCE COUNTY, SC

I, Kelvin O'Neal, 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.

Kelvin O'Neal

SWORN to and subscribed before me this 31
day of October 2014

Mamuel W (L.S.)
Notary Public

My Commission Expires: 3/8/2018

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

I, Kevin O'Neal, 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.

Kevin O'Neal
Applicant

~~SWORN~~ or affirmed to and subscribed before me this

31 day of October
Maunula
Notary Public

My Commission Expires: 3/8/2021

FILED
2014 NOV -3 PM 2:05
CONNIE REEL-SHELDON
CLERK & GS
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
TWELTH JUDICIAL CIRCUIT

Kelvin Danier O'Neal, Sr., #360657,

2014-CP-21-3100

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed on November 3, 2014, the Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the April 2010 term of the Florence County Grand Jury for one count of Possession with Intent to Distribute Cocaine Base and Resisting Arrest and one count of Accessory After the Fact of Murder (2010-GS-21-0467; 2012-GS-21-0899). Applicant was represented by Chevron Scott, Esquire. Due to lack of evidence, the Conspiracy charge was dropped. On July 16, 2014, Applicant pled guilty and was sentenced by the Honorable Michael G. Nettles, to twelve years for Possession with Intent to Distribute Cocaine Base and twelve years for Accessory After the Fact of Murder, each sentence to run concurrently. Applicant did not appeal this conviction or sentence.

II.

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

1.) "Ineffective Counseling"

- a. "I was not correctly prepared for sentencing;"
- b. "Failure to investigate."

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

III.

For purposes of this Return, Respondent interprets Applicant's allegations as claims of ineffective assistance of counsel. Respondent submits that Applicant's claim of ineffective assistance of trial counsel is without merit. In a PCR action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel 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 in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. 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 pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

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

IV.

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

V.

WHEREFORE, Respondent requests an evidentiary hearing solely for the purpose of determining whether Applicant's trial counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

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

_____, 2016

State of South Carolina))
County of Florence)

In Circuit Court of the
Twelfth Judicial Circuit
2014-CP-21-3100

KELVIN D. O'NEAL,
Plaintiff,
vs.
STATE OF SOUTH CAROLINA,
Defendant.

Transcript of Record

Florence, South Carolina
March 14, 2017

B E F O R E:

The Honorable Paul M. Burch

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

Mr. Jonathan D. Waller, Esquire
Attorney for Plaintiff

Ms. Lindsey A. McCallister, Esquire
Attorney for Defendant

Lisa Carter
Circuit Court Reporter

I N D E X

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EXHIBITS

NO.

DESCRIPTION

EV.

(NO EXHIBITS WERE INTRODUCED DURING HEARING)

K. O'Neal- Direct Examination by Mr. Waller

4

1 THE COURT: Okay.

2 MS. McCALLISTER: Your Honor, this is Kelvin O'Neal
3 versus the State of South Carolina, 2014-CP-21-3100. We're
4 here today in response to a post conviction relief
5 application filed on November 3, 2014. Mr. O'Neal is
6 currently incarcerated with the South Carolina Department
7 of Corrections. He was indicted at the April, 2010 term of
8 the Florence County grand jury for one count of possession
9 with intent to distribute cocaine base and resisting
10 arrest. And one count of accessory after the fact of
11 murder. He was represented on those charges by Cheveron
12 Scott. There was a conspiracy charge that was dropped and
13 then on July 16, 2014 the applicant pleaded guilty and was
14 sentenced by Judge Nettles to twelve (12) years for
15 possession with intent to distribute cocaine base and
16 twelve (12) years for accessory after the fact of murder
17 with the sentences is to run concurrently. He did not
18 appeal his conviction, post sentences.

19 He is present in the courtroom today and he is
20 represented by Johnathan Waller. I'll let Mr. Waller
21 speak.

22 MR. WALLER: And, Your Honor, I think we can narrow
23 the issues contained in his application just a little bit.
24 He's not challenging the convictions themselves only the
25 sentence and it will become clear. I think we can narrow

1 those issues before, Your Honor. There was either -- the
2 allegations is there was either a plea agreement in place
3 that was not honored and I would object to it or that an
4 offer was extended that was rejected based on ineffective
5 advice of counsel. So that's the issue we're going forward
6 on, Your Honor.

7 THE COURT: All right.

8 MR. WALLER: I would call Kelvin O'Neal.

9 THE COURT: Come around and be sworn please, sir.

10 THE CLERK: Raise your right hand as best as you
11 can. Do you swear or affirm that the testimony you give
12 will be the truth, the whole truth, and nothing but the
13 truth so help you God?

14 MR. O'NEAL: Yes, ma'am.

15 THE CLERK: Thank you.

16 KELVIN O'NEAL, first being
17 duly sworn, testified as follows:

18 **Direct Examination by Mr. Waller:**

19 Q. Good afternoon, Mr. O'Neal, how are you today?

20 A. All right. And you?

21 Q. I'm doing well. Mr. O'Neal, you were, I guess, we'll
22 jump right into it, you were arrested on an accessory after
23 the fact of murder charge, is that correct?

24 A. Yes, sir.

25 Q. And some other charges as well, some drug charges?

K. O'Neal- Direct Examination by Mr. Waller

6

1 A. Yes, sir.

2 Q. Resisting arrest?

3 A. Yes, sir.

4 Q. Conspiracy?

5 A. Yes, sir.

6 Q. And who was your attorney on those charges?

7 A. Cheveron Scott.

8 Q. Okay. How did he come to be your attorney?

9 A. At first I had John Ervin and there was some
10 miscommunication with us and I decided to hire another
11 lawyer.

12 Q. Okay. So you retained Mr. Scott?

13 A. Yes, sir.

14 Q. Okay. Now, all of those different charges, they
15 weren't all from the same incident, is that right?

16 A. No, sir.

17 Q. Okay. How many times do you think you and Mr. Scott
18 met?

19 A. It was, it was more than enough. I mean, each time I
20 needed to talk with him he came by and talk with me.

21 Q. Okay. So you were comfortable having talked to him
22 several times?

23 A. Yes, sir.

24 Q. Okay. And let me, just by way of clarification, the
25 -- you were charged with accessory after the fact of

1 murder, who was alleged to be involved in the murder that
2 was related to you?

3 A. Travis Delaine.

4 Q. Okay. How was he related to you?

5 A. He was my cousin.

6 Q. Okay. So somebody you were related to was charged
7 with murder and that's what led to you being charged?

8 A. Yes, sir.

9 Q. Okay. When you and Mr. Scott met, did y'all discuss
10 the evidence in your case that the State would use against
11 you?

12 A. Yes, sir.

13 Q. Did y'all discuss going to trial?

14 A. Yes, sir.

15 Q. What did y'all talk about when you discussed going to
16 trial?

17 A. As far as going to trial, it wasn't something that I
18 wanted to do because of the simple fact that, how do I want
19 to say this, ---

20 Q. Well, let me ask you this way ---

21 A. There was ---

22 Q. --- did y'all discuss you going to trial? Did y'all
23 start preparing for it?

24 A. Yes, sir.

25 Q. Okay. And at some point you made the decision not to

K. O'Neal- Direct Examination by Mr. Waller

8

1 go to trial, you made a decision to plead guilty, is that
2 right?

3 A. Yes, sir.

4 Q. Okay. Prior to making that decision had any plea
5 offers been extended to you?

6 A. Yes.

7 Q. Okay. Do you remember what those were?

8 A. Ten (10), the first one was ten (10) and then the
9 second one was seven (7).

10 Q. Okay. It was just a straight ten (10) or a cap of ten
11 (10) or a recommendation, do you recall?

12 A. I don't know, they just said ten (10).

13 Q. Okay.

14 A. The solicitor offered ten (10).

15 Q. Okay. Let's talk about that ten (10) for second, what
16 happened, you didn't plead guilty on a recommendation of
17 ten (10) years?

18 A. No.

19 Q. Okay. What did you -- what was your response to that
20 offer?

21 A. I was like, when he said ten (10) years, I was like
22 why would I plea to ten (10) years and the other co-
23 defendant's that was in the case, had more conflict or more
24 activity of what was going on, you know what I'm saying,
25 they had got probation, why would I plea to ten (10).

1 Q. Okay. And at some point after that, there was another
2 offer extended to you?

3 A. Yes, sir.

4 Q. Okay. And what was -- did you and Mr. Scott talk
5 about that offer?

6 A. Yes.

7 Q. Okay. What did y'all talk about?

8 A. Well, he told me -- he told me to plea for the seven
9 (7) it was non-violent and the time, you know what I'm
10 saying, the time frame of what non-violent is and all of
11 that, and I asked him about my ankle bracelet, you know
12 what I'm saying, by me being on an ankle bracelet for three
13 (3) years, and this is my first time being in trouble and I
14 haven't been in any trouble after that, you know I'm
15 saying, my record was clean, I was like, is there any
16 chance I could get probation.

17 Q. Okay.

18 A. And so he went back and talk to Ed.

19 Q. Let me stop you just a second, you were -- while you
20 were -- you were out on bond, is that right?

21 A. Yes.

22 Q. Okay. But you were on a GPS monitor the whole time
23 you were on bond?

24 A. Yes.

25 Q. And it was a few years, is that ---

K. O'Neal- Direct Examination by Mr. Waller

10

1 A. Three (3).

2 Q. Three (3) years?

3 A. Three (3) years.

4 Q. Okay. So you were made an offer of seven (7) again,
5 do you remember if it was a recommendation or a cap or do
6 you remember the details other than the number seven (7)?

7 A. I remember it was seven (7). I don't know if it was a
8 cap of seven (7) or he just said, seven (7).

9 Q. Okay.

10 A. It might be, it might was a cap.

11 Q. Okay. And after that you talked to Mr. Scott about
12 that, is that right?

13 A. Yes.

14 Q. Okay. What did y'all, what did y'all discuss about
15 the seven (7)?

16 A. I mean, he basically told me, you know what I'm
17 saying, seven (7) was, you know I'm saying, by the
18 circumstances, seven (7) was an okay number and after he
19 broke it down to how much non-violent seven (7) is, I was
20 like, okay, maybe I completed that. But, you know I'm
21 saying, after he talked with Ed again, Ed said something
22 about the possibility I could get probation if I go in with
23 an open plea and that when he came to me with that
24 solution.

25 Q. Okay. Who came to you, your attorney?

1 A. Attorney.

2 Q. Mr. Scott?

3 A. Yes.

4 Q. Okay. So did y'all reject the seven (7) year offer?

5 A. I wouldn't say reject. He, basically, he advised me
6 that by me going in with the open plea it was a better
7 chance that I could get probation.

8 Q. So it was on your advice that you didn't take the
9 seven (7), correct -- Mr. Scott's advice you didn't take
10 the seven (7) year offer?

11 A. Yes.

12 Q. Okay. And you went and pled guilty in front of Judge
13 Nettles, is that right?

14 A. Yes.

15 Q. Okay. An you ultimately -- you heard the solicitor
16 say several times that the plea was about negotiations and
17 recommendations?

18 A. Yes.

19 Q. Okay. And was that your understanding at the time
20 that you pled?

21 A. When he said that, I mean, I didn't know exactly what
22 was meant by that because I figured like by Cheveron
23 already talking to him that everything was understood, do
24 you know I'm saying?

25 Q. Understood what?

K. O'Neal- Direct Examination by Mr. Waller

12

1 A. As far as, basically, he said, Ed said he's not going
2 to tell the judge to give me probation, he's not going tell
3 the judge not to give me probation, it would be up to the
4 judge.

5 Q. Okay. Did you think that the seven (7) year offer was
6 still in existence at that point or had you rejected that
7 plea?

8 A. No, I didn't reject it. I thought it still could be,
9 it still could be available.

10 Q. Okay. You, ultimately, got twelve (12) years, is that
11 right?

12 A. Yes.

13 Q. Okay. Did you have any conversations with Mr. Scott
14 after you got sentenced?

15 A. Yes. I talked to him once or twice, about twice.

16 Q. Okay. Did y'all talk about the sentence?

17 A. Yes.

18 Q. Did you ask him, hey I thought I was going to get, you
19 know, ---

20 A. Yeah.

21 Q. --- get probation or get seven (7) years, what was his
22 response to you?

23 A. He felt like maybe there was some miscommunications or
24 something went wrong or, you know, he felt like that it was
25 a strong possibility that I was going to get probation.

1 Q. Okay. When you say, miscommunication, do you mean
2 miscommunication between you and he or miscommunication
3 between he and Solicitor Clements?

4 A. Him and Clements.

5 Q. Okay. What was your understanding when you pled
6 guilty in the plea offer or plea agreement that was in
7 place?

8 A. Either it was gonna be -- I know it was zero (0) to
9 fifteen (15) but by him saying seven (7), it was like if I
10 was to plea, it could be anywhere between zero (0) to seven
11 (7).

12 Q. Okay. And to your knowledge ---

13 A. That's what I ---

14 Q. --- you never explicitly rejected that offer?

15 A. No.

16 Q. Okay.

17 MR. WALLER: No further questions. Please answer
18 any questions Ms. McCallister has.

19 **Cross Examination by Ms. McCallister:**

20 Q. Mr. O'Neal, do you remember the day of your plea?

21 A. Yes.

22 Q. Do you remember coming to court and standing in front
23 of the judge?

24 A. Yes.

25 Q. Okay. Do you remember the judge asking you some

K. O'Neal- Cross Examination by Ms. McCallister

14

1 questions about what was happening that day?

2 A. Yes.

3 Q. Okay. Do you remember, do you remember Mr. Scott
4 talking with the judge that day as well?

5 A. Yes.

6 Q. Okay. Do you agree with me that both the solicitor
7 and the judge at some point during that, during your plea,
8 specifically, stated that the plea was without
9 recommendations or negotiations?

10 A. Yes, I heard them say it.

11 Q. Okay. You heard the judge say that and you heard the
12 solicitor say that, correct?

13 A. Mmm, hmm.

14 Q. Okay. Do you remember talking to the judge about what
15 the maximum sentence is that you might be facing?

16 A. Yes.

17 Q. Okay. And you understood when you went into that plea
18 that you were facing up to fifteen (15) years, is that
19 correct?

20 A. Yes, zero (0) to fifteen (15).

21 Q. Zero (0) to fifteen (15), okay. And you remember
22 being sworn and being under oath, correct?

23 A. Mmm, hmm.

24 Q. Do you remember the judge talking to you about whether
25 you were satisfied with Mr. Scott's representation?

1 A. Yes.

2 Q. Do you remember what you told the judge?

3 A. I said, yes.

4 Q. Okay. Do you remember the judge talking to you about
5 whether you were pleading guilty freely and voluntarily?

6 A. Yes.

7 Q. And what did you -- do you remember what you told the
8 judge?

9 A. Yes.

10 Q. Okay. At that point if you thought that you were only
11 going to get up to seven (7) years, why did you not speak
12 up?

13 A. When he said without recommendations or negotiation, I
14 mean, I figured that he was telling me it was zero (0) to
15 fifteen (15) and the seven (7) wasn't never brought up.
16 Which you are right, I should have brung seven (7) up but
17 at the time, I mean, I'm new to the system so I didn't know
18 to say something or not.

19 Q. Do you remember the judge asking you if anyone had
20 promised you anything to get you to plead guilty?

21 A. Yes.

22 Q. Okay. Do you remember what you answered?

23 A. I answered, yes.

24 Q. You answered, yes? You answered that ---

25 A. No, I answered -- you're saying, did anybody promise

K. O'Neal- Cross Examination by Ms. McCallister

16

1 me anything?

2 Q. Right.

3 A. Yeah, I said, no. I said, no.

4 Q. Okay. So you told the judge that no one made you any
5 promises to get you to plead guilty?

6 A. Yes.

7 Q. Correct?

8 A. (Shaking of the head, yes)

9 Q. Okay. And that includes a promise of seven (7) years,
10 correct?

11 A. Yes. That's right.

12 Q. Okay. What -- did you want to go to trial ---

13 A. No.

14 Q. --- on these charges? No. So if you had known that
15 you were going to get twelve (12) years, what would you
16 have done?

17 A. I would've took the plea of seven (7).

18 Q. Well, without the plea of seven (7) if you had a
19 choice between trial and plea with nothing on the table,
20 would you have taken the case to trial?

21 A. Probably not.

22 Q. Okay. At any time did, at any time during your talks
23 with Mr. Scott, you said you talk several times with him
24 about making these decisions, correct?

25 A. Mmm, hmm.

1 Q. At any time did he promised you that you would get no
2 more than seven (7) years?

3 A. Yes.

4 Q. He promised you that?

5 COURT REPORTER: You've got to answer.

6 Q. Then when you went ---

7 COURT REPORTER: You've got to answer yes or no.

8 A. I said, yes.

9 COURT REPORTER: I didn't hear you.

10 Q. When did he make that promise to you?

11 A. The question was, he said that was a 95% chance I
12 could get probation. I said what about the other 5%, he
13 said if push comes to shove, if I had to do any time, it
14 would be the seven (7) or less.

15 Q. When did you have that conversation with him?

16 A. The last time I spoke with him before I went to court.

17 Q. Okay. So I thought you told me a few minutes ago
18 though, that you understood that when you went into that
19 courtroom that you could get up to fifteen (15) years?

20 A. Yes. But by him, by him saying there was a 95% I
21 could get probation and I asked him about the other five,
22 he said if I had to do any time it would probably be seven
23 (7) or less.

24 Q. Probably be seven (7) or less?

25 A. (Shaking of the head, yes)

K. O'Neal- Redirect Examination by Mr. Waller

18

1 Q. Okay. So he didn't guarantee seven (7) or less?

2 A. No.

3 Q. Okay.

4 A. But that's why I made the decision to go in with the
5 open plea.

6 Q. An you -- do you recall telling the judge that you
7 had, had enough time to talk to Mr. Scott about this and
8 that you understood everything that he had told you about
9 your situation?

10 A. Yes.

11 Q. Yes. Okay. And Mr. Scott did ask the judge to give
12 you probation, did he not?

13 A. Yes.

14 Q. Okay.

15 MS. McCALLISTER: Okay. I think that's all the
16 questions that I have, Your Honor. Thank you.

17 MR. WALLER: Just very briefly, Your Honor.

18 Redirect Examination by Mr. Waller:

19 Q. Mr. O'Neal, you had rejected an offer of ten (10), is
20 that correct?

21 A. Mmm, hmm.

22 Q. Okay. I believe this question might have already been
23 asked by the Attorney General but, would you have talked
24 about going to trial, that you didn't want to go to trial,
25 but you pled guilty and you're not challenging that here

K. O'Neal- Re-cross Examination by Ms. McCallister

19

1 today, is that right?

2 A. No.

3 Q. Okay. Would you have pled if you knew you were going
4 to get more than seven (7) at that time?

5 COURT REPORTER: Okay, you've got to answer ---

6 A. No. No, sir.

7 MR. WALLER: No further questions.

8 **Re-cross Examination by Ms. McCallister:**

9 Q. I'm sorry, so just to clarify, going into the plea
10 that day, is it your testimony that you were aware that the
11 judge could sentence you to more than seven (7) years?

12 A. Yes.

13 Q. Okay.

14 MS. McCALLISTER: Thank you.

15 THE COURT: You may step down. Thank you.

16 MR. WALLER: Your Honor, I would call Cheveron
17 Scott.

18 THE CLERK: Do you swear or affirm that the
19 testimony you give will be the truth, the whole truth, and
20 nothing but the truth so help you God?

21 MR. SCOTT: I do.

22 THE CLERK: Thank you.

23 CHEVERON SCOTT, first being
24 duly sworn, testified as follows:

25 **Direct Examination by Mr. Waller:**

C. Scott- Direct Examination by Mr. Waller

20

1 Q. Good afternoon, Mr. Scott, how are you today?

2 A. Good afternoon. I'm fine.

3 Q. Mr. Scott, how did you come to represent Mr. O'Neal?

4 A. Through a family friend, contacted me about Kelvin and
5 told me that he was in searching for another lawyer. At
6 that point, I told that person that if he had another
7 lawyer that ethically I could not have any kind of
8 conversation with him at that point. But it was later on, I
9 think if I can remember correctly, I think Kelvin called me
10 and advised me that he no longer had that attorney and he
11 wanted me to look at his case and he came up to my office
12 and I looked at the file and I decided to represent him at
13 that point.

14 Q. Okay. How long have you been a practicing attorney?

15 A. Since 2001.

16 Q. Okay. And you have been practicing criminal law
17 regularly?

18 A. Yes, about 80% of my practice is in criminal defense.

19 Q. Okay. If you could just briefly kinda give the court
20 a factual background of the allegations against Mr. O'Neal,
21 as much of your recollection?

22 A. If I can remember correctly, he had a number of drug
23 charges and he had the accessory after the fact charge.
24 They were from, I think, it was two or three different
25 incidences and as the attorney, I was trying to kind of

1 work it out so that I could get them all done at the same
2 time.

3 Q. Okay. Let's talk about at some point he made the
4 decision to plead guilty?

5 A. Correct.

6 Q. Okay. Prior to that or after that, were there any
7 plea offers made by the State?

8 A. Now, mind you, I came in late. There was another
9 attorney I'm assuming had already kind of working things
10 out with the solicitor's office. So I came in later in the
11 case. The first recommendation that I can recall but this
12 was very early in the stages was, I'm almost sure, it was
13 ten (10) years. At that point, of course, once I got that
14 recommendation or that plea recommendation, I went to
15 kelvin with that and he advised me that he did not want to
16 take the ten (10) years and could I work something else
17 out. So, consequently, as time went on we were preparing
18 for trial and I think it was maybe a couple weeks before
19 the trial is when the solicitor came and he came with
20 another recommendation of seven (7) years. So I went to
21 Kelvin with that seven (7) years and again he was adamant
22 he didn't feel like he deserved seven (7) years. Now, at
23 this point, I had started working with Kelvin in my
24 foundation and he had started to like speaking to my young
25 people and all of that, so he was doing all of the things

1 that always asked all of the young people who work with me,
2 doing. So at that point I felt compelled to write the
3 solicitor, Ed Clements, a letter. I've never done it
4 before. I wrote him a letter telling him what a good kid
5 this young man was, how he had turned around his life and
6 how I believe that he would be a good candidate for
7 probation. Pursuant to that letter, if I can recall
8 correctly, Ed came, Ed called me and we made -- he said,
9 well, Cheveron I understand your position. I'm in a
10 certain position too, and I can respect that. So he said,
11 well, what I can do is I can put on the record that you
12 would not have, you won't have a recommendation and I'll
13 just let you discuss the mitigating circumstances with the
14 court. Now, based on my professional observations, often
15 times whatever the State recommends is often times what the
16 solicitor, what the judge normally goes with. So because
17 of what Kelvin said he didn't want the seven (7) years and
18 I knew that the only way that I could get probation because
19 if, I felt like if he offered, if the offer was a plea
20 recommendation was for seven (7) years then there was no
21 way in my mind I could see a judge giving him probation
22 based on that. So I made the calculated decision to not
23 have a recommendation and to just go and present the
24 mitigating circumstances in hopes that the judge would
25 consider all of those and give him probation.

1 Q. So that was your recommendation to Mr. O'Neal?

2 A. Yes, it was.

3 Q. Okay. But you didn't think that the seven (7) years
4 was a good plea offer for him, but you thought he had a
5 better chance of getting a lower sentence or probation?

6 A. I felt like that was the best way because of the
7 culpability that he had in the alleged incident and based
8 on that culpability I didn't see a judge giving him the
9 amount of time that he ended up getting. And actually I
10 didn't see the judge giving him seven (7) and a half years.

11 Q. Okay ---

12 A. --- ah, seven (7) years.

13 Q. Sure. Did you have any -- did you discuss that with
14 him when y'all rejected the seven (7) year offer, seven (7)
15 and a half year offer?

16 A. I discussed the probability that the only, I felt as
17 though the only way that he could get probation in this
18 case was that if we did not have a recommendation from the
19 State.

20 Q. Okay.

21 A. So I discussed that with him back and forth and I told
22 him that he was looking at zero (0) to fifteen (15) but in
23 all of my years of practicing law, I -- judge, I'm going to
24 be very candid with you, there have been maybe one other
25 case that I've done in my entire practice of law that I've

C. Scott- Direct Examination by Mr. Waller

24

1 lost a lot of sleep over, this is one of them. I don't
2 feel like I prepared Kelvin for the sentence that he got
3 and I don't know of any other way to say it other than
4 that. I think he knew that he was looking at zero (0) to
5 fifteen (15) but I think that based on all of the facts and
6 all, I can see how he believed that he would get less than
7 that.

8 Q. Had you discussed your conversations with the
9 Solicitor Clements with Mr. O'Neal?

10 A. I did.

11 Q. Okay.

12 A. And I advised him of what I was going, before I sent
13 the letter, I advised him that I was going to send a letter
14 to him trying to see if I can work something out less than
15 the seven (7) years and once I got the call back from the
16 solicitor, Mr. Clements, regarding that no plea, I advised
17 him of that as well.

18 Q. Okay. So that was part of your -- you had already had
19 that conversation before you made your recommendation to
20 Mr. O'Neal?

21 A. I'm sorry I don't quite understand what you're saying.

22 Q. You had already spoken with the solicitor and that was
23 part of your recommendation to Mr. O'Neal to go with the no
24 recommendation plea?

25 A. Correct.

1 Q. Okay.

2 MR. WALLER: No further questions. Please answer
3 anything that Ms. McCallister has.

4 **Cross Examination by Ms. McCallister:**

5 Q. Did you, at any time in your representation of Mr.
6 O'Neal, promised him a specific number of years?

7 A. No.

8 Q. Okay. And you said you felt that he, you felt that
9 maybe you didn't prepare him for the number twelve (12) but
10 is it that -- do you believe that he logically understood
11 that he could get that much time?

12 A. It's very difficult for me to say what he thought. I
13 don't think I can testify to that but what I can testify to
14 is that based on all of the factors involved in this
15 particular case, I did not believe that the sentence would
16 be what it was.

17 Q. Okay. You didn't believe that the sentence would be
18 what it was, but you did not tell Mr. O'Neal that there was
19 a guarantee of any particular number other than it would be
20 between zero (0) and fifteen (15), is that correct?

21 A. Well, as a criminal defense attorney I don't think we
22 can ethically guarantee anything. So I did not guarantee
23 him anything. But what I did was present all of the facts
24 to him in order for him to make a decision on it but as a
25 part of that analysis, I did not do a good job of

C. Scott- Cross Examination by Ms. McCallister

26

1 presenting all of the facts that I needed to for the judge
2 to make a decision based on all of the factors. I didn't
3 do that.

4 Q. Okay. You did make a lengthy the argument in
5 mitigation, correct?

6 A. I did. I talked about his rehabilitation. I talked
7 about all of those things. But one of those things that
8 kinda haunts me, judge, is when Judge Nettles, he was
9 presented with all of the facts by, the solicitor did a
10 good job of presenting the facts, he presented the plea or
11 he presented the sentence for the actual shooter which was
12 I think, I think it was life, but he didn't present any of
13 what happened with the other culpable people in it. And
14 one of those culpable people also got an accessory after
15 the fact and he was given probation and that was not put on
16 the record. And I think that if a judge, if Judge Nettles
17 had known that, I think that might've been something that
18 he would've have considered as a part of it as well. And I
19 did not present that during my mitigating factors in the
20 case and I regret that to this day that I did not.

21 Q. At any time did Mr. O'Neal tell you that he wanted to
22 go to trial?

23 A. I don't recall him saying he wanted to go to trial. I
24 know we talked extensively about the fact that he did not,
25 he didn't want to do, he didn't want to do ten (10) years,

1 he didn't want to do seven (7) years. So my whole analysis
2 was that either, Kelvin, either we're going to have to take
3 this deal or allow me to argue for probation or we're going
4 to have to go to trial, but if I can recall correctly I
5 think we were like, we were -- it was time -- it was the
6 week of the trial, so we had to make a decision. Either we
7 would go to trial or we were gonna, gonna take the plea.

8 Q. Okay. And you were optimistic about what would happen
9 if he took the plea?

10 A. I was optimistic that he would not get anywhere near
11 the time that he got, based on the culpability of all of
12 the parties involved and based on his alleged role in the
13 murder.

14 Q. Okay. And you agree, though, that the solicitor
15 presented the facts of the case to the judge fairly?

16 A. I think he did.

17 Q. Okay.

18 A. I think, now, I think that the only thing in the --
19 hindsight is 20/20, judge, and in hindsight the only thing
20 I would have wished that the solicitor would've done was to
21 present the other individuals and what their sentences was
22 as a part of, I think that would've been the only fair way
23 for the judge to make a proper analysis on what to give
24 this particular defendant, is by having all of the
25 sentences from all of them. But the only thing that Judge

C. Scott- Redirect Examination by Mr. Waller

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1 Nettles got was that the shooter got life.

2 Q. Okay. Beg the Court's indulgence just one moment,
3 Your Honor.

4 MS. McCALLISTER: That's all the questions I have,
5 Your Honor. Thank you.

6 MR. WALLER: Just very briefly, Your Honor.

7 **Redirect Examination by Ms. Waller:**

8 Q. Mr. Scott, you as a criminal defense lawyer, you
9 couldn't have made a guarantee on a recommendation anyway,
10 is that right?

11 A. Correct.

12 Q. The judge isn't bound by any recommendation?

13 A. Correct.

14 Q. Okay. Based on your conversations with Mr. O'Neal,
15 what did you believe his expectation was going into the
16 plea, in the sentencing?

17 MS. McCALLISTER: Your Honor, objection. He's
18 asking him to speculate about what Mr. O'Neal thought or
19 knew.

20 MR. WALLER: Your Honor, I said based on your
21 conversations with him. I believe, you know, he has, he
22 can give ---

23 THE COURT: Well, it was speculation, however, you
24 are correct, if there were statements made that would've
25 put him in a position to know. So you can't go into any

SCATS COFT SO BEHC CASEL EXAMINATION BY MS. MCCALLISTER 29
) Twelfth Judicial Circuit
 County of Florence) 2014-CP-21-3100
 1 speculation he had, but if he relayed something to you

2 verbally or in writing as to what his expectation was, I

3 KELVIN DOWD O'NEAL,)

4 A. I'm not sure if I can -- the only thing I can say is)

5 that when we, when we discussed the ~~plea~~ ~~chapter~~ ~~in~~ ~~record~~)

6 ~~STATE OF SOUTH CAROLINA~~ (12) years and as a matter of fact,)

7 judge, when the judge said twelve (12) years, I was)

8 expecting for him to say suspended down to something and

9 when he didn't and he said and I'll run twelve (12) years

10 concurrent, my knees buckled, ~~March 14, 2011~~ ~~because~~ I

11 was taken aback. And to this day I can tell this court and

12 I can tell everybody in this courtroom that there has not
 B E F O R E:

13 been more than two or three days that have gone by that I
 14 The Honorable Paul M. Burch
 have not thought about Kelvin.

15 A P P M B. A W A L A E R: C E Nothing further. Thank you.

16 MS. MCCALLISTER: Waller, Esquire.

Attorney for Plaintiff

17 Re-cross Examination by Ms. McCallister:

Ms. Lindsey A. McCallister, Esquire

18 Q. ~~At the time of the~~ ~~plea~~ ~~he~~ ~~received~~ ~~any~~ ~~bad~~ ~~about~~ ~~the~~ ~~sentence~~ ~~that~~
 19 he received?

20 A. You can't -- ma'am, you can't phantom what I feel.
 Lisa Carter

21 Q. Okay. But you agree that ~~the~~ ~~sentence~~ ~~of~~ ~~twelve~~ ~~(12)~~
 22 years is a lawful sentence within the sentencing range?

23 A. It is, it is within the zero (0) to fifteen (15)
 24 range, that is correct.

25 Q. An you did tell Mr. O'Neal that he would be facing

E. Clemments- Direct Examination by Ms. McCallister 30

1 zero (0) to fifteen (15) years if he went into the plea
2 without recommendations?

3 A. That was a part of our conversations, yes.

4 Q. Okay.

5 MS. McCALLISTER: Okay. Thank you.

6 THE COURT: Thank you, sir.

7 MR. WALLER: Nothing further from the applicant,
8 Your Honor.

9 MS. McCALLISTER: Your Honor, the State would call
10 Mr. Clements.

11 THE COURT: Come around and be sworn please.

12 THE CLERK: Do you swear or affirm that the
13 testimony you give will be the truth, the whole truth, and
14 nothing but the truth so help you God?

15 MR. CLEMENTS: I do.

16 THE CLERK: Thank you.

17 ED CLEMENTS, first being
18 duly sworn, testified as follows:

19 **Direct Examination by Ms. McCallister:**

20 Q. Mr. Clements, you are the solicitor for the Twelfth
21 Circuit, is that correct?

22 A. That's correct.

23 Q. Did you have that title at the time of Mr. O'Neal's
24 case, if you recall?

25 A. I did.

1 Q. Okay. And do you recall his case?

2 A. I recall his case very well and also the co-defendants
3 who were involved. Travis Fonnelle Delaine, Montez Barker,
4 Laross Graham, and Mr. Wingate who was the defendant, that
5 was the other accessory, that got a probationary sentence
6 due to his cooperation.

7 Q. Okay. An you handled this case, in terms of you were
8 the solicitor at the plea, is that correct?

9 A. I did. It was based out of a death penalty case and
10 ended up all pleading out.

11 Q. Okay. And you mentioned this briefly, but there was a
12 co-defendant who you said cooperated with the State, is
13 that correct?

14 A. Yeah. If you want me to I think it would be a lot
15 more understandable of Mr. O'Neal's section of it if I gave
16 you the big picture and kind of put all the pieces into
17 place if you want me to do that, I can.

18 Q. Sure. If you can tell us what you remember about that
19 case and about how those sentences would fit together?

20 MR. WALLER: Your Honor, I'm going to object. I'm
21 not sure how this is relevant to the allegations or claims
22 brought up in the application. We've narrowed the issues
23 substantially.

24 THE COURT: I'm going to have to overrule you on
25 that because it may spread some knowledge about what the

E. Clemments- Direct Examination by Ms. McCallister 32

1 plea agreements were and when they possibly expired and how
2 this led up to a straight up a plea. I'm going to give him
3 some lead way.

4 MR. WALLER: Certainly.

5 A. Your Honor, this was a case that came out of a Billy
6 Hall and Talya Poston were killed by two people. Mr. Hall
7 had been a CI for the local law enforcement and he had
8 purchased drugs from Travis Fonnelle Delaine who was a drug
9 dealer and he also had a rap studio here in Florence. He's
10 Kelvin O'Neal's cousin. And he had a little group that
11 kinda did things for him and kind of ran his errands and
12 stuff and Kelvin O'Neal was one of those people. Somehow
13 Mr. Delaine figured out and thought that Billy Hall was the
14 person that bought the drugs and he had a drug trial
15 pending. And so he hired, ended up getting Laross Graham
16 who got Montez Barker involved to go to take Billy Hall out
17 and Talya Poston. And they did that out in the country off
18 of a road right off of the Pamlico Highway. And at the
19 time Montez Barker who had gotten out on parole and had a
20 electronic monitoring device on his ankle the entire time.
21 So law enforcement was able to track their route and what
22 they did by the ankle monitor and all of the telephone
23 calls that were going back and forth between Laross Graham
24 and Delaine. So Hall and Tayla Poston were shot and left
25 on the side of the road. Their vehicles were taken into

1 East Florence and burned up. And then Mr. Graham got back
2 to the studio so he could get some money and get taken care
3 of and I think Mr. Wingate was the one who went and picked
4 him up and brought him back to the studio. And then when
5 he got what he got, he took him away and Mr. O'Neal was
6 involved somehow in that part of it after it all occurred.
7 Mr. Wingate ended up being represented by Josh Bailey. I
8 approached him through Mr. Bailey to see if he's willing to
9 cooperate. I approach Mr. O'Neal through Jay Ervin to see
10 if he was willing to cooperate. Both of the attorneys
11 appeared to be willing to wanting their clients to
12 cooperate and help if they could. Mr. Wingate ended up
13 taking us and showing us some physical evidence that he had
14 hidden when he was given the gun to get rid of. When he
15 took Mr. Laross Graham and took him back to where he was
16 and everything had been completed. Mr. Wingate fully
17 cooperated with us. Told us the whole story of his
18 involvement, his knowledge and so as a result of that he
19 ended up pleading later on. He was one of the first to
20 plea and he got a probationary sentence. And I'm not sure
21 but I think Mr. Wingate might've been sentenced by Judge
22 Nettles. I'm not sure of that but, I know Judge Nettles
23 knew about the whole situation. And it ended up that Mr.
24 Laross Graham was going to testify so Montez Barker pled
25 guilty. He was the shooter. He got life. Laross Graham

E. Clemments- Direct Examination by Ms. McCallister

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1 got, I think, thirty (30) years. Mr. Delaine ended up
2 pleading guilty, he got life. And Mr. Wingate, pled and he
3 got a lot of time hanging over his head but he got a
4 probationary sentence. Mr. O'Neal, I tried several times
5 to meet with Jay Ervin and I'd go over to his office over
6 there across from the Darlington courthouse and talk with
7 him and relate to him what evidence we had, what was
8 happening in the case, and he wanted his guy to cooperate
9 but his guy wasn't willing. All he would tell me was his
10 client, Mr. O'Neal, was scared. And he ended up with Mr.
11 Scott. Mr. Ervin worked very hard, in my opinion, for Mr.
12 O'Neal. When Mr. Scott got involved and Mr. Scott seem to
13 get even more passionately involved on behalf of Mr.
14 O'Neal. I went with him, I had two families of the two
15 dead people that have been shot and left on the side of the
16 road that I had to deal with as far as communicating to
17 them any kind of plea offer we had and what we had to do.
18 And Cheveron was excellent to work with, you know, he
19 advocated for Mr. O'Neal very strongly and I told him I
20 said, I've got this family to talk to and this ten (10)
21 years is the best I can offer. I went back to him. The
22 best I can get as far as me recommending a time of seven
23 (7) years. Mr. O'Neal, it was communicated to me, he did
24 not want to accept that. So I went back to the family and
25 I said well, if we just have an open ended plea, the judge

1 is going to sentence him to whatever he thinks he's
2 appropriate to be sentenced to. And so I talked with Mr.
3 Scott about that and said Cheveron the best I can do is
4 just let him please straight up and I'm not going to try to
5 burn your man, I was just going to state what the facts are
6 and whatever you can talk the judge into, is what you talk
7 the judge into and we'd go from there. And Mr. Scott had
8 written me a very moving letter about Mr. O'Neal and what
9 he was trying to do with his life after all of this. So he
10 also offered all that to the court, all that information,
11 all his facts. The judge listened very carefully to it,
12 ended up giving him a twelve (12) year sentence. And I
13 didn't ask for anything. I laid all the facts out. The
14 things I did not, might not have mentioned I think Judge
15 Nettles knew about it because he was involved in a lot of
16 the dispositions of these cases.

17 Q. Mr. Clements, can I ---

18 A. And that was it, basically, in a nutshell.

19 Q. Though, you heard Mr. Scott testify about a co-
20 defendant who got probation ---

21 A. That was Mr. Wingate.

22 Q. --- that would be Mr. Wingate, is that correct?

23 A. Yeah. Yeah.

24 Q. Okay. And so in your opinion were Mr. Wingate in Mr.
25 O'Neal similarly situated?

E. Clemments- Cross Examination by Ms. Waller

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1 A. They were not simply situated because as I stated
2 earlier Mr. Wingate testified or was willing to testify on
3 our behalf, took us and showed this physical evidence. We
4 met at Josh Bailey's office and I kind of laid it out and
5 said this is what you're looking at, this is what I'm going
6 to do to you, if you want to cooperate, you need to talk to
7 your lawyer now and you need to cooperate and I walked out
8 of the room.

9 Q. Okay.

10 A. And left him talking with Josh Bailey. Josh Bailey
11 came out and said, you're going to love this, he wants to
12 cooperate fully and you're going to love this and I said,
13 what is that? And he said, he thinks he can take you to
14 where he hid the gun when they told him to get rid of. And
15 we went to that place and looked for a few hours and Mr.
16 Wingate ended up digging around in straw and he's sweating
17 and he said, this is in the area where I put it. We did
18 not find the gun but we found several of the bullets that
19 were there in a bag that had deteriorated, they were the
20 caliber bullets used in that gun.

21 Q. Okay.

22 A. So he helped us tremendously and his testimony
23 would've put all the loose ends tied together.

24 Q. Okay.

25 A. And so he was not similarly situated with Mr. O'Neal

1 because of his cooperation.

2 Q. Okay. And so the cooperation is the reason for the
3 differences in the recommendation in terms of the sentence?

4 A. Well, I did recommend, I just told the judge how much
5 his corporation was and the judge gave him a probationary
6 sentence.

7 Q. Okay. So even if Mr. Wingate's case, you didn't make
8 a recommendation?

9 A. I don't recall making a recommendation of probation
10 just asking for help based on his cooperation.

11 Q. Okay. And was this a well-known case in Florence?

12 A. Yeah, it was all in the media.

13 Q. It was all in the newspaper?

14 A. Yes.

15 Q. To your recollection, were the sentences that the co-
16 defendants received in the newspaper?

17 A. They were.

18 Q. Okay.

19 MS. McCALLISTER: Thank you. I have nothing
20 further.

21 **Cross Examination by Mr. Waller:**

22 Q. Mr. Clements, did you ever talk to Mr. O'Neal directly
23 without one of his attorneys present?

24 A. No, not that I know of it all. I don't do that. I
25 talk to them many times with their attorneys but I do not

1 recall, specifically, meeting with Mr. O'Neal with Jay or
2 with Cheveron. I just recall -- I may have. But I just
3 recall my conversations with the attorneys, not with Mr.
4 O'Neal being present.

5 Q. Sure. And, obviously, you weren't in the room when
6 they were discussing the plea offers that were extended to
7 them?

8 A. No, I was not.

9 Q. So you don't know what was said between the two of
10 them?

11 A. I don't.

12 MR. WALLER: No further questions.

13 MS. McCALLISTER: Nothing further from the State,
14 Your Honor.

15 THE COURT: You may step down. Thank you.

16 MR. CLEMENTS: Thank you, Your Honor.

17 MR. WALLER: I'd just have a couple of sites I'd ask
18 you to take a look at.

19 THE COURT: All right.

20 MR. WALLER: Your Honor, there are three cases I'd
21 ask you to take a look at, two of them are, the first two
22 are Thompson versus State, it's 340 S.C. 112. It's a 2012
23 Supreme Court case. Jordan versus State, 297 S.C. 52.
24 That's a 1988 Supreme Court case. Both of those cases deal
25 with plea agreements and them being enforced, if they're

1 not enforced at a sentencing. Your Honor, the other case
2 that I ask you to take a look at is an unreported case,
3 obviously, has no prejudicial value, but it is Nickell, Ni-
4 c-k-e-l-l, versus State, the Appellate Case Number is 2014-
5 002155. And that case says that a PCR court may consider
6 the advice given by counsel the ineffective nature advice
7 given by counsel. That case was to enter into a plea
8 agreement. I think that kind of the reverse stands here on
9 erroneous advice from counsel to reject the plea or not,
10 we'd ask you to consider that.

11 THE COURT: Okay. By tomorrow, can you get that
12 written out for me?

13 MR. WALLER: Yes, sir.

14 THE COURT: All those?

15 MR. WALLER: Yes, sir, I can.

16 MS. McCALLISTER: Thank you. Your Honor, I also
17 have some cases sites that I would give to you so if I can
18 submit those to you by tomorrow as well.

19 THE COURT: Please.

20 MS. McCALLISTER: Okay. Thank you. And, Your
21 Honor, I would just argue that Mr. O'Neal took a risk. His
22 attorney was optimistic about how that would turn out. But
23 I don't believe there's been any testimony that he was
24 promised anything, a specific number by anyone and that he
25 knew what he was doing when he decided to take that risk.

1 He knew he was possibly facing fifteen (15) years. So it's
2 understandable to be upset about the outcome but that does
3 not mean that Mr. Scott rendered ineffective assistance.

4 THE COURT: All right. Go and get those cases up,
5 I'll take a look at them. It's under advisement until we
6 can review them.

7 MR. WALLER: Thank you, Your Honor.

8 (CONCLUSION OF THE HEARING ON MARCH 14, 2017)

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CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Twelfth Circuit Court for Florence County, South Carolina, on the 14th day of March, 2017.

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

s/ Lisa S. Carter

Lisa S. Carter

Circuit Court Reporter

March 11, 2018

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Kelvin O'Neal, #360657,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
OF THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2014-CP-21-3100

ORDER OF DISMISSAL

2017 DEC 18 PM 3:33
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed November 3, 2014. Respondent made its Return on September 16, 2016. An evidentiary hearing into the matter was convened on March 14, 2017, at the Florence County Courthouse. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Cheveron T. Scott, Esquire (Counsel), and Solicitor Ed Clements, who prosecuted the case, also testified. This Court had before it a copy of the records of the Florence County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return, and the plea transcript.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the April 2010 term of the Florence County Grand Jury for one count of possession with intent to distribute (PWID) cocaine base and resisting arrest (2010-GS-21-0467). Applicant was also indicted at the July 2012 term for one count of accessory after the fact of murder and conspiracy (2012-GS-21-0899). Applicant was represented on these charges by Chevron Scott, Esquire. On

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

July 16, 2014, Applicant pleaded guilty before the Honorable Michael G. Nettles to the PWID and accessory charges. The remaining charges were dismissed. Judge Nettles sentenced Applicant to concurrent terms of twelve years' imprisonment for PWID cocaine base and accessory after the fact of murder. Applicant did not file an appeal.

ALLEGATIONS

In his current application and the subsequent amendments thereto, Applicant alleges that he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel, in that:
 - a. Counsel did not correctly prepare Applicant for sentencing; and
 - b. Counsel failed to investigate.

At the call of the case, Applicant's attorney informed the Court Applicant had narrowed the issues in his application. Applicant abandoned all issues except the claim Applicant did not fully understand the potential sentence he was facing when he agreed to plead guilty, either because Counsel failed to inform the plea court of the State's offer correctly on the record, or alternatively, because Applicant was induced to reject the offer due to Counsel's ineffective assistance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the

allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."

Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Applicant testified he was charged with four crimes – accessory after the fact of murder, conspiracy, resisting arrest, and PWID cocaine base – as a result of two separate incidents. Applicant stated he hired Counsel to defend him and acknowledged he met with Counsel "more

than enough" times to discuss the State's evidence and weigh the options between a trial and a plea. Applicant testified any time he wanted to talk with Counsel, Counsel was able. Applicant further testified he decided he did not want to go to trial but wished to plead guilty instead. Applicant testified the State first extended a plea offer for ten years, which he rejected because a co-defendant, whom he felt was more culpable than himself, had received only probation. Applicant also testified the State then extended an offer of seven years, which he discussed with Counsel. Applicant testified he told Counsel seven years was "an okay number" but inquired as to whether he could receive probation since he had no other. Applicant testified he also asked Counsel if he could receive credit for the three years he spent on electronic monitoring while out on bond. Applicant further testified Counsel discussed the offer with the Solicitor, Ed Clements, who told Counsel Applicant could get probation if Applicant pleaded guilty without a recommendation from the State. On cross examination, Applicant stated he did not understand what the Solicitor meant when he informed the judge the plea was without negotiation or recommendation, and Applicant believed the seven-year offer could still be available. Applicant acknowledged he never informed the judge at any point during the plea of his belief he would only receive up to seven years. Applicant also testified Counsel did discuss the possible sentencing range with him, and he was aware he could receive anywhere from zero to fifteen years, but he believed if he pleaded guilty, he would not get more than seven years. Applicant further testified he would not have gone to trial even if no plea offer had been made, and Applicant further stated Counsel did not promise or guarantee Applicant would receive a sentence of seven years or less.

Counsel testified he has practiced law since 2001, with about 80% of his practice in criminal defense. Counsel testified he met Applicant through a family friend, and Applicant

eventually hired Counsel to defend him on multiple sets of charges, which Applicant was trying to resolve at the same time. Counsel testified Applicant made the decision to plead later in the case, after first rejecting an offer of ten years. Counsel stated he was preparing for trial when he received the State's offer of seven years. Counsel further testified he felt strongly that Applicant was a good candidate for probation because he had stayed out of trouble, was working, and had been volunteering in the community. Counsel testified he sent Solicitor Clements a letter arguing for probation, and the Solicitor offered to let Applicant plead without a recommendation so Counsel could make those arguments to the judge. Counsel further testified he believed if the State recommended seven years, that is what the judge would impose because judges often accept whatever the State asks for. Counsel testified he felt the best way to get Applicant a lower sentence was to plead without recommendation, and he made that recommendation to Applicant. Counsel also testified he explained to Applicant that Applicant could receive anywhere between zero and fifteen years, but Counsel believed Applicant expected to get less than seven years, even though he knew, logically, he could receive more. Counsel testified he loses sleep at night over this case because he feels he did not properly prepare Applicant for a sentence of twelve years, and he was taken aback by it himself. However, Counsel also testified he did not promise Applicant a specific term of years because he did not believe it would have been ethical for him to do so. Counsel further testified he prepared a lengthy argument in mitigation and, while he believed the Solicitor presented the facts of the case fairly, either he or the Solicitor should have informed the judge that one codefendant received probation for similar charges.

Solicitor Clements testified he prosecuted Applicant's case for the State, along with the cases of Applicant's codefendants. The Solicitor testified this case arose out of the murder of a

confidential informant who was preparing to testify against Applicant's cousin in a drug case.

The Solicitor further testified Applicant's codefendant, who was the actual shooter, was wearing an electronic monitoring device at the time, and the State was able to track him using that device and cell phone calls to other codefendants. Solicitor Clements testified he approached counsel for both Applicant and his codefendant, Anthony Wingate (Wingate), about cooperating with the State, but only Wingate chose to do so. The Solicitor testified Wingate lead investigators to physical evidence, but Applicant did not wish to cooperate because he was scared. The Solicitor further testified he did not consider Applicant and Wingate to be similarly situated because of Wingate's full cooperation with the State. Solicitor Clements testified he did not believe the State made a recommendation in Wingate's case, but he explained the extent of Wingate's cooperation at Wingate's plea, and the judge sentenced Wingate to probation. Solicitor Clements further testified Counsel was extremely passionate in his defense of Applicant and in his negotiation with the State. However, the Solicitor testified, because of the feelings of the victim's families, the seven years was the lowest offer he could make. The Solicitor further testified this was a high-profile case in Florence County at the time, and all codefendants' pleas and sentences were reported in the newspaper. Solicitor Clements testified he agreed to just recite the facts of the case and allow Counsel to see if he could convince a judge to give Applicant a lower sentence.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds Counsel provided effective assistance in this case. Counsel is a trial practitioner who has extensive experience in the trial of criminal offenses. Counsel conferred with Applicant on multiple occasions, during which Counsel discussed the pending charges, the State's evidence, possible defenses and courses of

action, and answered all of Applicant's questions. Additionally, Counsel conveyed all plea offers to Applicant, who rejected them because he felt he deserved a lesser sentence than what the State offered. Both Counsel and Applicant testified Counsel explained the potential sentencing range to Applicant, and Counsel made no promises as to the sentence Applicant would receive. Applicant further testified he would not have gone to trial even if no plea offer had been made.

The Court finds this case to be similar to the situation in Griffin v. State, 361 S.C. 173, 604 S.E.2d 394 (2004). There, the South Carolina Supreme Court explained:

[C]ounsel told [Applicant] the plea court had indicated he would likely give [Applicant] a sentence comparable to [the codefendant's] twenty-two year sentence, counsel made no promises. He also informed [Applicant] there were no plea negotiations and informed him of the possible range of sentences. Further, the plea court informed [Applicant] of the maximum sentences he could receive for the charges prior to [the] plea being entered. The plea court also asked [Applicant] whether he understood there were no promises made regarding his guilty plea. [Applicant's] answers to those questions reflect an awareness of the potential range of sentences and an understanding that he had not been promised anything in return for his guilty plea. Accordingly, counsel's performance was not deficient even though he related his belief to [Applicant] that the court would give a twenty-two year sentence instead of the thirty years respondent received.

Id. at 177, 604 S.E.2d at 396. Furthermore, "[w]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). While this Court acknowledges Counsel's candid assessment of his performance and his obvious distress at the sentence his client received, the Court is mindful of the United States Supreme Court's admonishment in Strickland "that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made. 466 U.S. at 689. Accordingly, the Court must be wary of second-guessing plea counsel's tactics. Edwards v.

State, 392 S.C. 449, 456–57, 710 S.E.2d 60, 64 (2011) (citing Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Specifically, this Court credits Applicant's own testimony and finds Applicant would not have proceeded to trial, even if the State had not made any plea offer. "A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial." Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (quoting Hill v. Lockhart, 474 U.S. 52, 56-57 (1985)). Therefore, Applicant was not prejudiced by any alleged deficiency in Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

CONCLUSION

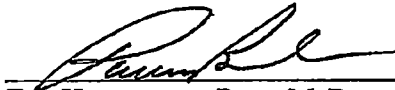
Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application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

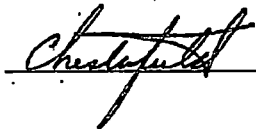
The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate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

IT IS THEREFORE ORDERED:

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

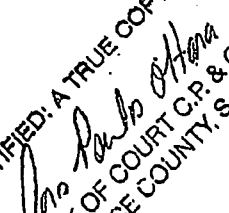
AND IT IS SO ORDERED this 11th day of December, 2017.


 THE HONORABLE PAUL M. BURCH
 Presiding Judge
 Twelfth Judicial Circuit

, South Carolina.

2017 DEC 18 PM 3:38
 DORIS POULOS O'HARA
 C.C.P. & G.S.
 FLORENCE COUNTY, SC

FILED

CERTIFIED: A TRUE COPY

 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

WITNESSES

Bradley Bazen

Florence County Sheriff

FITZLEE H MCEACHIN

ARREST WARRANT NUMBER

M270651

M270643

M270652

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

4/1/10

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010-GS-21-0467

The State of South Carolina

County of

FLORENCE

COURT OF GENERAL SESSIONS

APRIL

TERM

2010

THE STATE

vs.

KELVIN DANIER ONEAL

JOHN RICHARD HINES, JR. *FB 10*

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE COCAINE BASE,
POSSESSION OF COCAINE BASE,
RESISTING ARREST

STATE OF SOUTH CAROLINA)

INDICTMENT FOR

COUNTY OF FLORENCE)

POSSESSION WITH INTENT TO DISTRIBUTE
COCAINE BASE,
POSSESSION OF COCAINE BASE,
RESISTING ARREST

At a Court of General Sessions, convened on APRIL 1, 2010 the Grand Jurors of FLORENCE County present upon their oath:

COUNT ONE- POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE

That KELVIN DANIER ONEAL did in Florence County on or about October 7, 2009, possess with intent to distribute, dispense or deliver, or did aid, abet, attempt or conspire to distribute, dispense or deliver a quantity of Cocaine Base, a controlled substance under the provisions of Section 44-53-110, et. seq., Code of Laws of South Carolina, 1976, as amended, such distribution not having been authorized by law, and being in violation of Section 44-53-375(B), S. C. Code of Laws, 1976, as amended.

COUNT TWO- POSSESSION OF COCAINE BASE

That JOHN RICHARD HINES, ^{aka.} did in Florence on or about October 7, 2009, knowingly, willfully and intentionally, possess a quantity of Cocaine Base, a controlled substance under provisions of Section 44-53-110, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized by law and being in violation of Section 44-53-375(A), S. C. Code of Laws, 1976, as amended.

COUNT THREE - RESISTING ARREST

That KELVIN DANIER ONEAL did in Florence County on or about October 7, 2009, knowingly and willfully oppose or resist an arrest being made by one whom the defendant knew or reasonably should have known was a Law Enforcement Officer, in violation of Section 16-09-0320(A), S. C. Code of Laws, 1976, as amended.

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



E.L. Clements, III
TWELFTH CIRCUIT SOLICITOR

DOCKET NO. 2012-GS-21-00899

County Sheriff

The State of South Carolina

County of

FLORENCE

COURT OF GENERAL SESSIONS

JULY TERM 2012

THE STATE

vs.

KELVIN DANIER ONEAL

BILL

1

Indictment for

ACCESSORY AFTER THE FACT TO
MURDER,
AND
CONSPIRACY

Date:

FILED
2012 JUL 19 AM 11:11
CONNIE REEL-SHEARIN
CCJP & GS
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE)

INDICTMENT FOR

ACCESSORY AFTER THE FACT TO MURDER,
 AND CONSPIRACY

At a Court of General Sessions, convened on JULY 19, 2012 the Grand Jurors of FLORENCE County present upon their oath:

COUNT ONE – ACCESSORY AFTER THE FACT TO MURDER

CDR: 2413

16-01-0055

That KELVIN DANIER ONEAL did in Florence County on or about September 01, 2009, render assistance after the fact to a felon, namely LAROSS ANTONIO GRAHAM, who, on or about September 01, 2009 committed the felony of the Murder of Billy Lee Hall, II and/or Talya Jeanette Poston, by aiding and abetting said LAROSS ANTONIO GRAHAM in concealing the Murders; in violation of Section 16-01-0055, S.C. Code of Laws, 1976, as amended.

COUNT TWO – CONSPIRACY

CDR: 0049

16-17-0410

That KELVIN DANIER ONEAL did in Florence County on or about September 01, 2009, unlawfully, willfully, knowingly, wickedly and feloniously unite, combine, conspire, confederate, agree between and among FONNELEZE TRAVIS DELANE, and/or LAROSS ANTONIO GRAHAM, and/or ANTHONY CORINTHIANS WINGATE, and have tacit understanding with each other and with divers other persons whose names are unknown to the Grand Jurors for the purpose of concealing the crime of Murder of Billy Lee Hall, II and/or Talya Jeanette Poston; in violation of Section 16-17-0410, S.C. Code of Laws, 1976, as amended.

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



E.L. Clements, III
 TWELFTH CIRCUIT SOLICITOR