

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Robin B. Stilwell, Circuit Court Judge

CHARVUS T. NESBITT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001223

APPENDIX

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT
2011-GS-42-1414, 1415
2012-GS-42-0349

State of South Carolina)
VS.)
Charvus Tarrel Nesbitt)

Transcript of Record

February 13, 2012
Spartanburg, South Carolina

B E F O R E:

The Honorable Roger Couch

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

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Spartanburg, South Carolina

Attorney for the State

Fletcher N. Smith, Jr., Esquire
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SIXTEENTH JUDICIAL CIRCUIT

I N D E X

WITNESS

DIRECT CROSS RE-DIRECT RE-CROSS

(No testimony taken)

EXHIBITS

EXHIBIT NO.	DESCRIPTION	ID	EV
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(No Exhibits)

1 Mr. Bulsa - May it please the Court, Your Honor.

2 The Court - Yes, sir, Mr. Bulsa.

3 Mr. Bulsa - This is State vs. Charvus Tarrel
4 Nesbitt. He has three indictments pending against him,
5 indicates by his signature wishes to plead guilty to those
6 charges, 2012-0349 true billed indictment for attempted
7 armed robbery, 2011-1414, that's a two-count indictment
8 for murder and possession of a firearm during the
9 commission of a violent crime, 2011-1415, an indictment
10 for attempted murder. He's represented by Fletcher Smith.
11 It is a negotiated sentence of forty years.

12 The Court - Please swear the defendant.

13 (Whereupon, Charvus Tarrel Nesbitt was duly
14 sworn by the Deputy Clerk)

15 The Court - If you would, Mr. Smith, move over
16 and let him get right over in front of the microphone.

17 (Mr. Smith complies)

18 The Court - Thank you very much.

19 Mr. Smith - Your Honor, this is an Alford plea.

20 The Court - On all charges?

21 Mr. Smith - Yes, sir.

22 The Court - All right. And did you agree with
23 the State concerning the negotiated nature of this
24 sentence?

25 Mr. Smith - Yes, sir, I have.

1 The Court - And did he state that negotiation
2 correctly? Mr. Bulsa.

3 Mr. Smith - He did, Your Honor.

4 The Court - All right. Sir, your name is
5 Charvarus Tarrel Nesbitt?

6 Mr. Nesbitt - No, sir, it's Charvus Tarrel
7 Nesbitt.

8 The Court - All right. And, Mr. Nesbitt, you're
9 in front of me today on three charges. I'm going to go
10 over the charges with you. When I finish, if you have any
11 questions I'll be more than happy to discuss those with
12 you. The first two cases I will talk about are 2011-GS-
13 42-1414 and 1415. Both of these are for -- One of them is
14 for murder, the other is for attempted murder. Now, both
15 of those cases have gone to the Grand Jury and a true bill
16 was issued in both cases. The more severe sentence in
17 this case is the sentence for murder. That carries a
18 sentence of thirty years to life. The attempted murder --
19 Mr. Bulsa, what is the maximum on that one?

20 Mr. Bulsa - Up to thirty years, Your Honor.

21 The Court - Up to thirty year. Do you
22 understand those two charges?

23 Mr. Nesbitt - Yes, sir.

24 The Court - Do you understand the potential
25 sentences in those cases?

1 Mr. Nesbitt - Yes, sir.

2 The Court - Now, Mr. Nesbitt, your attorney has
3 informed me that -- And the State has informed me as well
4 that there's a negotiated sentence in this case.

5 Mr. Nesbitt - Yes, sir.

6 The Court - That was forty years. And I will
7 tell you that while I was not a party to those
8 negotiations, I have the right to either accept them or
9 not accept them. What I will do is I will listen to your
10 plea and go over the circumstances, then I'll make a
11 decision as to whether or not I will accept the negotiated
12 sentence.

13 (Discussion being held between Mr. Smith and Mr.
14 Nesbitt.)

15 The Court - Pay attention to me, Mr. Nesbitt,
16 just a minute. I will inform you if I decide not to
17 accept the negotiations and at that time I would give you
18 an opportunity to withdraw your plea. Do you understand
19 how that works?

20 Mr. Nesbitt - Yes, sir.

21 The Court - Sir?

22 Mr. Nesbitt - Yes, sir.

23 The Court - Okay, is that how you understand
24 that we're going to proceed?

25 Mr. Nesbitt - Yes, sir.

1 The Court - All right. Now, Mr. Nesbitt, do you
2 suffer from any mental, physical, nervous conditions, any
3 conditions that would affect your ability to understand
4 what you're doing today or to make good decisions today?

5 Mr. Nesbitt - No, sir.

6 The Court - Now, you have to speak up because
7 this has to be on tape.

8 Mr. Nesbitt - No, sir.

9 The Court - Okay, thank you. Have you taken or
10 used any drugs or other substances that might have a
11 similar affect?

12 Mr. Nesbitt - No, sir.

13 The Court - So, Mr. Nesbitt, do you know what
14 you're doing?

15 Mr. Nesbitt - Yes, sir, I'm pleading not guilty
16 but to no content (sic).

17 The Court - Yes, sir, I understand that. Do you
18 understand the charges?

19 Mr. Nesbitt - Yes, sir.

20 The Court - And are you able to make good
21 decisions today?

22 Mr. Nesbitt - Yes, sir.

23 The Court - Now, you're here today with your
24 attorney, Mr. Smith. Are you satisfied with what he's
25 done so far?

1 Mr. Nesbitt - No, sir, but I'm just going to go
2 ahead and take the deal.

3 The Court - Well, is there something else you
4 feel that he ought to do for you before we go forward?

5 Mr. Nesbitt - No, uh -- No, sir.

6 The Court - Is there something else that you
7 feel that you need to consult with him about ---

8 Mr. Nesbitt - No, sir.

9 The Court - --- before we go forward?

10 Mr. Nesbitt - No, sir.

11 The Court - Well, you're indicating that you're
12 not satisfied with him. Are you not satisfied with ---

13 Mr. Nesbitt - Not with him, it's just the time,
14 not with him.

15 The Court - Okay. So you're satisfied with his
16 efforts.

17 Mr. Nesbitt - Yes, sir.

18 The Court - Okay. Now, Mr. Nesbitt, I will tell
19 you that in these cases, all three of these charges are
20 classified as violent and most serious offenses. What
21 that means is that in the future if you were to be charged
22 with or found guilty of similarly classified crimes, such
23 as violent, serious or most serious, that your pleas in
24 these cases could be used in the future to make future
25 sentences more severe, could result in the future of a

1 sentence of life imprisonment without the possibility of
2 ever receiving a parole. Do you understand that that
3 would be a possibility if you were convicted of similar
4 offenses in the future?

5 Mr. Nesbitt - Yes, sir.

6 The Court - Now, Mr. Nesbitt, your attorney has
7 informed me that you are pleading in these cases a no
8 contest or an Alford plea.

9 Mr. Nesbitt - Yes, sir.

10 The Court - Is that how you're pleading to these
11 three charges?

12 Mr. Nesbitt - Yes, sir.

13 The Court - Now, that plea as a no contest plea
14 of course carries with it the same sentencing possibility
15 as a guilty plea. Do you understand that?

16 Mr. Nesbitt - Yes, sir.

17 The Court - Do you also understand that it will
18 also appear as a conviction on your record just like a
19 guilty plea would appear? Do you understand that as well?

20 Mr. Nesbitt - (No response)

21 The Court - Sir?

22 Mr. Nesbitt - Yes, sir.

23 The Court - Now, when someone tells me that
24 they're pleading under Alford or pleading no contest, what
25 that means to me is, if you'll listen to what I'm saying

1 and see if this agrees with your position, that means that
2 you and your attorney have reviewed the evidence that's in
3 the possession of the State as it relates to these
4 charges, and after reviewing that evidence you have come
5 to the conclusion that if that evidence were presented to
6 a jury during a trial, that it would more than likely
7 result in a conviction by a jury of those charges, and
8 therefore, while not admitting guilt, you are pleading no
9 contest as a result of your review of that evidence. Does
10 that correctly state your position in this matter?

11 Mr. Nesbitt - Yes, sir, he said if he took it to
12 trial would be charged with the hand of one is the hand of
13 all.

14 The Court - Well, yes, sir that's -- That is a
15 theory that exist in South Carolina. Your lawyer if he's
16 advised you of that fact has correctly advised you that
17 that is the law in this State. And You understand that
18 concept. Is that right, Mr. Nesbitt?

19 Mr. Nesbitt - Yes, sir.

20 The Court - All right. Now, counselor, I'm sure
21 that you've discussed this matter thoroughly with Mr.
22 Nesbitt. Is that correct?

23 Mr. Smith - I have, Your Honor.

24 The Court - Are you satisfied that he understood
25 the consultations you've had with him?

11

1 Mr. Smith - I am, Your Honor.

2 The Court - I would suspect that among the many
3 things you would have discussed with him during your
4 consultations would've been such things as the nature of
5 these charges, the potential penalties, any defenses that
6 he might've had to the charges or lack thereof, his rights
7 under the constitution as they relate to these charges, as
8 well as the fact that these are what are considered no
9 parole offenses and so his possibility of receiving a
10 parole on this will be very unlikely.

11 Mr. Smith - Yes, sir.

12 The Court - Have you discussed that with him?

13 Mr. Smith - I have, Your Honor.

14 The Court - And are you satisfied that Mr.
15 Nesbitt understood all those matters?

16 Mr. Smith - Yes, sir, he's very intelligent.

17 The Court - Now, he tells me that he has reached
18 a decision, that his decision is to offer a plea of no
19 contest to these charges. Is that your understanding of
20 his decision as well?

21 Mr. Smith - Yes, sir.

22 The Court - And do you agree with the decision
23 that he's made after reviewing the evidence?

24 Mr. Smith - I do, Your Honor.

25 The Court - Now, Mr. Nesbitt, my information in

1 this case is that you are twenty-three years of age. Is
2 that correct?

3 Mr. Nesbitt - Yes, sir.

4 The Court - How far did you go in your
5 education, sir?

6 Mr. Nesbitt - I was in college to be a dental
7 hygienist. I got a -- I went to high school and I
8 finished high school a year early.

9 The Court - Okay. And were you enrolled in any
10 school when you were arrested?

11 Mr. Nesbitt - Yes, sir.

12 The Court - Where were you enrolled?

13 Mr. Nesbitt - SCC, Spartanburg Community and I
14 worked for BMW.

15 The Court - Well, Mr. Nesbitt, are you married?

16 Mr. Nesbitt - I was engaged to be married.

17 The Court - And do you have any children?

18 Mr. Nesbitt - No, sir.

19 The Court - Now, Mr. Nesbitt, were you working
20 when you were arrested?

21 Mr. Nesbitt - Yes, sir, I was injured, but I was
22 like on workers' comp, but, yes, sir.

23 The Court - All right, and where did you have a
24 job? Where did you get injured?

25 Mr. Nesbitt - BMW. I was there for two years.

13

1 The Court - All right. Now, Mr. Nesbitt, has
2 anyone in any way threatened you or put pressure on you or
3 tried to intimidate you, in other words, done anything to
4 you to try to make you or force you offer (sic) the plea
5 that you offered?

6 Mr. Nesbitt - No, sir.

7 The Court - Have you offered this plea freely
8 and voluntarily?

9 (Discussion is held between Mr. Nesbitt and Mr.
10 Smith which was not reported.)

11 The Court - Sir?

12 Mr. Nesbitt - Excuse me.

13 The Court - I asked you if you've offered this
14 plea freely and voluntarily?

15 Mr. Nesbitt - I don't understand.

16 The Court - Well, is it -- Is it your decision
17 to --

18 Mr. Nesbitt - Oh, yes, sir.

19 The Court - --- offer this plea?

20 Mr. Nesbitt - Yes, sir.

21 The Court - Have you had time -- enough time to
22 think about this decision?

23 Mr. Nesbitt - I been thinking about it the last
24 two weeks, Your Honor.

25 The Court - Oh, I understand that. And so you

1 say you have had enough time?

2 Mr. Nesbitt - Yes, sir.

3 The Court - And -- Well, has anyone made any
4 promises, guarantees or assurances to you about anything
5 in connection with these pleas, other than the negotiated
6 sentence that's been worked out?

7 Mr. Nesbitt - Nothing but the negotiated.

8 The Court - All right, Mr. Nesbitt when you
9 offer a guilty plea, or excuse me, a no contest plea to
10 the Court, you are waiving or giving up most of your
11 constitutional rights as they relate to these charges.
12 It's my obligation to see to it that you do that knowingly
13 and intelligently and that you are -- have done it freely
14 and voluntarily. In order for me to establish that you've
15 done this knowingly and intelligently, I'm going to
16 explain to you your rights under the constitution as they
17 relate to these charges, and when I finish, I'll give you
18 a chance to ask any questions you'd like to ask. Do you
19 understand what I'm doing now?

20 Mr. Nesbitt - Yes, sir.

21 The Court - All right, sir. First of all, you
22 have a right to have a Grand Jury consider these
23 indictments, and that has already happened. A true bill
24 was issued in each case. You have a right to your
25 attorney and the services of your lawyer, and he's present

15

1 and available to you. Now, you have a right to a trial by
2 jury. At that trial, you'd be presumed to be innocent
3 until such time as the State proved your guilt beyond a
4 reasonable doubt. At the trial and under the
5 constitution, you'd have the right to do several things.
6 Now, Mr. Nesbitt, are you listening?

7 Mr. Nesbitt - Yes, sir.

8 The Court - You would have the right to have
9 subpoenas issued to witnesses to require that they attend
10 the trial. You would have the right to confront or
11 question anyone who might testify during the trial. You
12 would have the right at the trial to present any defense
13 that you have to the charges. You would be given the
14 opportunity to try to suppress any and all evidence the
15 State may have against you on constitutional grounds.
16 That includes any statements that you might have made
17 prior to the time of the trial. You at all times, Mr.
18 Nesbitt, have the right to remain silent. At the trial if
19 you chose to remain silent, the Judge conducting the trial
20 would be required to instruct the jury that your silence
21 could not be used against you. Now, Mr. Nesbitt, did you
22 understand the rights I just went over with you?

23 Mr. Nesbitt - Yes, sir.

24 The Court - Did you -- Do you have any questions
25 about them?

1 Mr. Nesbitt - No, sir.

2 The Court - Do you need any further explanation
3 about those rights?

4 Mr. Nesbitt - No, sir.

5 The Court - When you plead no contest, you give
6 up all of those rights except the right to have your
7 lawyer represent you until your case is completed. Do you
8 understand that you would be giving up those rights with
9 a no contest plea?

10 Mr. Nesbitt - Yes, sir.

11 The Court - And does the fact that you have to
12 give up those rights, does that cause you to want to
13 change your plea in any manner?

14 Mr. Nesbitt - No, sir.

15 The Court - Now, at this time I'm going to ask
16 the State to go over the facts that they're alleging in
17 your case. Mr. Nesbitt, I want you to listen to what he
18 has to say, because when he finishes, I'm going to ask you
19 some questions about those facts. Mr. Bulsa, at this time
20 I'd ask that you go over the facts with me.

21 Mr. Bulsa - Yes, sir, Your Honor. This incident
22 occurred on December the 7th of 2010 at approximately 5:45
23 in the evening. It was at a residence on Wrengate Drive.
24 That's a mobile home park in the Fairforest Community here
25 in Spartanburg. A lady by the name of Germicka (phonetic)

17

1 Rooker lived there with her two children. Her brother,
2 the victim in the murder case, Daniel Tremayne Landrum
3 lived there as well. On this occasion a phone call was
4 made to Mr. Landrum concerning the purchase of some
5 marijuana. Mr. Landrum sold marijuana actually from the
6 residence. A phone call was made by a man by the name of
7 Teddy Byers. Mr. Byers and Mr. Landrum had met working at
8 Great American Paper Company up in the Inman community.
9 They learned that each other dealt in marijuana. Mr.
10 Byers arranged a so-called drug-buy for some of his
11 friends or cousins to come by and make the buy. At about
12 5:45, Mr. Byers drives the car to the location. In the
13 car is Mr. Nesbitt who is actually his half brother, a
14 Hazel Stoudemire who is a young cousin, and a Johnathon
15 Petty who was a friend of theres. Mr. Nesbitt, Mr. Petty
16 and Mr. Stoudemire get out of the vehicle, walk a short
17 distance to where the trailer is located. Mr. Nesbitt,
18 Your Honor, owned two pistols. He had purchased some
19 pistols about a year earlier from the Inman Gun and Pawn.
20 They were legally registered to him. It's the State's
21 position that the evidence would show that Mr. Nesbitt had
22 one of the pistols which actually looked sort like a mini
23 machine gun, and the second pistol was in the possession
24 of Hazel Stoudemire. When the three men got to the
25 trailer, two of the three went inside, one being Mr.

1 Nesbitt and one being Hazel Stoudemire. They got inside
2 under the ruse that they were there to buy marijuana.
3 When -- It gets a little unclear because we've talked with
4 Hazel Stoudemire. He says they went in, he was actually
5 trying to make the buy. The plan was when the -- When the
6 victim pulled the money out -- or pulled the drugs out,
7 they were to take the drugs and whatever money he had with
8 the drugs. Mr. Stoudemire tells us when they began that
9 process, this defendant, Charvus Nesbitt began firing a
10 handgun he had brought. The State would've went to trial
11 on that premise that this was the actual gunman. He fired
12 multiple times. The physical evidence shows eight shell
13 casings recovered from the scene. It shows eight bullets
14 recovered from the scene. Three were actually from the
15 body of the victim, Daniel Tremayne Landrum. Your Honor,
16 they went to actually what's the back door of the trailer.
17 It opens into a small hallway. Pretty much directly in
18 front of the doorway is a laundry room. That is where the
19 transaction was taking place, in the laundry room and the
20 hallway. The back door had been closed once the two men
21 had got inside. There was another -- There was a lady
22 friend of Mr. Landrum's inside the laundry room. She was
23 not really paying attention. She said she had her phone
24 out, was messing with her phone. Ms. Rooker the main
25 resident of the house and her children and the friend of

19

1 theres was in the living area of the trailer. When the
2 shots began to be fired, Ms. Rooker went to the -- towards
3 the area to see what was going on. She got shot herself.
4 State's position is the man saw her coming towards the
5 area and fired at her. She actually got struck in the
6 neck and was fortunate she did not die. Mr. Stoudemire
7 who readily admits that he had one of the guns, claims he
8 never pulled his gun, panicked when Mr. Nesbitt began
9 firing, tried to get out the back door, but the back door
10 the way it closed, it was hard to get out, so he basically
11 left that area and went towards the back of the trailer
12 and dove out the master bedroom window, just dove right
13 through the glass, took the curtain with him. Mr.
14 Nesbitt, after he finished shooting, followed suit out the
15 same window. Mr. Stoudemire actually dropped the pistol
16 that he was carrying. He said he didn't realize it until
17 he got back to the car. The car was parked about one
18 street over, so they had to run back to the car. Mr.
19 Petty had been waiting outside the trailer, heard the
20 shots, took off to -- back to the car. They all met up
21 where Teddy Byers, the brother and Mr. Nesbitt was
22 waiting. They got in the car, drove off and began talking
23 about what had happened. That's when Mr. Stoudemire
24 realized he'd dropped his pistol. They began talking
25 about what they needed to do to cover that up, because

1 they knew the pistol would come back to Mr. Nesbitt. A
2 ruse was planned whereby he would report the pistol
3 stolen. They actually drove the vehicle to the Inman
4 community, left it on the side of the road and they
5 reported -- reported that he'd broken down and the pistol
6 had been stolen out of the glove box. The police working
7 with the individuals in the house along with the
8 information about the pistol, they knew they had a suspect
9 in Mr. Nesbitt, because it came back to him, began working
10 with line-ups, and they looked at the victim's phone and
11 learned that the number -- One of the last numbers that
12 had been called had come from a Teddy Byers, so the police
13 were looking at Teddy Byers and Charvus Nesbitt as the two
14 main perpetrators. Some of the line-ups, the
15 identifications from the actual persons in the trailer
16 were not that strong. The police picked up Mr. Byers,
17 began questioning him hard. He then essentially started
18 telling the police about setting up this deal, saying that
19 Mr. Nesbitt, his brother and Hazel Stoudemire his cousin
20 were the ones that went into the trailer. So the police
21 were focusing on that part of it. When Mr. Stoudemire
22 actually came to -- came to the police station, his family
23 brought him to the police station, he readily confessed to
24 his role in this. He, of course, denied being the
25 shooter, told pretty much the story I've told the Court.

21

1 We've met with Mr. Stoudemire and he was consistent with
2 us in his past statements and readily pointed the finger
3 at Charvus Nesbitt. We met with Johnathon Petty, the
4 gentleman who stood outside. He didn't give a statement
5 initially. He actually fled to Florida and was brought
6 back and questioned by us. He says it was Charvus Nesbitt
7 that fired the -- fired the weapon. Teddy Byers decided
8 to cooperate, initially not wanting to admit he set up a
9 drug deal that was supposed to be armed robbery. Finally
10 admitted that the shooter was his brother. So we've got
11 the three co-defendants all pointing the finger at the
12 defendant. There was a lady friend of Mr. Petty's who was
13 at the house where these -- where the men had gone to --
14 was actually the defendant's brother's house, she came
15 over and heard the defendants talking, heard Mr. Nesbitt
16 say he didn't mean to shoot the boy, basically heard an
17 admission by him that he had fired the gun. The police in
18 speaking to Mr. Nesbitt, he first denied it to the police.
19 They served the warrant on him, put him in the jail, and
20 then they learned that he wanted to speak to them. So
21 they went over to talk to him and he said I can take you
22 to the gun, wouldn't really admit that he fired it, but
23 admitted that the gun went off and actually went with the
24 police to try to find the gun that had been thrown out.
25 So all the evidence points to this defendant as being the

1 shooter. And that is how I would've proceeded at trial.
2 Those are the facts of the case. I'll have some more to
3 speak up to family in a minute.

4 The Court - Thank you. Now, Mr. Nesbitt, did
5 you hear what the Solicitor just went over with me?

6 Mr. Nesbitt - Yes, sir.

7 The Court - Is that the information that you and
8 your lawyer have reviewed in this case?

9 Mr. Nesbitt - Yes, sir.

10 The Court - Based on your review of that
11 evidence, it appears that you have made a decision to
12 plead no contest. Is that correct?

13 Mr. Nesbitt - Yes, sir.

14 The Court - So that again tells me that after a
15 review of that evidence, it's your belief that if that
16 evidence were presented to a jury during a trial, that it
17 would more than likely result in a conviction in this
18 matter, and that has led you to the decision to plead no
19 contest given the negotiated sentence. Have I corrected
20 stated your position?

21 Mr. Nesbitt - Sir?

22 The Court - Now, have you told me the truth
23 today, Mr. Nesbitt?

24 Mr. Nesbitt - Yes, sir.

25 The Court - Did anyone tell you how to respond

1 to my questions?

2 Mr. Nesbitt - No, sir.

3 The Court - So that means the responses I have
4 received to my questions were your own. Is that right?

5 Mr. Nesbitt - Yes, sir.

6 The Court - Is there any part of what you and I
7 have discussed that you'd like to reconsider or go back
8 over at this time?

9 Mr. Nesbitt - I just want to say no contents
10 (sic) to the facts that he's present with. No, sir.
11 That's it.

12 The Court - Well, you've already pled no contest
13 ---

14 Mr. Nesbitt - Okay.

15 The Court - --- and I'm in the process of being
16 sure that that's how you wish you plead. And is that how
17 you wish to plead?

18 Mr. Nesbitt - Yes, sir.

19 The Court - All right. Then it's my finding
20 that the plea has been freely and voluntarily given, the
21 defendant is aware of the charges, he's aware of the
22 potential penalties, and I'm not sure I went over with you
23 the armed robbery penalty, but it's a minimum of ten years
24 up to thirty years. Do you understand that, sir?

25 Mr. Nesbitt - Yes, sir.

1 Mr. Bulsa - And, just for the record, Your
2 Honor, that's attempted armed robbery, which ---

3 The Court - Oh, I'm sorry, it's attempted ---

4 Mr. Bulsa - --- and would be up to twenty years.

5 The Court - Up to twenty years. I'm sorry. All
6 right, so do you understand that Mr. Nesbitt?

7 Mr. Nesbitt - Yes, sir.

8 The Court - All right, now, it's my finding that
9 he's had the services of an attorney, that while he is not
10 necessarily happy with where he finds himself, he is
11 pleased with his attorney's efforts and what his attorney
12 has done, and it's my finding that the plea should be
13 accepted as freely and voluntarily given. So at this
14 point in time I'll allow Mr. Smith to discuss this matter
15 with the Court.

16 Mr. Smith - Thank you, Your Honor. May it
17 please the Court.

18 The Court - Yes, sir.

19 Mr. Smith - Mr. Nesbitt, as he's indicated, is
20 twenty-three years old. He has his mom here, his fiance
21 and other extended family members. His grandmother is
22 here and his grand-daddy's here and I'll ask them to stand
23 up right now.

24 The Court - If you would, please, stand, family
25 members for Mr. Nesbitt. Stand, please.

25

1 (Family members comply)

2 Mr. Smith - Thank you, Your Honor.

3 The Court - Okay. Thank you very much. You can
4 be seated.

5 Mr. Smith - Your Honor, this is a tragic
6 situation, because it's three members of family who was
7 involved in this situation. If we had gone to trial, Your
8 Honor, we believe that one of the witnesses in the house
9 would've pointed out that the other fellow named Hazel
10 Stoudemire was actually the shooter in the case, but then
11 the forensics was all confused, because the gun that was
12 not found was the gun that was actually had the ballistics
13 in tune with it and the gun that was actually dropped was
14 not fired, so looking at all the facts and circumstances
15 from that standpoint, Mr. -- I recommended to my client
16 here that he plead no contest to the offenses that are
17 charged in this case. And I did go over with him that the
18 hand of one is the hand of all, because his brother Teddy
19 Byers was on trial for the same offense today as well, and
20 whatever testimony he would've given -- or convictions --
21 They would've been fed out of the same spoon. That's what
22 I told him.

23 The Court - I understand.

24 Mr. Smith - So now he is -- He's a very educated
25 young man. He made some bad decisions in life. First of

1 all he made bad decisions in trusting his brother, because
2 here he's been a law-abiding citizen and he got involved
3 with his half brother who -- who set up this drug deal,
4 this cockamamie scheme to go rob somebody, and Mr. Nesbitt
5 got caught up with it with the little cousin who was a
6 teenager and according to Mr. Nesbitt, he was going to try
7 to stop it, but it didn't stop and it got out of hand and
8 somebody ended up losing their life, so he's sorry about
9 that family member over there that can't walk home and
10 can't be a part of their family anymore, and nobody wants
11 to lose a family member, so he understands that and he's
12 very compassionate toward the lady who was shot as well,
13 and he's sorry that that situation happened, but -- And
14 he's told me he -- He's very remorseful. So, Your Honor,
15 was ask that if the Court is so inclined to follow the
16 recommendation or the negotiations of the State and Mr.
17 Nesbitt and give him that sentence, Your Honor. I'm sorry
18 that we have another young man who is in a tragic -- two
19 young men, one that's passed away and this one right here
20 who's losing part of his life as a result of this crime.

21 The Court - Mr. Nesbitt, your opportunity to
22 speak to the Court. Anything you want to tell me?

23 Mr. Nesbitt - No, sir.

24 The Court - All right, Mr. Bulsa, prior record
25 for this individual?

27

1 Mr. Bulsa - Your Honor, he just has a
2 trespassing from March of 2010.

3 The Court - All right.

4 Mr. Bulsa - If I may put one other fact on the
5 record, I ---

6 The Court - Yes, sir.

7 Mr. Bulsa - Mr. -- What Mr. Smith had eluded to
8 it -- I meant to state it in my recitation. There were
9 forensics done on the shell casings as well as the rounds
10 recovered from the scene and the body. Eight bullets were
11 recovered -- Eight fired bullets were recovered. They
12 were determined to be all fired by the same weapon. Eight
13 shell casings were found. Seven of the eight were fired
14 by the same weapon. The other one was inconclusive. So -
15 - And the pistol found at the scene that was dropped did
16 not fire any of those. So we're convinced that the man
17 who fled the residence with the gun was the shooter and
18 that was the gun that was not recovered.

19 The Court - All right.

20 Mr. Bulsa - I don't know if any family members
21 want to speak.

22 The Court - Any of the victim's family wish to
23 be heard at this time, I'll be glad to hear from you.
24 Anyone wish to speak?

25 (No response)

1 Mr. Bulsa - For the record, we did discuss this
2 with the family in detail and they are in agreement with
3 the negotiations.

4 The Court - Thank you. Is there a specific time
5 credit that he's claiming?

6 Mr. Smith - Yes, sir, Your Honor. I think he's
7 been in the county jail for over a year I think.

8 The Court - Do you know what the date of his
9 incarceration was, date of arrest?

10 Mr. Bulsa - February the -- Excuse me, December
11 the 10th, ---

12 The Court - Of ---

13 Mr. Bulsa - --- 2010.

14 The Court - Okay. Mr. Nesbitt, it's the Order
15 of this Court on the attempted murder that you be confined
16 to the State Department of Corrections for a period of
17 thirty years. On the attempted -- On the armed robbery it
18 is twenty years and on the murder forty years, so I've
19 accepted the negotiated sentence. I've run those
20 concurrently, given credit for time since December 10th of
21 2010. Good luck to you, sir.

22 Mr. Smith - Thank you, Your Honor.

23 Mr. Bulsa - Thank you, Your Honor.

24 (Mr. Nesbitt exits the courtroom)

25 Mr. Smith - Your Honor, may I be excused now.

1 Wait one second.

2 Mr. Bulsa - There's a second count, pistol
3 count.

4 The Court - Beg your pardon?

5 Mr. Bulsa - The pistol count.

6 The Court - I didn't see that one in there.

7 Deputy Clerk - There's another sentencing sheet
8 under that one.

9 The Court - Oh, I see it.

10 Mr. Bulsa - That's up to five years, Your Honor.

11 The Court - You want him to come back in to get
12 that? I'll run it concurrent.

13 Mr. Smith - Yes, sir. Thank you.

14 The Court - It won't affect the sentence.

15 Mr. Smith - Thank you, Your Honor.

16 The Court - All right, thank you very much.

17 Mr. Bulsa - Thank you, Your Honor.

18 The Court - It is five years, run concurrent.

19 (End of Transcript)

20

21

22

23

24

25

Certificate

I, Shirley G. Broom, the undersigned Court Reporter, hereby certify that the foregoing 30 pages constitute a true record of proceedings taken in the case of State of South Carolina vs. Charvus Tarrel Nesbitt, as taken by me at the time and place stated.

I do further certify that the persons were present as stated, that I am not of Counsel for, related to, or in the employee of any of the parties to this action and that I have no interest whatsoever in the outcome of this case.

This the 31st day of Oct., 2012.



Shirley G. Broom
Circuit Court Reporter
Sixteenth Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE GENERAL SESSIONS COURT
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
The STATE of SOUTH CAROLINA,	)	
Vs.	)	MOTION FOR RECONSIDERATION
CHARVUS TARREL NESBITT,	)	AND/OR NEW TRIAL
	)	
Defendant.	)	Indictment Numbers:
	)	2011-GS-42-01414
	)	2011-GS-42-01414(A)
	)	2011-GS-42-01415
	)	2012-GS-42-00349
	)	

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SPARTANBURG COUNTY
2012 FEB 23 AM 11:42
M. HOPE BLACKLEY

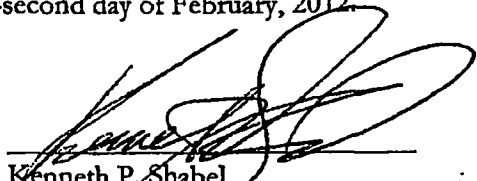
TO: THE HONORABLE ROGER L. COUCH, Circuit Court Judge
DERRICK B. BULSA, Assistant Solicitor for the Seventh Circuit Solicitor's Office

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through the undersigned attorney, hereby moves before the Court for a reconsideration of his sentence received on February 13, 2012 for the above-referenced indictments. The Defendant so moves based upon the following:

- (a) That, based on information and belief, the Court did not take into proper consideration the Defendant's lack of criminal record prior to his arrest on these charges;
- (b) That, based on information and belief, the Court did not take into proper consideration the significant criminal record of the co-defendants, who at the time of the Defendant's plea, still had charges pending;
- (c) That, based on information and belief and following the Defendant's plea, the state reduced all of the charges against the co-Defendants that, as a result, has them serving twenty-five fewer years than the Defendant;

- (d) That, based on information and belief, the Defendant, was unaware of separate plea negotiations with co-Defendants prior to agreeing to plea in these indictments and his knowledge of these plea negotiations would have materially affected his decision to plead in these indictments;
- (e) That, based on information and belief, the sentence is overly harsh and constitutes "cruel and unusual punishment";
- (f) That, based on information and belief, the plea colloquy was insufficient under the law of this state to ensure that the Defendant knew exactly what rights he was giving up by pleading guilty; and
- (g) That, based on information and belief, the Defendant did not knowingly and intelligently waive his right to a twenty-four hour waiting period between his guilty plea and his sentencing.

The Defendant so moves, this twenty-second day of February, 2012.



Kenneth P. Shabel
SC Bar #16136
Attorney for the Defendant
CAMPBELL & SHABEL, Attorneys at Law
104 North Daniel Morgan Avenue, Suite 201
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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE GENERAL SESSIONS COURT
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
The STATE of SOUTH CAROLINA,	)	AMENDED
	)	MOTION FOR RECONSIDERATION
Vs.	)	AND/OR NEW TRIAL
	)	
CHARVUS TARREL NESBITT,	)	Indictment Numbers:
	)	2011-GS-42-01414
Defendant.	)	2011-GS-42-01414(A)
	)	2011-GS-42-01415
	)	2012-GS-42-00349
	)	

TO: THE HONORABLE ROGER L. COUCH, Circuit Court Judge
DERRICK B. BULSA, Assistant Solicitor for the Seventh Circuit Solicitor's Office

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through the undersigned attorney, hereby moves before the Court for a reconsideration of his sentence received on February 13, 2012 for the above-referenced indictments. The Defendant so moves based upon the following:

- (a) That, based on information and belief and following the Defendant's plea, the State reduced all of the charges against the co-Defendants that, as a result, has them serving twenty-five fewer years than the Defendant, thus making his negotiated sentence unjust and unfair;
- (b) That, based on information and belief, the Defendant, was unaware of separate plea negotiations with co-Defendants prior to agreeing to plea in these indictments and his knowledge of these plea negotiations would have materially affected his decision to plead in these indictments;
- (c) That, based on information and belief, the plea colloquy was insufficient under the law of this state to ensure that the Defendant knew exactly what rights he was giving up by pleading guilty;

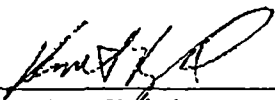
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- (d) That, based on information and belief, the Defendant did not knowingly and intelligently waive his right to a twenty-four hour waiting period between his guilty plea and his sentencing; and
- (e) That the Defendant was never questioned about his plea to one of his four charges and, based on information and belief, was not even present in the Courtroom for the discussion of that charge.

The Defendant so moves, this twenty-second day of February, 2012 and (as amended) this seventh day of March, 2012.


Kenneth P. Shabel
SC Bar #16136
Attorney for the Defendant
CAMPBELL & SHABEL, Attorneys at Law
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J. L. CRAWLEY

1 STATE OF SOUTH CAROLINA

2 COUNTY OF SPARTANBURG

3 COURT OF GENERAL SESSIONS

4 STATE OF SOUTH CAROLINA

5 PLAINTIFF,

6 vs.

7 CHARVUS NESBITT,

8 DEFENDANT

9 TRANSCRIPT

10 OF

11 RECORD

12 2011-GS-42-1414 - 1415

13 April 26th, 2012

14 Spartanburg, South Carolina

15 B E F O R E:

16 THE HONORABLE ROGER L. COUCH, Judge, and a jury.

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

18 DERRICK BULSA
19 DEPUTY SOLICITOR
20 Attorney for the State

21 KENNETH P. SHABEL
22 ESQ.
23 Attorney for the Defendant

24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

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INDEX

(There were no exhibits marked or testimony taken
during this hearing.)

P R O C E E D I N G S

1
2
3 THE COURT: All right. Mr. Shabel, I'll hear from you.

4 MR. SHABEL: May it please the court?

5 THE COURT: Yes, sir, it's your motion I believe for me
6 to reconsider a sentence.

7 MR. SHABEL: Yes, Your Honor.

8 I'm here with the unenviable task of asking you to
9 reconsider not only the sentence, but a negotiated sentence.

10 THE COURT: Uh-huh. (Affirmative).

11 MR. SHABEL: And I recognize and my client recognizes
12 this is a situation of be careful of what you wish for cause
13 you just might get it, but if I could have a moment---

14 THE COURT: Sure.

15 MR. SHABEL: ---to explain my position.

16 THE COURT: All right.

17 MR. SHABEL: On February 13th of 2012 Mr. Nesbitt was
18 before the Court on four different charges. All of them had
19 been indicted. All of them presented to the Grand Jury.

20 Indictment number one was 2012-349 for attempted armed
21 robbery. Indictment number two was a two prong indictment,
22 2011-1414. Prong one was for murder. Prong two was for
23 possession of a firearm during the commission of a violent
24 crime, and Indictment Number three, 2011-1415, was for
25 attempted murder. He was represented at that trial by

1 Mr. Fletcher Smith.

2 They came before Your Honor on that date,
3 February 13th of 2012, and as these indicated in the
4 transcript, which I presented to the Court, there was a
5 negotiated sentence of forty years as to all four charges,
6 and, as you carefully explained, if you decided, at the
7 conclusion of the presentation of the facts that my client,
8 that you were not going to accept the negotiated sentence,
9 my client does, would have a Constitutional right to
10 withdraw his plea because, as the Court is well aware,
11 negotiated sentences are treated far differently than
12 recommendations by the State.

13 As the transcript goes on, to reflect the Court's
14 memory, on Page 5 of the transcript, the Court goes over two
15 of the indictments. The first prong of the 2011-1414
16 indictment, the murder, and the 2011-1415 indictment for
17 attempted murder, the Court then goes over the Boyken
18 questions, the questions making sure that he understands he
19 has a right to trial on all issues, et cetera. The Court
20 hears from the State, and at the conclusion of the State's
21 presentation of what the facts are, I believe it's on Page
22 23 of the record, my client is asked about the 2012
23 indictment for attempted armed robbery and is advised of the
24 years and that sort of thing. The Court accepts the plea
25 and sentences him in accordance with the negotiated

1 sentence.

2 As evidenced by Page 28 of the transcript, Mr. Nesbitt
3 proceeds to enter the courtroom. Then on Page 29 of the
4 transcript it shows and it references the possession of a
5 firearm in the commission of a violent crime. My client has
6 left the courtroom, and is not brought back in to discuss
7 the ramifications of that particular charge. He's not
8 advised by the Court that it can carry up to a certain
9 number of years, but the Court does, in fact, sentence him
10 to five years indicating it doesn't affect the sentence.

11 My argument, Your Honor, is this. Under Boyken, the
12 possession of a firearm charge, the second prong of the
13 2011-1414 indictment, is an invalid plea. He has not
14 knowingly, willfully, and freely given up his Constitutional
15 rights on that charge. Therefore, that plea should be
16 withdrawn.

17 But more importantly, this is a negotiated sentence.
18 It's a package deal, and if one charge, one plea is invalid,
19 my argument is it invalidates the entire plea.

20 I have two cases that I would like to submit to the
21 Court for its consideration.

22 If I may approach?

23 THE COURT: You may.

24 MR. SHABEL: And I will acknowledge that they are not
25 directly on point, but I do take the position that they are

1 in support of my argument today.

2 The first case, Your Honor, is State versus Thrift, 440
3 S.E.2d Reporter 341, and I'm quoting from Page 7 on my
4 hand-out about half-way down.

5 THE COURT: Which one?

6 MR. SHABEL: State v. Thrift.

7 THE COURT: I'm there.

8 MR. SHABEL: Page 7, about a third of the way down,
9 where it says Page 349, which I think is the reporter page
10 number, today we underline the requirement of disclosure to
11 the Court of all aspects of the plea agreement, and we
12 specifically add the requirement that such disclosure must
13 be made on the record, and I also have presented to the
14 Court Reid v. Becka, 511 S.E.2d Reporter 396, which is a
15 Court of Appeals case from 1999, and I'm referring
16 specifically, for purposes of this argument, to Page 6,
17 two-thirds of the way down.

18 A plea agreement is only an offer until the defendant
19 enters a Court approved guilty plea. Defendant accepts the
20 offer by pleading guilty. Thus, until formal acceptance of
21 a plea by the Court has occurred, the plea binds no one, not
22 the defendant, the State, or a Court. Citations omitted for
23 purposes of this argument.

24 Your Honor, I would submit that because the plea for
25 the possession of the firearm, the second prong of that

1 indictment is invalid, and given the nature that this is a
2 negotiated sentence and negotiated package deal, it negates
3 the entire plea agreement, which gives my client the right
4 to plead guilty or for a trial. We, therefore, respectfully
5 request the Court vacate the plea, and allow this case to go
6 forward.

7 THE COURT: Is he aware that the potential sentence
8 could be life?

9 MR. SHABEL: Your Honor, my client is very aware. I've
10 explained to him, on several occasions, both in writing and
11 in face-to-face, that he could be facing life in prison and
12 I'll be, in all candor, Your Honor, he's indicated to me
13 he's already got forty.

14 THE COURT: Forty's not life.

15 MR. SHABEL: Forty is not life, but it's close to it.

16 THE COURT: Mr. BULSA.

17 SOLICITOR BULSA: And forty is what he asked for, Your
18 Honor. There were extensive plea negotiations between the
19 State and his attorney. They were clearly regarding the
20 murder charge because that was the greatest offense.

21 Your Honor, he came to this Court and accepted that
22 forty years and now he's trying to back, back out of it, and
23 Your Honor, the State's argument is that the plea is valid.
24 The five year pistol charge was incorporated in the murder
25 indictment.

1 Your Honor, he was clearly aware of that charge, and
2 aware of what he was pleading to. The sentence is merely
3 five years. It does not have any impact on the sentence of
4 the Court. It's -- the State would ask that the Court deny
5 this motion and let this sentence be valid.

6 Your Honor, the family is expected closure at least
7 from this stage of the proceedings. We understood that
8 there was probably gonna be some sort of appeal based on the
9 defendant's nature and the seriousness of the charge.

10 But, Your Honor, the other codefendants have also pled
11 guilty and they deserve some closure as well, and by
12 reopening this case they're subject to being called back to
13 Court as well for possible testimony.

14 The -- I was upset, I don't mind telling the Court,
15 when I got this motion. I'm a little bit perplexed as to
16 why we're even here. This seems like a ludicrous argument
17 and it's merely an attempt by Mr. Nesbitt to undo what he
18 wished he hadn't done in the first place.

19 Your Honor, he clearly understood the ramifications.
20 He could of asked for a jury trial. He could of pled
21 straight up. He could of asked for a recommendation of the
22 State. He chose to request forty years, and we agreed to go
23 along with that. We ask the Court to deny this motion and
24 let that forty years stand.

25 THE COURT: Let me see if I understand your position,

1 Mr. Shabel.

2 MR. SHABEL: Yes, Your Honor.

3 THE COURT: What does he say the deal was?

4 MR. SHABEL: I'm not denying, Your Honor, that the deal
5 was forty years on all charges.

6 THE COURT: On all charges?

7 MR. SHABEL: On all four. But the question now we
8 have---

9 THE COURT: And the sentence as though, on the gun
10 charge, did not affect the forty years.

11 MR. SHABEL: It did not. It was part of the forty
12 years. We can sit here and debate ethically, morally,
13 logistically whether that meant he would of gotten 35 on
14 everything else and five on a gun, whether he'd of gotten 39
15 on everything else, and one on the gun. We can sit here for
16 hours. Nobody knows the answer to that, but the argument
17 was forty years, four charges.

18 SOLICITOR BULSA: Forty years for the murder charge,
19 Your Honor.

20 THE COURT: I couldn't sentence him to forty on the gun
21 charge.

22 MR. SHABEL: No, you couldn't. You did a package deal
23 on all four, and I -- and, yes, the murder charge is the
24 big---

25 THE COURT: That's the only one that carries that much.

1 MR. SHABEL: It's the only one that carries that. It's
2 the biggest one of the bunch, but it doesn't negate the fact
3 that there were three other charges as a part of the
4 negotiated sentence.

5 THE COURT: And he understood that?

6 MR. SHABEL: And he understood that.

7 THE COURT: But he's not denying that he understood
8 that?

9 MR. SHABEL: He's not denying that he understood that
10 there was, that that was the negotiation and that was the
11 offer.

12 THE COURT: Maybe I don't understand your position
13 then, and it was addressed in the, in the transcript, the
14 fact that he was not present. Was offered -- he was -- the
15 attorney was offered a chance to bring him into court.

16 MR. SHABEL: And, Your Honor, I'm gonna read again
17 directly from Page 29 of the transcript. The Court says, at
18 the beginning of Line 1, you want him to come back to get
19 into that. I'll run it concurrent.

20 Yes, sir, thank you, was Mr. Smith's response.

21 There's no record to indicate that Mr. Smith did or did
22 not waive his presence for that.

23 THE COURT: Well, he was offered an opportunity to come
24 back before the Court.

25 Isn't that right, Mr. Shabel?

1 Am I missing something?

2 MR. SHABEL: He was, he was offered the opportunity to
3 come back into court. Clear from Line 11 of the transcript.
4 What's not clear from the, from the transcript is whether or
5 not that offer was accepted or rejected.

6 THE COURT: Well, I would suspect if he didn't come
7 back he didn't decide to come back.

8 MR. SHABEL: But if the record doesn't show, how is
9 that fair to my client's Constitutional rights?

10 THE COURT: There's no record that he came back to the
11 court and asked to be heard, and the Court denied him that
12 right either.

13 MR. SHABEL: That is correct, Your Honor.

14 THE COURT: Okay. Anything further?

15 MR. SHABEL: Not in this hearing, Your Honor. Thank
16 you.

17 THE COURT: Mr. Bulsa.

18 SOLICITOR BULSA: No, sir.

19 THE COURT: I'll take it under advisement. Thank you.

20 MR. SHABEL: Thank you, Your Honor.

21

22 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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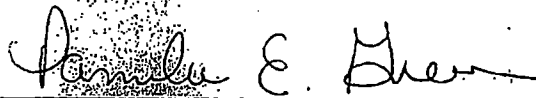
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 26th day of April, 2012.

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

July 23rd, 2012



PAMELA E. GREEN, Court Reporter

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS
FOR THE SEVENTH JUDICIAL CIRCUIT

State of South Carolina,

vs.

Charvius Tarrel Nesbitt,

Defendant.

ORDER

Case Numbers: 2011-GS-42-1414
2011-GS-42-1415
2012-GS-42-0349

FILED
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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

This matter came before the Court on the Defendant's Motion to Reconsider his sentence received February 13, 2012. The State of South Carolina was represented by Derrick Bulsa and the Defendant represented by Fletcher Smith at the plea hearing. The Honorable Roger L. Couch sentenced Defendant to forty (40) years for murder, thirty (30) years for attempted murder, twenty (20) years for attempted armed robbery, and five (5) years for possessing a weapon during the commission of a violent crime. The Court ran the sentences for attempted murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime concurrent with the forty (40) year sentence for murder.

On February 23, 2012, Defendant filed a Motion to Reconsider his sentence. A hearing was held in Spartanburg, South Carolina on April 26, 2012. The State was represented by Derrick Bulsa and Defendant was represented by Kenneth Shabel. Having considered the Motion and oral arguments of both parties, the Court makes the following findings:

1. The Defendant was removed from the Courtroom prior to the discussion of the charge of possession of a weapon during the commission of a violent crime. Tr. at 28:24.
2. The Court overlooked the charge of possession of a weapon during the commission of a violent crime and was reminded by the Solicitor following the Defendant's exit of the Courtroom. Tr. at 29:2-9.
3. The Defendant's attorney at the plea, Fletcher Smith, did not waive the Defendant's presence with regards to the discussion of that particular charge. Tr. at 29:11-13.
4. The Defendant was never questioned by the Court about his plea to the offense of possession of a weapon during the commission of a violent crime.
5. The plea deal that Defendant agreed to on the record was forty (40) years for murder, attempted

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murder, and attempted armed robbery.

Pursuant to South Carolina case law, "all plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement." *State v. Thrift*, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994). In other words, a plea agreement is made up of only that which a defendant agrees to on the record, regardless of communications prior to the hearing. In the case at bar, the Court only discussed three charges with the Defendant on the record- murder, attempted murder, and attempted armed robbery. The plea transcript indicates that the Court inquired as to whether the Defendant's plea under *North Carolina v. Alford* was on these particular charges. (Tr. at 9:10-11). The Defendant answered the Court in the affirmative. (Tr. at 9:12). The Court did not, however, question the Defendant about his plea to the offense of possession of a weapon during the commission of a violent crime. Consequently, the forty (40) year plea agreement was made up of only the murder, attempted murder, and attempted armed robbery charges. See *Thrift*, 312 S.C. at 296, 440 S.E.2d at 349.

Based on the foregoing, the Court hereby invalidates the five (5) year sentence that was imposed on the Defendant for the offense of possession of a weapon during the commission of a violent crime. Accordingly, that charge, Count Two of indictment number 2011-GS-42-1414, was not a part of the negotiated plea and is hereby reopened and subject to prosecution by the State. This decision has no bearing on the validity of the plea given by the Defendant on the other three charges. See *Phillips v. State*, 281 S.C. 41, 314 S.E.2d 313 (1984) (the invalidation of a defendant's guilty plea on one charge does not affect the validity of a guilty plea for a different charge taken at the same hearing).

Therefore, Defendant's Motion to Reconsider is granted in that the five (5) year sentence issued by this Court on the charge of possession of a weapon during the commission of a violent crime is hereby invalidated. The sentences imposed by the Court on the charges of murder, attempted murder, and attempted armed robbery are hereby affirmed.

IT IS SO ORDERED.

May 24, 2012
Spartanburg, South Carolina

FILED
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SPARTANBURG COUNTY
2012 MAY 24 PM 4:12
M. HOPE BLACKLEY


Roger L. Couch, Presiding Judge
Seventh Judicial Circuit

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court

The Honorable Roger L. Couch, Circuit Court Judge

Case Nos. 2011-GS-42-1414, 2011-GS-42-1415, and 2012-GS-42-0349

The State,

Respondent,

vs.

Charvus Tarrell Nesbitt,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ONLY SETTING ASIDE ONE OF THE APPELLANT'S FOUR GUILTY PLEAS WHEN THE NEGOTIATED PLEA WAS NOT FULLY AND PROPERLY PLACED ON THE RECORD?

STATEMENT OF THE CASE

On February 13, 2012, Charvus Tarrel Nesbitt (hereinafter "Appellant") came before the Court to enter into a plea on four charges: attempted armed robbery, murder, possession of a firearm during a violent crime, and attempted murder. He was prepared to plead in accordance with the procedure set forth in the Supreme Court case of North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

Prior to the call of the case, the State and Appellant reached an oral agreement to a negotiated sentence of forty years on all four charges. The Assistant Solicitor announced this agreement to the Court in the first moments of the hearing, referencing the four charges as part of the agreement.

During Appellant's plea colloquy, the Court went over three of the four charges in detail. The Court ensured Appellant knew of the maximum penalties on these three charges. The Court then announced it was accepting the negotiated sentence of forty years and allowed the Appellant to leave the Courtroom.

However, the Court did not discuss the charge of possession of a firearm during a violent crime with Appellant. It was only after Appellant left the Courtroom did the Court put his entry of guilt on the record.

Appellant filed a Motion to Reconsider his sentence and to set aside his plea. He subsequently filed an Amended Motion after receiving the Transcript from the plea hearing. Although five points were addressed by the Motion, only the fifth point was addressed at the Motion hearing.

At a hearing on April 26, 2012 on that Motion, the Court reviewed the transcript from the plea hearing and took oral argument from Appellant's attorney and the State Assistant Solicitor. The Court issued its Order on May 24, 2012 granting (in part) Appellant's motion. The Court threw out the sentence on the weapon charge. The Court denied the motion as to the remaining three charges, leaving the forty-year sentence intact.

Appellant filed his Notice of Appeal on June 7, 2012.

STANDARD OF REVIEW

When faced with appeals from criminal convictions or guilty pleas, the appellate courts may only review errors in law. State v. Kirton, 381 S.C. 7, 22, 671 S.E.2d 107, 114 (Ct. App. 2008) (citations omitted). The discretion to modify, change or set aside a sentence rests solely with the sentencing judge. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). Appellate Courts may only overturn, this discretion by a finding of abuse of discretion. State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106-107 (1998). Such abuse occurs when the Court's conclusions are controlled by an error of law or lack evidentiary support. State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010).

ARGUMENT

I. BECAUSE THE NEGOTIATED PLEA NEVER BECAME ENFORCEABLE, THE TRIAL COURT ABUSED ITS DISCRETION BY NOT SETTING ASIDE APPELLANT'S FULL AND COMPLETE PLEA AND SENTENCE.

The Circuit Court never heard the complete plea agreement between the State and Appellant; therefore, it cannot enforce any portion of that agreement. It is a fundamental principle of Constitutional Law that a guilty plea must be voluntary. When he pleads guilty, a Defendant must know the specific rights he is waiving by pleading guilty, including the right against self-incrimination, the right to a jury trial, and the right to confront witnesses who accuse him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

To ensure that a Defendant's plea is truly voluntary, the Court has a duty to ensure that the individual Defendant has a complete understanding of the consequences of his plea and the charges to which he is pleading. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citations omitted). Courts must examine the Defendant specifically about the punishment that the Court could impose upon him. Id. at 434-435, 405 S.E.2d at 392.

The Court must have a complete record showing the Defendant's plea is voluntary. State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). In South Carolina, "all plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement." State v. Thrift, 312 S.C.

282, 295, 440 S.E.2d 341, 348 (1994). As a result, no one – not the State, not the Court, not the Defendant – can enforce a plea agreement based on terms that are not on the record. Id. at 296, 440 S.E.2d at 349.

A Defendant has no constitutional right to have a Court accept their guilty plea. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed. 2d 427 (1971). Courts have the authority under the Constitution to either accept a plea or reject it. Id. However, the United States Supreme Court has defined the moment when a plea becomes a Constitutionally protected right:

A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.

Mabry v. Johnson, 467 U.S. 504, 507, 104 S. Ct. 2543, 2546, 81 L.E.2d 437, 442 (1984).

South Carolina has expounded upon the U.S. Supreme Court's definition. As this State's Courts have explained, it is very much akin to contract law. A plea agreement is the equivalent of an "offer" that the Defendant accepts by pleading guilty. Reed v. Becka, 333 S.C. 676, 689, 511 S.E.2d 396, 402 (Ct. App. 1999) (citation omitted). Therefore, until the Court formally accepts the plea agreement, the agreement "binds no one, not the defendant, the State, or the court." Id. Although similar to contract law, plea agreements "must be more stringent than a contract because the rights involved are fundamental and constitutionally based."

State v. Thrift, 312 S.C. 282, 293, 440 S.E.2d 341, 347(1994) (citing United States v. Ringling, 988 F.2d 504 (4th Cir. 1993)). Furthermore, the government must be “held to a higher degree or responsibility than the defendant for imprecisions or ambiguities.” Id.

In looking at Appellant’s plea colloquy, it is clear that the Court did properly discuss three of the four charges. The Court advised him of the indictment for murder and explained that the murder charge carried a sentence of thirty years to life.¹ R. p. 15, lines 16-18. Appellant testified he understood that charge and the potential sentence involved. R. p. 15, line 21- p. 16, line 1. The Court advised him of the indictment for attempted murder and explained that this charged carried a maximum sentence of thirty years.² R. p. 15, lines 18-21. Again, Appellant testified he understood that charge and the potential sentence involved. R. p. 15, lines 18-21. Finally, after the Court went over numerous rights Appellant was waiving and after the Court heard the facts behind the charges, the Court advised Appellant of the indictment for attempted armed robbery and explained that this charge had a sentencing range of up to twenty years.³ R. p. 33, line 22-p. 34, line 7.

The record also indicates that as to these three charges Appellant gave up certain rights. Included among those rights were his right to trial by jury,

¹ S.C. Code Ann. § 16-3-20(A).

² S.C. Code Ann. § 16-3-29.

³ S.C. Code Ann. § 16-11-330(B).

subpoena witnesses, confront witnesses, present defenses, and remain silent. R p. 35, line 1-p. 36, line 14.

The Court specifically, and correctly, advised Appellant that because this was a plea on a negotiated sentence, the Court could accept or reject the negotiated sentence. R. p. 36, lines 6-12. The Court also informed Appellant that if the Court decides to reject the negotiated sentence, Appellant could withdraw his plea. R. p. 36, lines 16-20. However, the Court accepted the negotiated sentence.⁴ R. p. 38, lines 14-20. Appellant left the Courtroom at this time. R. p. 38, line 24.

At this point, the Assistant Solicitor notified the Court of the weapon charge. R. p. 39, line 2-5. The Court acknowledged not seeing the sentencing sheet for that charge. R. p. 39, lines 6-9. The Court did not bring Appellant back into the Courtroom, but announced the sentence to the weapon charge would be concurrent to the other charges. R. p. 39, lines 11-12. The Court did not explain the charge to Appellant and did not explain the potential sentence.⁵

On hearing Appellant's Motion for Reconsideration, the Court acknowledged that Appellant's attorney "did not waive [his] presence with regards to the discussion of that particular charge." R. p. 5, lines 30-31. The Court further acknowledged that it did not question Appellant about his plea to the

⁴ The Court sentenced Appellant to forty years on the murder indictment. R. p. 38, line 18. The other sentences – twenty years on the attempted armed robbery and thirty years on the attempted murder – ran concurrent with the murder sentence. R. p. 38, line 14-21.

weapons charge. R. p. 5, lines 31-32. However, The Court below found that because the Court never questioned Appellant about the weapons charge, it was therefore not of the plea agreement. R. p. 6, lines 9-12).

However, in finding that the weapons charge was ultimately not part of the negotiated plea, R. p. 6, lines 15-16., the Court misconstrued the Supreme Court's ruling in Thrift. The Ruling in Thrift mandates full disclosure of plea agreements and ensures that no one can enforce them unless it is completely within the record. In this case, the record was clear as to what Appellant's full and complete plea agreement was. It was four charges, not three. Once one portion of the complete plea agreement became invalid, there was no plea agreement to enforce. The Court lost its ability to enforce the four-term plea agreement, and it had no jurisdiction to enforce a three-term plea agreement.

In its decision, the Court relied upon Phillips v. State, 281 S.C. 41, 314 S.E.2d 313 (1984). R. p. 6, lines 16-19). In Phillips, the Defendant pled guilty to two charges: assault and battery of a high and aggravated nature ("ABHAN") and robbery. Id. at 42, 314 S.E.2d at 313. He was initially indicted for kidnapping instead of ABHAN, but in plea negotiations the charge was reduced to ABHAN. Id. at 42, 314 S.E.2d at 313-314. He received consecutive sentences on the two pleas – five years on the ABHAN and ten on the robbery. Id. at 42, 314 S.E.2d at 313. The Court threw out the ABHAN plea (but not the robbery plea) in the

5 Convictions for Possession of a Weapon during the commission of a violent crime is punishable by up to five years in prison "in addition to the punishment provided for the principal crime." S.C. Code Ann. § 16-23-490.

Defendant's Post-Conviction Relief case because the ABHAN charge never went before the grand jury. Id. at 42-43, 314 S.E.2d at 314.

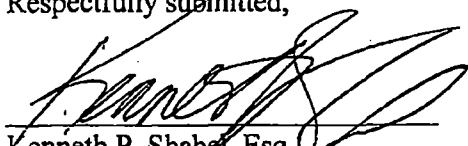
The nature of the sentences given in Phillips makes that case easily distinguishable from Appellant's case. The pleas in Phillips led to two separate, consecutive sentences. Appellant had a four-term plea agreement to forty-years, without any separate allocation as to any one individual charge. It was simple for the Supreme Court to differentiate between the two charges because one sentence stood separate from the other in all facets. For Appellant, although he was set to receive a forty year negotiated sentence, there was no evidence on the record what portion of the forty years was for which charge. There was no evidence on the record that any of the charges were to run concurrent or consecutive as part of the plea agreement. There was no allocation as to how many years were associated with each charge.

Thrift requires full disclosure of all terms of a plea agreement. As such, the higher degree of responsibility for the imprecisions and ambiguities of Appellant's plea agreement rests with the State, not with Appellant. The Court cannot substitute its own opinions as to the nature of the agreement when the record does not fully explain the terms. When one of the four charges of Appellant's negotiated plea became unenforceable, the Court could not enforce any portion of the negotiated plea unless the record was clear as to how the negotiated plea actually divided the charges.

CONCLUSION

For the above stated reasons and on the grounds stated, Appellant respectfully requests that the Court reverse the decision of the trial court and grant Appellant's Motion for Reconsideration of his sentence, throwing out the entire sentence for failure to comply with the negotiated plea agreement.

Respectfully submitted,



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May 1, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court

The Honorable Roger L. Couch, Circuit Court Judge

Case Nos. 2011-GS-42-1414, 2011-GS-42-1415, and 2012-GS-42-0349

The State,

Respondent,

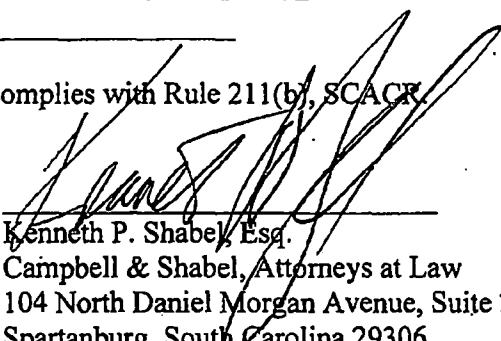
vs.

Charvus Tarrell Nesbitt,

Appellant.

CERTIFICATE OF COMPLIANCE

I certify that this Final Brief complies with Rule 211(b), SCACR.


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court Of General Sessions

The Honorable Roger L. Couch, Circuit Court Judge

Case Nos. 2011-GS-42-1414; 2011-GS-42-1415; 2012-GS-42-0349

The State

Respondent,

vs.

Charvus Tarrell Nesbitt,

Appellant,

PROOF OF SERVICE

I certified that I have served the Final Brief of Appellant, the Record on Appeal, and the Certificate of Compliance by depositing a copy of these in the United States Mail, postage prepaid, on the State of South Carolina, addressed to the Respondent's attorney of record, a copy of the same to:

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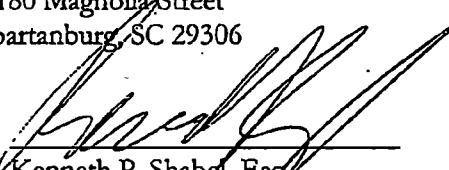
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2012-212222

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ABUSE ITS DISCRETION IN ONLY SETTING ASIDE ONE OF THE APPELLANT'S FOUR GUILTY PLEAS WHEN THE NEGOTIATED PLEA WAS NOT FULLY AND PROPERLY PLACED ON THE RECORD?

COUNTER STATEMENT OF ISSUE ON APPEAL

Did trial court properly refuse to vacate Appellant's convictions and sentences for murder, attempted murder and attempted armed robbery that were entered pursuant to an *Alford* plea and negotiated sentence, after vacating his plea to a weapons charge entered as part of the same deal, because (1) there was no evidence in the record that he did not voluntarily, knowingly and intelligently enter the remaining pleas; (2) the State had not breached the negotiated sentence; (3) prior to filing the motion to vacate, Appellant had received the agreed upon forty year sentence and he only lost that agreement as the result of his own action in filing the motion for reconsideration or new trial on the weapons charge; and, (4) in the absence of evidence showing ineffectiveness of plea counsel that is preserved for appellate review, any claim that the remaining pleas were involuntary is only properly heard in Post-Conviction Relief?

STATEMENT OF THE CASE

Charvus Tarrel Nesbitt (Appellant) is currently incarcerated in the Perry Correctional Institution, of the South Carolina Department of Corrections, as the result of his Spartanburg County murder conviction and life sentence. The Spartanburg County Grand Jury rendered three indictments on March 25, 2011, charging Appellant with one count of murder and one count of possession of a weapon during the commission of a violent crime (11-GS-42-1414); attempted murder (11-GS-42-1415); and armed robbery (11-GS-42-0349). **R. pp. 1-4.** Initially Fletcher N. Smith, Esquire, represented Appellant on these charges. Deputy Seventh Circuit Solicitor Derrick B. Balsa prosecuted the case.

Counsel successfully plea bargained for a negotiated sentence of forty years imprisonment on all of the charges against Appellant; and Appellant appeared before the Honorable Roger L. Couch on February 23, 2012, to enter a guilty plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), to these charges. The Deputy Solicitor called these four charges and announced the negotiated sentence. **R. p. 14, lines 3-11.** Mr. Smith also confirmed the negotiated sentence on Appellant's behalf and explained that it was an *Alford* plea. Judge Couch then had a colloquy with Appellant and Mr. Smith consistent with *Boykin v. Alabama*, 395 U.S. 238 (1969) and he accepted Appellant's plea as to all charges, except for the count of possession of a weapon during the commission of a violent crime in 11-GS-42-1414. **R. p. 14, line 12- p. 38, line 3.**

Judge Couch announced that he was accepting the negotiated sentence and he sentenced Appellant to forty years imprisonment for murder, with concurrent sentences of thirty years for

attempted murder and twenty years for attempted armed robbery. **R. p. 38, lines 14 - 21.**¹ After Appellant had left the courtroom, the Deputy Solicitor brought to Judge Couch's attention that he had not addressed the weapons charge. Judge Couch asked Mr. Smith if counsel wanted Appellant brought back in to receive a five year concurrent sentence. Counsel replied, "Yes, sir. Thank you." Judge Couch then imposed a concurrent five year sentence. **R. p. 38, line 24- p. 39, line 18.**

However, Appellant was apparently not brought back into the courtroom for further proceedings. Instead, he filed a February 23, 2012 motion for reconsideration or new trial on the weapons charge. **R. pp. 7-8.** He made an amended motion on March 7, 2012. **R. pp. 9-10.** Judge Couch heard this motion on April 26, 2012. Kenneth P. Shabel, Esquire, represented Appellant at the hearing. Deputy Solicitor Balsa again represented the State.

Counsel argued that the trial court had to vacate the plea to the weapons charge because the sentence was imposed even though the trial court never addressed this count with Appellant and had not determined that Appellant had made a knowing and voluntary waiver of his constitutional rights. Because the weapons count was part of a negotiated sentence to all four charges, he argued that the trial court had to vacate the remaining pleas, as well. **R. p. 43, line 3 - p. 51, line 16.** At the conclusion of this hearing, Judge Couch took the matter under advisement. **R. p. 51, lines 19-20.**

On May 24, 2012, Judge Couch filed an Order vacating the conviction and sentence on the weapons charge but "affirming" the other convictions and sentences. **R. pp. 5-6.**

Appellant timely served and filed a notice of appeal.

¹ Appellant was given credit for time served, as well. **R. p. 38, lines 4-13.**

STATEMENT OF FACTS

The State proffered the following factual basis for Appellant's guilty pleas:

This incident occurred on December the 7th of 2010 at approximately 5:45 in the evening. It was at a residence ... [in] a mobile home park in the Fairforest Community here in Spartanburg. A lady by the name of Germicka (phonetic) Rooker lived there with her two children. Her brother, the victim in the murder case, Daniel Tremayne Landrum lived there as well. On this occasion a phone call was made to Mr. Landrum concerning the purchase of some marijuana. Mr. Landrum sold marijuana actually from the residence. A phone call was made by a man by the name of Teddy Byers. Mr. Byers and Mr. Landrum had met working at Great American Paper Company up in the Inman community. They learned that each other dealt in marijuana. Mr. Byers arranged a so-called drug-buy for some of his friends or cousins to come by and make the buy. At about 5:45, Mr. Byers drives the car to the location. In the car is Mr. Nesbitt who is actually his half brother, a Hazel Stoudemire who is a young cousin, and a Johnathon Petty who was a friend of [theirs]. Mr. Nesbitt, Mr. Petty and Mr. Stoudemire get out of the vehicle, walk a short distance to where the trailer is located. Mr. Nesbitt, Your Honor, owned two pistols. He had purchased some pistols about a year earlier from the Inman Gun and Pawn. They were legally registered to him. It's the State's position that the evidence would show that Mr. Nesbitt had one of the pistols which actually looked sort like a mini machine gun, and the second pistol was in the possession of Hazel Stoudemire. When the three men got to the trailer, two of the three went inside, one being Mr. Nesbitt and one being Hazel Stoudemire. They got inside under the ruse that they were there to buy marijuana. ... It gets a little unclear because we've talked with Hazel Stoudemire. He says they went in, he was actually trying to make the buy. The plan was when the ... victim pulled the money out - - or pulled the drugs out, they were to take the drugs and whatever money he had with the drugs. Mr. Stoudemire tells us when they began that process, this defendant, Charvus Nesbitt began firing a handgun he had brought. The State would've went to trial on that premise that this was the actual gunman. He fired multiple times. The physical evidence shows eight shell casings recovered from the scene. It shows eight bullets recovered from the scene. Three were actually from the body of the victim, Daniel Tremayne Landrum. Your Honor, they went to actually what's the back door of the trailer. It opens into a small hallway. Pretty much directly in front of the doorway is a laundry room. That is where the transaction was taking place, in the laundry room and the hallway. The back door had been closed once the two men had got inside. ... There was a lady friend of Mr. Landrum's inside the laundry room. She was not really paying attention. She said she had her phone out, was messing with her phone. Ms. Rooker the main resident of the house and her children and the friend of [theirs] was in the living area of the trailer. When the shots began to be fired, Ms. Rooker went ... towards the area to see what was going on. She got shot herself. [The] State's position is the man saw her coming towards the area

and fired at her. She actually got struck in the neck and was fortunate she did not die. Mr. Stoudemire who readily admits that he had one of the guns, claims he never pulled his gun, panicked when Mr. Nesbitt began firing, tried to get out the back door, but the back door the way it closed, it was hard to get out, so he basically left that area and went towards the back of the trailer and dove out the master bedroom window, just dove right through the glass, took the curtain with him. Mr. Nesbitt, after he finished shooting, followed suit out the same window. Mr. Stoudemire actually dropped the pistol that he was carrying. He said he didn't realize it until he got back to the car. The car was parked about one street over, so they had to run back to the car. Mr. Petty had been waiting outside the trailer, heard the shots, took off ... back to the car. They all met up where Teddy Byers, the brother and Mr. Nesbitt was waiting. They got in the car, drove off and began talking about what had happened. That's when Mr. Stoudemire realized he'd dropped his pistol. They began talking about what they needed to do to cover that up, because they knew the pistol would come back to Mr. Nesbitt. A ruse was planned whereby he would report the pistol stolen. They actually drove the vehicle to the Inman community, left it on the side of the road and they reported that he'd broken down and the pistol had been stolen out of the glove box. The police working with the individuals in the house along with the information about the pistol, they knew they had a suspect in Mr. Nesbitt, because it came back to him, began working with line-ups, and they looked at the victim's phone and learned that ... one of the last numbers that had been called had come from a Teddy Byers, so the police were looking at Teddy Byers and Charvus Nesbitt as the two main perpetrators. Some of the line-ups, the identifications from the actual persons in the trailer were not that strong. The police picked up Mr. Byers, began questioning him hard. He then essentially started telling the police about setting up this deal, saying that Mr. Nesbitt, his brother and Hazel Stoudemire his cousin were the ones that went into the trailer. So the police were focusing on that part of it. When Mr. Stoudemire actually ... came to the police station, ... he readily confessed to his role in this. He, of course, denied being the shooter, told pretty much the story I've told the Court.

We've met with Mr. Stoudemire and he was consistent in his past statements and readily pointed the finger at Charvus Nesbitt. I've met with Johnathon Petty, the gentleman who stood outside. He didn't give a statement initially. He actually fled to Florida and was brought back and questioned by us. He says it was Charvus Nesbitt that fired the -- fired the weapon. Teddy Byers decided to cooperate, initially not wanting to admit he set up a drug deal that was supposed to be armed robbery. Finally [he] admitted that the shooter was his brother. So we've got the three co-defendants all pointing the finger at the defendant. There was a lady friend of Mr. Petty's who was at the house where these ... men had gone ... -- [it] was actually the defendant's brother's house, she came over and heard the defendants talking, heard Mr. Nesbitt say he didn't mean to shoot the boy, basically heard an admission by him that he had fired the gun. The police in speaking to Mr. Nesbitt, he first denied it to

the police. They served the warrant on him, put him in the jail, and then they learned that he wanted to speak to them. So they went over to talk to him and he said I can take you to the gun, wouldn't really admit that he fired it, but admitted that the gun went off and actually went with the police to try to find the gun that had been thrown out. So all the evidence points to this defendant as being the shooter. And that is how I would've proceeded at trial. Those are the facts of the case.

r. pp. 26-32. Appellant admitted that this was the factual information that his attorney had provided to him and upon which he based his decision to enter his *Alford* plea. **R. p. 32, lines 4-13.**

ARGUMENT

The trial court properly refused to vacate Appellant's convictions and sentences for murder, attempted murder and attempted armed robbery that were entered pursuant to an *Alford* plea and negotiated sentence, after vacating his plea to a weapons charge entered as part of the same deal, because (1) there was no evidence in the record that he did not voluntarily, knowingly and intelligently enter the remaining pleas; (2) the State had not breached the negotiated sentence; (3) prior to filing the motion to vacate Appellant had received the agreed upon forty year sentence and he only lost that agreement as the result of his own action in filing the motion for reconsideration or new trial on the weapons charge; and, (4) in the absence of evidence showing ineffectiveness of plea counsel that is preserved for appellate review, any claim that the remaining pleas were involuntary is only properly heard in Post-Conviction Relief.

Appellant's only argument is that the trial court erred by refusing to vacate his convictions and sentences for murder, attempted murder and attempted armed robbery after vacating the plea to the charge of possession of a weapon during the commission of a violent crime. Respondent disagrees and submits that the trial court properly refused to vacate Appellant's remaining pleas because (1) there was no evidence in the record that he did not voluntarily, knowingly and intelligently enter those pleas; (2) the State had not breached the negotiated sentence; (3) prior to filing the motion, Appellant had received the agreed upon forty year sentence and he only lost that agreement as the result of his own action in filing the motion for reconsideration or new trial on the weapons charge; and, (4) in the absence of evidence showing ineffectiveness of plea counsel that is preserved for appellate review, any claim that the remaining pleas were involuntary is only properly heard in Post-Conviction Relief.

A. How issue developed.

As discussed, original plea counsel successfully plea bargained for a negotiated sentence of forty years imprisonment on all of the charges against Appellant. Appellant appeared before the

Honorable Roger L. Couch on February 23, 2012, to enter an *Alford* plea² to these charges. The Deputy Solicitor called these four charges and announced the negotiated sentence. **R. p. 14, lines 3-11.**

Mr. Smith confirmed the negotiated sentence on Appellant's behalf and explained that it was an *Alford* plea. Judge Couch then had a colloquy with Appellant and Mr. Smith consistent with *Boykin v. Alabama*, 395 U.S. 238 (1969) and he accepted Appellant's plea as to all charges, except for the count of possession of a weapon during the commission of a violent crime in 11-GS-42-1414. **R. p. 14, line 12- p. 38, line 3.** Judge Couch announced that he was accepting the negotiated sentence and he sentenced Appellant to forty years imprisonment for murder and he imposed concurrent sentences of thirty years for attempted murder and twenty years for attempted armed robbery. **R. p. 38, lines 14 - 21.**³

After Appellant had left the courtroom, the Deputy Solicitor brought to Judge Couch's attention that he had not addressed the weapons charge. Judge Couch asked Mr. Smith if counsel wanted Appellant brought back in to receive a five year concurrent sentence. Plea counsel did not object and simply replied, "Yes, sir. Thank you." Judge Couch then imposed a concurrent five year sentence. **R. p. 38, line 24- p. 39, line 18.**

However, Appellant was apparently not brought back into the courtroom for further proceedings. Instead, he filed a February 23, 2012 motion for reconsideration or new trial on the weapons charge. **R. pp. 7-8.** He made an amended motion on March 7, 2012. **R. pp. 9-10.** Judge Couch heard this motion on April 26, 2012. Kenneth P. Shabel, Esquire, represented Appellant at

² See *North Carolina v. Alford*, 400 U.S. 25 (1970).

³ Appellant was given credit for time served, as well. **R. p. 38, lines 4-13.**

the hearing. Deputy Solicitor Balsa again represented the State.

Counsel argued that the trial court had to vacate the plea to the weapons charge because the sentence was imposed even though the trial court never addressed this count with Appellant and had not determined that Appellant had made a knowing and voluntary waiver of his constitutional rights. Because the weapons count was part of a negotiated sentence to all four charges, he argued that the trial court had to vacate the remaining pleas, as well. The State opposed his request. **Apr. R. p. 43, line 3 - p. 51, line 16.** At the conclusion of this hearing, Judge Couch took the matter under advisement. **R. p. 51, lines 19-20.**

On May 24, 2012, Judge Couch filed an Order vacating the conviction and sentence on the weapons charge but "affirming" the other convictions and sentences. **R. pp. 5-6.** In the Order, Judge Couch found that:

1. The Defendant was removed from the Courtroom prior to the discussion of the charge of possession of a weapon during the commission of a violent crime. Tr. at 28:24.
2. The Court overlooked the charge of possession of a weapon during the commission of a violent crime and was reminded by the Solicitor following the Defendant's exit of the Courtroom. Tr. at 29:2-9.
3. The Defendant's attorney at the plea, Fletcher Smith, did not waive the Defendant's presence with regards to the discussion of that particular charge. Tr. at 29:11-13.
4. The Defendant was never questioned by the Court about his plea to the offense of possession of a weapon during the commission of a violent crime.
5. The plea deal that Defendant agreed to on the record was forty (40) years for murder, attempted murder, and attempted armed robbery.

Order, pp. 1-2; R. pp. 5-6.

He further found that "all plea agreements must be on the record and recite the scope,

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offenses and individuals involved in the agreement.’ *State v. Thrift*, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994).” **Order, p. 2; R. p. 6.** In this case, the trial court had only addressed the charges of murder, attempted murder and attempted armed robbery with Appellant, but the trial court had failed to address the weapons charge with him. As a result, the trial court found that the forty year agreement only pertained to the charges of murder, attempted murder and attempted armed robbery.

Order, p. 2; R. p. 6.

Therefore, the trial court vacated the conviction and five year sentence for possession of a weapon during the commission of a violent crime. This conviction was “reopened and subject to prosecution by the State.” However, the trial court found that this ruling “has no bearing on the validity of the plea given by the Defendant on the other three charges. *See Phillips v. State*, 281 S.C. 41, 314 S.E.2d 313 (1984) (the invalidation of a defendant’s guilty plea on one charge does not affect the validity of a guilty plea for a different charge taken at the same hearing).”⁴ Therefore, the trial court granted Appellant’s motion to vacate the weapons conviction but denied it with respect to the remaining convictions and “affirmed” those convictions. **Order, p. 2; R. p. 6.**

B. Discussion.

There was no error. A guilty plea may not be accepted unless it is voluntary and entered into with an understanding of the nature and consequences of the charge and plea. A plea is properly accepted if the record establishes it was voluntarily and knowingly made. *Boykin; supra; Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). “The standard was and remains whether the plea represents a voluntary and intelligent choice among

⁴ The Order does not expressly state that the conviction was vacated but this portion of the Order makes clear that it was vacated, since he could not otherwise be retried for the offense.

the alternative courses of action open to the defendant.” *Alford*, 400 U.S. at 31. Further, “[a] defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases.” *Richardson v. State*, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993). See also *Carter v. State*, 329 S.C. 355, 360, 495 S.E.2d 773, 775-76 (1998).

While plea agreements are obviously a matter of criminal jurisprudence, most courts have held that they are subject to contract principles. See, e.g., *Thrifty*, 312 S.C. at 292-93, 440 S.E.2d at 347 (citing *Santobello v. New York*, 404 U.S. 257 (1971)); *Reed v. Becka*, 333 S.C. 676, 686, 511 S.E.2d 396, 401 (Ct.App.1999); *United States v. Ringling*, 988 F.2d 504, 505 (4th Cir.1993); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir.1986) (“[I]n the process of determining whether disputed plea agreements have been formed or performed, courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts”).⁵

Here, the grant of relief on the weapons charge did not require the trial court to grant relief on the remaining charges. The State had lived up to its end of the negotiated sentence and did not breach it. *Accord Ricketts v. Adamson*, 483 U.S. 1 (1987) (defendant's breach of plea agreement by refusing to testify at co-defendants' retrial removed double jeopardy bar to prosecution of defendant on original charges, after defendant had been sentenced and began serving term on lesser offense, where plea agreement provided that parties would be returned to status quo if defendant refused to

⁵ Of course, “a plea agreement analysis must be more stringent than a contract because the rights involved are fundamental and constitutionally based.” *Thrifty*, 312 S.C. at 293, 440 S.E.2d at 347 (citing *Ringling*, *supra*).

testify).⁶ Also, the trial court had accepted this plea negotiation and had imposed a forty year sentence. As a result, Appellant had received the sentence that had been negotiated by plea counsel and that he had sworn that he wanted. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (defendant's representations, as well as any findings made by the judge accepting the plea, "constitute a formidable barrier Solemn declarations in open court carry a strong presumption of verity." Also, a subsequent presentation of conclusory allegations and contentions that are wholly incredible in the face of the record are subject to summary dismissal). The conviction and sentence on the weapons charge may have been voidable because the trial court had not addressed the matter with Appellant, *see Henderson v. Morgan*, 426 U.S. 637, 642-43 (1976), but it was not a void conviction or sentence since the trial court had subject matter jurisdiction to convict and sentence him. *State v. Gentry*, 363 S.C. 93, 100-01, 610 S.E.2d 494, 498-99 (2005) ("subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong;" and "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters"). While he had the right to file the motion and request the court to vacate the plea to the weapons charge, he only lost the benefit of the negotiated sentence as the result of his own decision to pursue his motion.

Further, there was no evidence in the record that he did not voluntarily, knowingly and intelligently enter the pleas to the remaining charges. *See R. p. 14, line 3 - p. 38, line 21*. To the contrary, he concedes that the trial court complied with *Boykin* with respect to these charges, and the

⁶ State prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. *Santobello v. New York*, 404 U.S. 257, 262 (1971). South Carolina has recognized the principles set forth in *Santobello*: when an accused pleads guilty upon the promise of a prosecutor, the agreement must be fulfilled. *See Sprouse v. State*, 355 S.C. 335, 338, 585 S.E.2d 278, 280 (2003); *Thrift*, 312 S.C. at 292, 440 S.E.2d at 347.

trial judge's colloquy with Appellant and plea counsel supports the conclusion that Appellant "[understood] the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001). *See also Blackledge*, 431 U.S. at 73-74.

Moreover, and contrary to Appellant's argument, the State would note that the trial judge's decision to allow the remaining convictions to stand where they were not effected by the error is supported by decisions by South Carolina appellate courts. Indeed, the trial court correctly noted that the Supreme Court had followed this approach in in *Phillips v. State*. *See* 281 S.C. at 42-43, 314 S.E.2d at 313-14.⁷ In addition to *Phillips*, the State would note that a similar result was reached in *Summerall v. State*, 278 S.C. 255, 255-56, 294 S.E.2d 344, 344 (1982), overruled, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005), where the Court vacated two of three counts of receiving stolen goods because there was neither indictment nor waiver of Grand Jury presentment on those charges, but it allowed the remaining count to stand because the Grand Jury had true billed that indictment. *See also Joseph v. State*, 351 S.C. 551, 557-60, 571 S.E.2d 280, 283-84 (2002), overruled on other grounds, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *John W. Hayward v. State*, 2011-MO-008 (S.C. S.Ct., Mar. 7, 2011) (unpublished); *State v. McKenzie*, 2009-MO-012 (S.C. S.Ct., Feb., 23, 2009). *Accord United States v. Toothman*, 137 F.3d 1393, 1394 (9th Cir. 1998).

Finally, the State would note that there is no evidence showing ineffectiveness of plea

⁷ The defendant had been indicted for kidnapping and robbery. As the result of plea negotiations, he was allowed him to plead guilty to assault and battery, rather than kidnapping, but the State "did not present the assault charge to the grand jury." The Court found that the circuit court was deprived of subject matter jurisdiction on the assault and battery of a high and aggravated nature charge, but it allowed the robbery charge to stand.*Id.*

counsel that is preserved for appellate review. Thus, he should not be heard to complain on direct appeal, where he is the architect of the present scenario, the Court would simply be granting him a windfall to which he was not entitled, and any claim that the remaining pleas were involuntary based upon counsel's ineffectiveness is only properly heard in Post-Conviction Relief. *See State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986); *State v. Carpenter*, 277 S.C. 309, 286 S.E.2d 384 (1982) ("Appellant's sole ground for appeal is ineffective assistance of counsel at trial. This Court usually will not consider that issue on appeal from a conviction, ... We follow that principle particularly when, as here, the issue was not argued to the trial judge") (citations omitted).

Therefore, Appellant's argument lacks merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court must be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

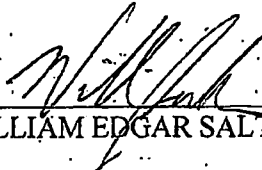
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By: 
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

May 15, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2012-212222

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

CHARVUS TARREL NESBITT,

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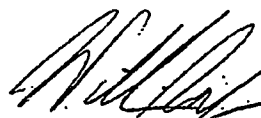
APPELLANT. MAY 15 2013

SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 15th day of May, 2013.



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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2012-212222

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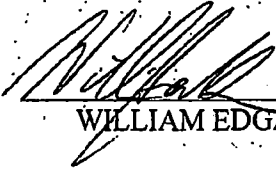
SC Court of Appeals

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Kenneth P. Shabel, Esq., 104 North Daniel Morgan Avenue, Ste. # 201, Spartanburg, SC 29306.

I further certify that all parties required by Rule to be served have been served.

This 15th day of May, 2013.


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ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State, Respondent,

v.

Charvus Tarrel Nesbitt, Appellant.

Appellate Case No. 2012-212222

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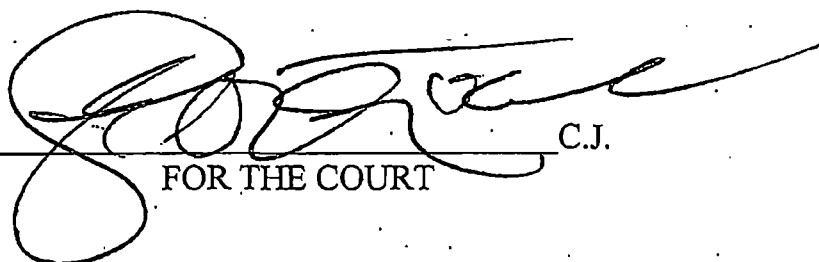
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SC Court of Appeals

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the Supreme Court of South Carolina. Upon receipt of this Order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.


C.J.
FOR THE COURT

Columbia, South Carolina

May 6, 2014

cc:

Kenneth Philip Shabel, Esquire

W. Edgar Salter, III, Esquire

Barry Joe Barnette, Esquire

The Honorable Jenny Abbott Kitchings

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Charvus Tarrel Nesbitt, Appellant.

Appellate Case No. 2012-212222

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27477
Heard November 19, 2014 – Filed January 14, 2015

AFFIRMED AS MODIFIED

Kenneth Philip Shabel, of Campbell & Shabel, LLC, of
Spartanburg, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Senior
Assistant Attorney General W. Edgar Salter, III, all of
Columbia, and Solicitor Barry Joe Barnette, of
Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: Charvus Nesbitt (Appellant) appeals the circuit court's finding that he entered knowing and voluntary *Alford*¹ pleas as to three of four charges listed in a negotiated plea agreement. On appeal, Appellant argues that his negotiated plea agreement was a "package deal," and that because his plea for one of the charges was invalid, his pleas for the remaining three charges were likewise invalid. We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

On December 7, 2010, Appellant and three co-conspirators arranged to purchase marijuana from Daniel Landrum (the victim) at the victim's mobile home, intending instead to rob the victim. While inside the mobile home, Appellant shot the victim eight times, killing him, and one of the bullets hit the victim's sister in the neck. The police arrested Appellant and his co-conspirators, and a grand jury subsequently indicted Appellant for murder, possession of a firearm during the commission of a violent crime, attempted murder, and attempted armed robbery.

Throughout the pre-trial proceedings, Appellant consistently maintained that one of his co-conspirators shot the victim, and that Appellant was merely present during the shooting. Nonetheless, Appellant elected to enter an *Alford* plea.²

During the plea colloquy, the State informed the circuit court that there were three indictments pending against Appellant, including a two-count indictment for murder and possession of a firearm during a violent crime. The State listed the four crimes covered in the indictments and informed the circuit court that Appellant and the State negotiated the plea in exchange for the State's recommendation of a forty-year sentence. Appellant's attorney acknowledged that the State correctly summarized the pending charges and negotiated sentence.

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

² See *State v. Ray*, 310 S.C. 431, 435, 427 S.E.2d 171, 173 (1993) ("The United States Supreme Court held in *Alford* that an accused may consent voluntarily, knowingly, and understandingly to the imposition of a prison sentence although unwilling to admit culpability, or even if the guilty plea contains a protestation of innocence, when the accused intelligently concludes that his interests require a guilty plea and the evidence strongly supports his guilt of the offense charged.").

However, at various points in the hearing, the circuit court incorrectly stated that Appellant was before the court on three charges. Omitting the firearm charge entirely, the court outlined the possible sentences for murder, attempted murder, and attempted armed robbery, and asked Appellant if he understood those potential sentences.³ The circuit court also told Appellant that the court had the right to accept or reject the plea negotiations and the sentencing recommendation, and informed Appellant that, if the court did not accept the negotiations, Appellant could withdraw his plea.

The circuit court then asked Appellant whether he was satisfied with his attorney's representation; whether he pled no contest; whether he entered the plea of his own free will; and whether he understood the constitutional rights he was giving up by pleading no contest, including the right to remain silent and the right to a jury trial. Appellant answered yes to each of the questions. The circuit court also asked whether anyone had promised Appellant anything or threatened him to acquire his guilty plea, and whether Appellant was under the influence of alcohol or drugs. Appellant answered no to both of the questions.

At the conclusion of its discussion with Appellant, the circuit court found that Appellant entered his pleas freely and voluntarily. Therefore, the court accepted the negotiated sentence, and sentenced Appellant to forty years' imprisonment for murder, thirty years' imprisonment for attempted murder, and twenty years' imprisonment for attempted armed robbery, the sentences to run concurrently.

Appellant then exited the courtroom. Immediately after Appellant's departure, the following discussion occurred:

[APPELLANT'S
ATTORNEY]: Wait one second.

[THE SOLICITOR]: There's a second count, [possession of a
firearm during the commission of a violent
crime].

THE COURT: Beg your pardon?

³ Both parties agree that the circuit court properly referenced the charges for murder, attempted murder, and attempted armed robbery during the plea colloquy.

[THE SOLICITOR]: The pistol count.

THE COURT: I didn't see that one in there.

DEPUTY CLERK: There's another sentencing sheet under that one.

THE COURT: Oh, I see it.

[THE SOLICITOR]: That's up to five years, Your Honor.

THE COURT: You want [Appellant] to come back in to get that? I'll run it concurrent.

[APPELLANT'S ATTORNEY]: Yes, sir. Thank you.

THE COURT: It won't affect the sentence.

[APPELLANT'S ATTORNEY]: Thank you, Your Honor.

THE COURT: All right, thank you very much.

[THE SOLICITOR]: Thank you, Your Honor.

THE COURT: It is five years, run concurrent.

Thus, although Appellant was never brought back into the courtroom to enter a plea on the firearm charge, the circuit court nonetheless "accepted" Appellant's plea in his absence and sentenced him to an additional five years' imprisonment, to run concurrently with his other three sentences.⁴

⁴ Both parties agree the court erred in accepting Appellant's plea to the firearm charge in Appellant's absence. See *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (stating that such a plea is void because it is not an intentional relinquishment of a known constitutional right or privilege); cf. *Dover v. State*, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991) (finding that a defendant's guilty plea was not knowing and voluntary when the trial court did not discuss the maximum allowable sentences for the crimes with the defendant).

Appellant made a motion for reconsideration or new trial, as well as an amended motion for reconsideration or new trial, alleging, *inter alia*, that he was neither properly questioned by the court regarding the firearm charge, nor even present when the court imposed the sentence for that charge. Thus, Appellant contended that his plea as to the firearm charge was invalid, and that he did not knowingly and voluntarily give up his constitutional rights with respect to that particular charge. Appellant further asserted that his negotiated plea agreement was a "package deal," and that because one plea was invalid, the entire negotiated plea was unenforceable.

Ultimately, the circuit court found that the "plea deal that [Appellant] agreed to on the record was forty (40) years for murder, attempted murder, and attempted armed robbery." Further, the court found that Appellant "was never questioned by the [c]ourt about his plea to the offense of possession of a weapon during the commission of a violent crime," and did not waive his right to be present for the discussion of that charge. Thus, the court invalidated Appellant's five-year sentence for the firearm charge. However, the circuit court held that because the firearm charge "was not a part of the negotiated plea[,] . . . [t]his decision has no bearing on the validity of the plea given by [Appellant] on the other three charges." (Citing *Phillips v. State*, 281 S.C. 41, 314 S.E.2d 313 (1984) (finding that invalidating a defendant's guilty plea on one charge does not affect the validity of a guilty plea for a different charge taken at the same hearing)). The court stated that the firearm charge was "reopened and subject to prosecution by the State."⁵

Appellant appealed, and we certified the appeal pursuant to Rule 204(b), SCACR.

ISSUE

Whether a negotiated plea agreement involving multiple charges is invalid when the defendant does not enter knowing and voluntary pleas for all of the charges contained in the agreement?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011) (citation omitted).

⁵ On March 27, 2013, the State *nolle prossed* the firearm charge.

"Appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law." *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993).

ANALYSIS

In general, a defendant's guilty plea is more than an admission of conduct; rather, it is a conviction that can deprive him of his liberty or other constitutionally protected interests. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *Boykin*, 395 U.S. at 242. Therefore, the entry of a guilty plea implicates the protections of the Due Process Clause of the federal and state constitutions. See U.S. Const. amend. XIV (providing that states may not deprive a person of life, liberty, or property without due process of law); S.C. Const. art. I, § 3 (same).

Among these protections, the Due Process Clause requires that a defendant enter his guilty plea voluntarily, knowingly, and intelligently. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). Thus, prior to receiving a defendant's guilty plea, the court must advise the defendant of "the nature and crucial elements of the charges, the consequences of the plea [including any maximum and minimum penalties for the crimes], and the constitutional rights he is waiving" by pleading guilty. *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) (citing *Anderson*, 342 S.C. at 57, 535 S.E.2d at 651); see also *Dover v. State*, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (stating that a defendant knowingly and voluntarily pleads guilty when he fully understands the consequences of his plea and the charges against him).

Here, the State concedes that the circuit court erred in failing to properly question and advise Appellant of his rights with respect to the firearm charge. However, Appellant further argues that, in invalidating the firearm sentence, the circuit court simultaneously invalidated a portion of Appellant's negotiated plea agreement, thus rendering all other parts of the plea agreement—namely, Appellant's remaining three pleas—unenforceable as well. Cf. *Puckett v. United States*, 556 U.S. 129, 137 (2009) ("When a defendant agrees to [a] plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, *i.e.*, to withdraw his plea.").

When the terms and obligations set forth in a plea agreement are not fulfilled, appellate courts may consider whether that failure constitutes harmless error. *Id.* at 141 (stating that "breach of a plea deal is not a 'structural error,'" and thus is subject to harmless error analysis).⁶ Here, Appellant received the forty-year sentence which he negotiated,⁷ and further received the benefit of having one of the charges against him essentially dropped, as his criminal record will only reflect three convictions and not four. Therefore, to the extent there was error, Appellant has suffered no prejudice. *See id.* at 141–42 ("The defendant whose plea agreement has been broken by the Government will not always be able to show prejudice, either *because he obtained the benefits contemplated by the deal anyway (e.g., the sentence that the prosecutor promised to request)* or because he likely would not have obtained those benefits in any event" (emphasis added)).

Moreover, any possible error is harmless beyond a reasonable doubt. *Cf. Joseph v. State*, 351 S.C. 551, 560, 571 S.E.2d 280, 284 (2002) (rejecting the defendant's argument that his second guilty plea was involuntary and unknowing because it was part of a "package deal," after the PCR court invalidated the first of his two guilty pleas, and finding that "Petitioner was properly advised and sentenced on the murder charge. Further, [P]etitioner failed to show he was

⁶ *See also Puckett*, 556 U.S. at 141 (explaining that a "plea breach does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence; it does not defy analysis by harmless-error standards by affecting the entire adjudicatory framework; and the difficulty of assessing the effect of the error is no greater with respect to plea breaches . . . than with respect to other procedural errors at sentencing, which are routinely subject to harmlessness review" (internal citations omitted) (internal quotation marks omitted)).

⁷ We note that the Due Process Clause is not implicated until the defendant enters his guilty plea, and that plea is accepted by the court. *See Mabry*, 467 U.S. at 507. Therefore, if the defendant enters into a negotiated plea agreement prior to the court's acceptance of his guilty plea, that agreement is a mere executory promise that, standing alone, has no constitutional significance, as it binds neither the government nor the defendant. *Id.*; *Reed v. Becka*, 333 S.C. 676, 685–87, 511 S.E.2d 396, 401–02 (Ct. App. 1999) (citations omitted). Only after the court accepts the defendant's guilty plea will the negotiated plea agreement become operative. *Reed*, 333 S.C. at 687, 511 S.E.2d at 402 (citation omitted).

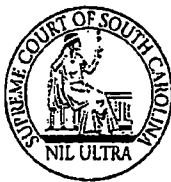
induced to plead guilty or that he would have not pled guilty to murder but for the [invalidated] grand larceny charge"); *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Roscoe v. State*, 345 S.C. 16, 21, 546 S.E.2d 417, 419 (2001) (rejecting the defendant's argument that "all of his pleas [we]re affected by the [circuit court's] erroneous advice concerning the [maximum sentence for the] armed robbery charge," because the defendant "was properly advised and sentenced on the [remaining] charges, and he fail[ed] to demonstrate his pleas to these offenses were in any way affected by the mis-advice concerning armed robbery").

CONCLUSION

For the foregoing reasons, the circuit court's decision is

AFFIRMED AS MODIFIED.

BEATTY, HEARN, JJ. and Acting Justice James E. Moore, concur.
PLEICONES, J., concurring in result only.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
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COLUMBIA, SOUTH CAROLINA 29201
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January 30, 2015

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: The State v. Charvus Nesbitt
Lower Court Case No. 2011-GS-42-01414, 2011-GS-42-01415
and 2011-GS-42-00349

Appellate Case No. 2012-212222

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

cc:

Kenneth Philip Shabel, Esquire

W. Edgar Salter, III, Esquire

Barry Joe Barnette, Esquire

The Honorable Roger L. Couch

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Charvus Tarrell Nesbitt #00349711
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2016-CP-42-103APPLICATION FOR
POST-CONVICTION RELIEF**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Perry Correctional Institute
2. Name and location of Court which imposed sentence Spartanburg County Court of

General Sessions

3. Name(s) of co-defendant(s) (if any) Teddy Lamont Byers, Johnathon Lee Petty, and Hazell Stoudemire III
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-GS-42-1414
 - (b) 2011-GS-42-1415
 - (c) 2012-GS-42-0349
5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

- (a) 40 years on indictment 2011-GS-42-1414 for Murder imposed on 2/13/12 for Murder to run concurrent with 2011-GS-42-1415 and 2012-GS-42-0349
- (b) 30 years on indictment 2011-GS-42-1415 for Attempted Murder imposed on 2/13/12 to run concurrent with 2011-GS-42-1414 and 2012-GS-42-0349
- (c) 20 years on indictment 2012-GS-42-0349 for Attempted Armed Robbery imposed on 2/13/12 to run concurrent with 2011-GS-42-1414 and 2011-GS-42-1415

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere Yes

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. South Carolina Court of Appeals
- ii. _____
- iii. _____

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

- i. Affirmed as Modified in written order
- ii. _____
- iii. _____

(c) the date of each such result:

- i. January 14, 2015
- ii. _____
- iii. _____

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

- i. 411 S.C. 194 (Ct. App. 2015)
- ii. _____
- iii. _____

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

- (a) N/A
 - (b) N/A
 - (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Failure to Investigate by Trial Counsel
 - (b) Ineffective Assistance of Trial Counsel
 - (c) Involuntary Plea
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Trial Counsel failed to talk to necessary defense witnesses
 - (b) Trial Counsel failed to subpoena and call necessary defense witnesses at trial
 - (c) Due to Trial Counsel's lack of preparation, Applicant was forced to plead under

North Carolina versus Alford

12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - iv. N/A
 - (b) the name and location of the Court in which each was filed:
 - i. N/A
 - ii. N/A

- iii. N/A
 - iv. N/A
 - (c) the disposition thereof:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - iv. N/A
 - (d) the date of each such disposition:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - iv. N/A
 - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - iv. N/A
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - (b) the proceedings in which each ground was raised:
 - i. N/A
 - ii. N/A
 - iii. N/A
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) This is first application for PCR
- (b) This is first application for PCR
- (c) This is first application for PCR

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

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. Fletcher Smith, 112 Wakefield Street, Greenville, SC 29601
 - ii. Ken Shabel, 175 Magnolia Street, Suite 201, Spartanburg, SC 29306
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Fletcher Smith was trial counsel
 - ii. Ken Shabel was appellate counsel
 - 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 Spartanburg

VERIFICATION

I, Charvus Tarrell Nesbitt, 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.

Charvus T. Nesbitt

SWORN to and subscribed before me this 11th
day of January, 2016.

Jamaica Conwell (L.S.)
Notary Public

My Commission Expires: My Commission Expires
September 25, 2023

2016 JAN 13 PM 2:58
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

Charvus T. Nesbitt, #349711,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2016-CP-42-0103

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on January 13, 2016, would respectfully show this Court:

I.

Charvus T. Nesbitt ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the March 2011 term of the Spartanburg County Grand Jury for murder, possession of a weapon during the commission of a violent crime (2011-GS-42-1414, counts 1 and 2), and attempted murder (2011-GS-42-1415). Applicant was subsequently indicted at the January 2012 term of the Spartanburg County Grand Jury for attempted armed robbery (2012-GS-42-0349). Fletcher N. Smith, Esquire, represented Applicant. On February 23, 2012, Applicant pleaded guilty under North Carolina v. Alford¹ before the Honorable Roger L. Couch. Judge Couch sentenced Applicant, pursuant to a negotiated sentence, to imprisonment for concurrent terms of 40 years for murder, 30 years for attempted murder, and 20 years for attempted armed robbery.

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

Applicant then left the courtroom, at which time the Deputy Solicitor brought to Judge Couch's attention that he had not addresses the weapons charge. Judge Couch then imposed a concurrent five year sentence for the possession of a weapon charge. However, Applicant was not brought back into the courtroom for further proceedings. On February 23, 2012 a motion for reconsideration or new trial was filed on the weapons charge. An amended motion was filed on March 7, 2012. Judge Couch heard the motion on April 26, 2012. Kenneth P. Shabel, Esquire, represented Applicant at this hearing. On May 24, 2012, Judge Couch issued an Order vacating the conviction and sentence on the weapons charge but affirming the other convictions and sentences.

Applicant filed a timely notice of appeal. Kenneth P. Shabel, Esquire, represented Applicant on appeal. The South Carolina Supreme Court affirmed Applicant's conviction as modified. State v. Nesbitt, 411 S.C. 194 (Ct. App. 2015). The Remittitur was returned on January 30, 2015.

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the transcript from Applicant's guilty plea, and Applicant's records for the Department of Corrections and appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

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

1. Failure to Investigate by Trial Counsel;
 - a. "Trial Counsel failed to talk to necessary defense witnesses";
2. Ineffective Assistance of Trial Counsel, in that;

- a. "Trial Counsel failed to subpoena and call necessary defense witnesses at trial";
- 3. Involuntary Plea, in that:
 - a. "Due to Trial Counsel's lack of preparation, Applicant was forced to plead under North Carolina versus Alford."

III.

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

IV.

Applicant alleges his guilty plea was involuntary. Such an assertion is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal

defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000). When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

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

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an

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

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of trial counsel and appellate counsel.

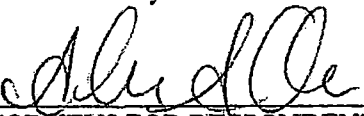
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

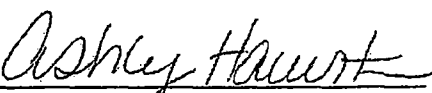
July 12th, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	2016-CP-42-0103
CHARVUS T. NESBITT, #349711,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Mr. Christopher Brough, Esquire
The Brough Law Firm
175 Magnolia St., Ste. 202
Spartanburg, SC 29306

DATED this 12TH day of July, 2016.


 Ashley Haworth, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS
3
4 Charvus T. Nesbitt,)
5 Applicant,) TRANSCRIPT OF RECORD
6 -vs-) 2016-CP-442-0103
7 The State,)
8 Respondent.) March 23, 2017
9 Spartanburg, South Carolina
10

11 B E F O R E:

12 HONORABLE ROBIN B. STILWELL, JUDGE
13
14

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

16 CHRISTOPHER D. BROUGH, ESQUIRE
17 Attorney for the Applicant

18 VALERIE G. GIOVANOLI, ESQUIRE
19 Attorney for the Respondent
20
21
22

23 Margaret A. Woods
24 Circuit Court Reporter
25

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
A-1	Applicant's rap sheet	12	13
A-2	Investigation report	12	15
A-3	Affidavit of identification	14	15
A-4	Statement of BJ Rookard	16	18
A-5	Copy of search warrant	18	21

MOTIONS AND MATTERS

1 THE COURT: What are we gonna call first?

2 MS. GIOVANOLI: Your Honor, Valerie Giovanoli on behalf
3 of the State, um, we're going to go forward with Charvus
4 Nesbitt, that's 2016-CP-42-0103.

5 THE COURT: Okay, good enough. Alright, well, uh, then
6 we'll call to bar the case it's Charl -- Charvus B -- T.
7 Nesbitt vs. the State a South Carolina, 2016-CP-42-1013.

8 (Whereupon a discussion was held off the record.)

9 THE COURT: Alright, you are Mr. Nesbitt, is that
10 correct, sir?

11 THE APPLICANT: Yes, sir.

12 THE COURT: Good mornin', how are you today?

13 THE APPLICANT: Doin' pretty good. I tried a little bit
14 a sandwich, Your Honor, that had been eatin', 'scuse me.

15 THE COURT: Uh, that's alright, that's okay, I
16 understand. Okay, alright, Ms. Giovanoli, did I pronounce
17 that right?

18 MS. GIOVANOLI: Yes, Your Honor, uh, ---

19 THE COURT: Alright, ---

20 MS. GIOVANOLI: --- one---

21 THE COURT: --- I'd be happy ---

22 MS. GIOVANOLI: --- moment, I ---

23 THE COURT: --- to hear from ---

24 MS. GIOVANOLI: --- just misplaced one document if I
25 could have one moment just to find it.

MOTIONS AND MATTERS

1 THE COURT: Sure.

2 MS. GIOVANOLI: I found it, thank you. I apologize, Your
3 Honor.

4 THE COURT: That's alright.

5 MS. GIOVANOLI: This is the case of Charvus T. Nesbitt
6 vs. the State of South Carolina, Case Number 2016-CP-42-0103.
7 Ne -- Applicant is presently confined in the South Carolina
8 Department of Corrections pursuant to orders of commitment of
9 the clerk of court for Spartanburg County. Applicant was
10 indicted at the March 2011 term of the Spartanburg County
11 Grand Jury for murder, possession of a weapon during the
12 commission of a violent crime, those were Case Numbers
13 2011-GS-42-1414, counts one and two, and attempted murder,
14 Case Number 2011-GS-42-1415. Applicant was subsequently
15 indicted at the January 2012 term of the Spartanburg County
16 Grand Jury for attempted armed robbery, Case Number
17 2012-GS-42-0349. Mr. Fletcher N. Smith, Esquire represented
18 Applicant and on February 23rd 2012 Applicant pled guilty
19 under *North Carolina v. Alford* before the Honorable Roger L.
20 Couch. Judge Couch sentenced Applicant pursuant to a
21 negotiated sentence to imprisonment for concurrent terms of 40
22 years for murder, 30 years for attempted murder and 20 years
23 for attempted armed robbery. Applicant then left the
24 courtroom at which time deputy solicitor to Judge Couch's
25 attention -- brought to Judge Couch's attention that he had

MOTIONS AND MATTERS

1 not addressed the weapons charge, Judge Couch then imposed a
2 concurrent 5-year sentence for the possession of a weapon
3 charge; however, Applicant was not brought back into the
4 courtroom for further proceedings. On February 23rd 2012 a
5 motion for reconsideration or a new trial was filed on the
6 weapons charge, an amended motion was filed on March 7th 2012.
7 Judge Couch heard the motion on April 26th 2012, Kenneth P.
8 Shabel, Esquire represented Applicant at this hearing and on
9 May 24, 2012 Judge Couch issued an order vacating the
10 conviction and sentence on the weapons charge but affirming
11 the other convictions and sentences.

12 Applicant filed a timely notice of appeal, Kenneth P.
13 Shabel, Esquire represented Applicant on appeal. The North
14 Carol -- I mean, the South Carolina Supreme Court affirmed
15 Applicant's conviction as modified in *State v. Nesbitt*, that's
16 411 S.C. 194, uh, the remittitur was returned on January 30th
17 2015. The State is present and ready to proceed, the
18 Applicant is also present and re -- represented by
19 Mr. Christopher Brough and I'll hand it over to counsel.

20 THE COURT: Alright, Mr. Brough.

21 MR. BROUGH: Thank, Your Honor, may it ---

22 THE COURT: Yes, sir.

23 MR. BROUGH: --- please the Court. Um, Your Honor,
24 Mr. Nesbitt files the application in front of you, we've
25 alleged three grounds: a failure to investigate by trial

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 counsel, ineffective assistance of trial counsel, involuntary
2 guilty plea. In support of our application, at this time we
3 would call Mr. Nesbitt to the stand, Your Honor.

4 THE COURT: Okay, Mr. Nesbitt, you wanna come on up, sir.
5 If you'll come around, uh, place your left hand on this
6 (indicating) Bible, raise your right, be sworn.

7 THE APPLICANT: Alright. Alright.

8 (Whereupon, the Applicant came forward.)

9 (Whereupon, a discussion was held off the record.)

10 THE COURT: Left hand on the Bible, raise your right to
11 the extent ya can. No, other way.

12 THE APPLICANT: Other way.

13 THE COURT: There you go.

14 CHARVUS TARREL NESBITT,
15 having been first duly sworn, testified as follow:

16 THE COURT: Okay, have a seat, please and state your full
17 name for the record if you will.

18 THE APPLICANT: Yes, sir, that my name is Charvus Tarrel
19 Nesbitt.

20 MR. BROUGH: May it please the Court, Your Honor.

21 THE COURT: Yes, sir, absolutely.

22 DIRECT EXAMINATION BY MR. BROUGH:

23 Q. Okay. Mr. Nesbitt, you filed this application and you've
24 alleged among other things that your plea was involuntary, is
25 that correct, sir?

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 A. Yes, sir.

2 Q. Okay. Now you pled under *North Carolina vs. Alford*, sir,
3 do you know what that is?

4 A. Yes, sir. Under *North Carolina vs. Alford* it means that,
5 um, by the evidence, you goin' off the evidence and you just
6 pleading to the evidence.

7 Q. Okay, and and your attorney at that time was Mr. Fletcher
8 Smith, is that correct?

9 A. Yes, sir.

10 Q. Okay, and was he the first lawyer that you had
11 retained ---

12 A. No, sir.

13 Q. --- this matter?

14 A. No, sir.

15 Q. Okay. Who was your first attorney, sir?

16 A. Mrs. Georgia Patri, uh, Mrs. Georgia Patricia Anderson.

17 Q. Okay, and I guess at some point ya'll went your separate
18 ways?

19 A. Uh, yes, sir.

20 Q. Okay. Uh, how long was she representing you before you
21 changed counsel, sir?

22 A. About three and a half, four months ---

23 Q. Okay.

24 A. --- think so, proximate.

25 Q. And then when you changed counsel to to Mr. Smith, what

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 was the reason for that change, sir?

2 A. Uh, I had to change Mrs. Pat Anderson, um, because I had
3 heard through a grapevine people sayin' she was a bad attorney
4 but then I had heard it through other family members that, uh,
5 I was gonna snitch on my brother Teddy Byers so they wanted to
6 fire her, kinda wanted me take the fall.

7 Q. Okay. Now the case that you were charged with, were you
8 the only person charged with these offenses, sir?

9 A. No, sir.

10 Q. Okay. Who were the other folks that were charged?

11 A. Uh, Teddy Byers, Johnathon Petty and Hazel Stoudemire.

12 Q. Okay, uh, and those are all folks that you know, sir?

13 A. Family ---

14 Q. Okay.

15 A. --- and friend a family, ---

16 Q. Uh, ---

17 A. --- thought was family.

18 Q. I got ya. Now the allegations against you essentially
19 were that ya'll went into the residence of a Daniel Landrum
20 who was list as a victim, correct?

21 A. Yes, sir.

22 Q. Uh, that he was robbed, shot and killed and that his
23 girlfriend also was shot, Jermeka ---

24 A. That's what ---

25 Q. --- Rookard, ---

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 A. --- it said.

2 Q. --- is that correct?

3 A. That's what they ---

4 Q. That's that's what the State alleged against you,
5 correct?

6 A. Yes, sir.

7 Q. Now at the time of your plea, if I can refer the Court to
8 the transcript, Your Honor, ---

9 THE COURT: Yes.

10 Q. --- uh, I wanna put this in front of you too, now you
11 were asked specifically 'bout the fact that you were pleading
12 under *North Carolina vs. Alford*, is that correct?

13 A. Yes, sir.

14 Q. Okay, and that you were pleading to a negotiated sentence
15 of 40 years.

16 A. Yes, sir.

17 Q. Okay. Uh, now in that, and the Court went through a
18 sentence with you, you were asked, sir, specifically by the
19 Court on page 9 of the transcript, starting on line 23 the
20 Court asked you starting, "Now when someone tells me they're
21 pleading under *Alford* or pleading no contest, what that means
22 to me is, if you'll listen and see well if this agrees with
23 your position, that means you and your attorney have reviewed
24 the evidence that's in the possession of the State as it
25 relates to these charges and after reviewing that evidence you

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 have come to the conclusion that if the evidence were
2 presented to a jury during trial that it would be more likely
3 result in a conviction by a jury of those charges and
4 therefore while not admitting guilt, you are pleading no
5 contest as a result of your review of that evidence, does that
6 correctly state your position," and you indicated on page 10,
7 starting on line 11, "Yes, sir, instead of takin' to trial be
8 charged with the hand of one is the hand of all," is that
9 correct?

10 A. Yes, sir.

11 Q. Now did you in fact review the evidence in the State's
12 possession before you entered this plea?

13 A. I reviewed the evidence that they showed me.

14 Q. Could you tell me what they showed you, sir.

15 A. It wasn't what I have now.

16 Q. Okay, and you say it wasn't what you have now, are you,
17 are you indicating that you're now in possession of items that
18 you were not aware existed in your case?

19 A. Absolutely.

20 Q. Okay. Now at the time of your plea, how old were you,
21 sir?

22 A. I had just turned 23.

23 Q. Okay, uh, and was it explained to you that on a murder
24 sentence you would do day for day time?

25 A. No, he told me I would do 85 percent.

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 Q. Okay, uh, but you understand now ---

2 A. Yes, day for day.

3 Q. Okay, uh, and so you agreed essentially under *North*
4 *Carolina vs. Alford* to take a plea based on what you felt was
5 the strength a the State's case that would keep you
6 incarcerated until you were 63-years-old, is that correct?

7 A. Yes, sir.

8 Q. Okay. Now go through with you, show you a number of
9 items -- have this marked for ID as Applicant's 1 and that
10 this is 2.

11 (Applicant's rap sheet marked Applicant's Exhibit
12 No. 1 and Investigation report marked Applicant's Exhibit
13 No. 2 for identification.)

14 Q. Mr. Nesbitt, I wanna show you what's been marked as
15 Applicant's No. 1 for ID, uh, would you agree with me that
16 that's a copy of your prior record at the time of this case,
17 sir?

18 A. Yes, sir.

19 Q. Okay, and would it be fair to say that before this case
20 the o -- absolutely only thing you had ever been charged
21 and/or convicted of is a trespassing charge ---

22 A. Yes, sir.

23 Q. --- back in 2010.

24 A. Yes, sir.

25 Q. This time like to move Applicant's 1 into evidence.

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 THE COURT: Objection?

2 MS. GIOVANOLI: Objection. Objection, it's it's not
3 authenticated, I don't know if that's in fact his, uh, correct
4 rap sheet.

5 THE COURT: Okay. Alright, I'll, um, overrule the
6 objection, allow it in as Applicant's Number 1.

7 MR. BROUGH: Thank you, Your Honor.

8 (Applicant's Exhibit No. 1, Applicant's rap sheet,
9 admitted into evidence.)

10 BY MR. BROUGH:

11 Q. Also gonna show you Applicant's No. 2, sir. Uh, would it
12 be fair to say that's an investigation report into this case?

13 A. Yes, sir.

14 Q. Prior to entering your plea, did you review that
15 document?

16 A. I never seen it before till you showed it to me.

17 Q. Okay. Um, and in that document does it indicate that you
18 were identified by some of the witnesses? Without getting
19 into the percentage sure that they indicate that they were
20 sure of your identify, is there an indication in there on the
21 second page of that that you were identified, uh, ---

22 A. It was 50 percent incorrect.

23 Q. I believe that it indicates that when they talk to
24 Ms. Burgess, Starr Burgess, she indicated that she was 40 to
25 50 percent sure that you were one of the suspects, is that

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 right?

2 A. Yes, sir.

3 Q. Okay, but she was one of the main witnesses that would
4 have testified at trial as to the identity of the folks
5 involved, correct?

6 A. Yes, sir.

7 Q. And that identity was 40 to 50 percent sure, is that
8 accurate?

9 A. Yes, sir.

10 Q. Okay. Were you aware of that in your review of the
11 evidence?

12 A. No, sir.

13 Q. Okay. Have this marked as Applicant's 3.

14 (Affidavit of identification marked Applicant's Exhibit
15 No. 3 for identification.)

16 Q. Show you what's been marked for identification as
17 Applicant's Exhibit 3, is that a copy, sir, uh, or does it
18 purport to be a copy of the affidavit of identification by
19 Ms. Burgess of you?

20 A. Yes, sir.

21 Q. Okay. Uh, if you would, sir, could you read what it says
22 as the the picture that she picked out and as to the person
23 agreed it was.

24 A. Here (indicating)?

25 Q. Yes, sir.

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 A. This says, Spoke with Jermaine while at the trailer, I am
2 40 to 50 percent sure this is him. From what I can remember,
3 he has a little bit longer hair and has facial hair was
4 fuller.

5 Q. Okay, so thi -- again, that this is the witness's ID of
6 you from the incident 40 to 50 percent sure describing
7 different facial hair ---

8 A. (The witness nodded in the affirmative.)

9 Q. --- and describing different hair on top of your head,
10 correct?

11 A. Yes, sir.

12 Q. A and that was one of the State's key witnesses, correct?

13 A. Yes, sir.

14 Q. Okay. Were you aware that any of that information
15 existed?

16 A. No, sir.

17 Q. Okay. I'll move Applicant's 2 and 3 into evidence.

18 THE COURT: Objections?

19 MS. GIOVANOLI: No, Your Honor.

20 THE COURT: Alright, without objection the same will be
21 moved into evidence.

22 (Applicant's Exhibit No. 2, Investigation report, and
23 Applicant's Exhibit No. 3, Affidavit of identification,
24 admitted into evidence.)

25 BY MR. BROUGH:

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 Q. And there was another witness as well, correct, ---

2 A. Yes, sir.

3 Q. --- to the incident a and she was a listed victim on the
4 attempted murder case, was that Ms. Rookard?

5 A. Yes, sir.

6 Q. Okay.

7 (Statement of BJ Rookard marked Applicant's Exhibit No. 4
8 for identification.)

9 I'll show you what's been marked for ID as Applicant's
10 Exhibit 4, wha -- does that purport to be a statement from
11 Ms. Rooker as to the incident?

12 A. Yes, sir, think this has BJ Rookard.

13 Q. Okay. BJ Rookard, okay. I'm sorry, you are correct, he
14 was the son of Ms. Rookard who was the listed victim, I
15 believe I misspoke, is that accurate?

16 A. Yes, sir.

17 Q. Okay. Uh, and he was a named witness as well in this
18 case, correct?

19 A. Yes, sir.

20 Q. Okay. Now in this statement he describes the incident in
21 detail, correct?

22 A. Yes, sir.

23 Q. Okay. Starting midway down on Applicant's 4 if you could
24 go through and and read what it says starting with, "Two black
25 guys . . ."

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 A. It says, "Two black guys dressed in all black walked
2 inside, the one in front was short and had a, some hat, you
3 could see that he had dread, dreadlocks and was and and a hat,
4 I didn't really see what the other guy looked like, next thing
5 I knew the guy with dreadlocks started shootin'."

6 Q. Now that the guy with dreadlocks who started shooting,
7 that was the individual that was described as being short,
8 correct?

9 A. Yes, sir.

10 Q. How tall are you?

11 A. My almost 6 foot, maybe 6'1.

12 Q. Would you describe that as being short?

13 A. No, sir.

14 Q. Did you have dreadlocks at the time?

15 A. No, sir.

16 Q. And this is the individual that they have list as the one
17 who fired, correct?

18 A. Yes, sir.

19 Q. That's another witness from the scene, correct?

20 A. Yes, sir, ---

21 (Indiscernible cross-talk.)

22 Q. When you entered your plea, had you reviewed this
23 evidence?

24 A. Nope, no, sir.

25 Q. Like to admit that as Applicant's 4, please.

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 THE COURT: Objections?

2 MS. GIOVANOLI: No, Your Honor.

3 THE COURT: Alright, without objection the same is
4 admitted.

5 (Applicant's Exhibit No. 4, Statement of BJ Rookard,
6 admitted into evidence.)

7 BY MR. BROUGH:

8 Q. Now we've talked a little bit about some of the evidence,
9 would it be fair to say that they did recover a weapon from
10 the scene, ---

11 A. Yes, sir.

12 Q. --- okay, that that weapon was in fact registered to you.

13 A. Yes, sir, it was.

14 Q. Okay. Uh, and it was later reported as being stolen,
15 correct?

16 A. Yes, sir.

17 Q. Okay. Now you indicated one of your co-defendants was a
18 gentleman by name of Teddy Byers, correct?

19 A. Yes, sir.

20 Q. Have this premarked as . . .

21 (Copy of search warrant marked Applicant's Exhibit No. 5
22 for identification.)

23 Thank you.

24 COURT REPORTER: Welcome.

25 Q. I'll show you a copy of what's been premarked as

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 Applicant's 5 for identification purposes, is that a copy of
2 the search warrant, sir?

3 A. Yes, sir.

4 Q. Okay, and and I'm gonna ask it going through
5 Applicant's 5 if I can, uh, on the the fourth page there's
6 there's an affidavit, uh, attached for the officer's reason
7 for search, correct?

8 A. Yes, sir.

9 Q. Okay. Uh, and in that affidavit 'bout midway through is
10 there an indication that Mr. Byers resides with you?

11 A. Want me to read it?

12 Q. Yes, sir, that be fine.

13 A. It says, "Through a record search this investigator was
14 able to determine that Teddy Byers a co-habitant of Nesbitt
15 closely matched the description of the other responsible
16 party," says, "A search of Landrum's mobile phone shows an
17 incoming call from phone number 864-497-2718 at 17:26 hours
18 and an ongoing call to the same number at 17:32 hours. It has
19 been determined that Mr. Byer's mobile phone number is
20 864-497-2718," says, "Mr. Byers was placed in a lineup and
21 identified as one of the suspects and his phone was one of the
22 last ones callin' the victim, it was also determined through
23 SCDMV that evidence could be located in their residence and in
24 their vehicles. Investigators feel the evidence taken from
25 the scene such as glass pieces of a window, curtain, blood or

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 other items could have been deposited in the vehicle since it
2 was apparently driven from the incident location."

3 Q. Okay, so there's an indication that Mr. Byers lived with
4 you, correct?

5 A. Yes, sir.

6 Q. And did he live with you?

7 A. He really didn't live anywhere, yeah, he's ---

8 Q. But he had access to your ---

9 A. Yes, sir.

10 Q. --- house, correct?

11 A. Yes, sir.

12 Q. So would have had had access to your property
13 potentially?

14 A. Yes, sir.

15 Q. Okay. Uh, ---

16 A. Yes, want me put on the record that, uh, him and his wife
17 was goin' through a divorce and she had put him out so the
18 clarification was he was pretty much movin' around everywhere.

19 Q. Okay, so that's why you said he wasn't really living
20 anywhere.

21 A. Yes, sir, ---

22 Q. Okay.

23 A. --- clarification.

24 Q. Um, you knew Mr. Byers?

25 A. Yeah, he my half brother, ---

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

- 1 Q. Okay.
- 2 A. --- got same mother.
- 3 Q. Was he, uh, tall like you?
- 4 A. Nah, he a little bit shorter than me and he more stocky
- 5 than me.
- 6 Q. He have dreads?
- 7 A. Yes, sir.
- 8 Q. So he would have matched the description as the
- 9 individual that was listed as firing from one of the witnesses
- 10 at the crime scene, correct?
- 11 A. Yes, sir.
- 12 Q. Were you aware that that information existed in
- 13 Applicant's 5 at the time of your plea, sir?
- 14 A. No, sir.
- 15 Q. This time like to move Applicant's 5 into evidence.
- 16 THE COURT: Objections?
- 17 MS. GIOVANOLI: No objection.
- 18 THE COURT: Alright, without objection the same is
- 19 admitted into evidence.
- 20 (Applicant's Exhibit No. 5, Copy of search warrant,
- 21 admitted into evidence.)
- 22 BY MR. BROUGH:
- 23 Q. Uh, direct your attention back to Applicant's Exhibit
- 24 No. 2 which is the investigation report, ---
- 25 A. Um -- hum.

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 Q. --- second page, sir, there there's a, an indication in
2 there 'bout statements that the victim, Ms. Rookard, had
3 given, correct?

4 A. Yes, sir.

5 Q. Okay. Uh, if you could starting on second full
6 paragraph, if you could go over that for me, sir, if you
7 could ---

8 A. Said ---

9 Q. --- read that.

10 A. --- second full paragraph?

11 Q. Yes, sir.

12 A. Says, On 12/9/10 we checked with SRMC to see if we could
13 speak with Jermeka Rookard, we were told to come then because
14 she was talkin' well and not too medicated. Investigator
15 Foster and I went to ICU at SRMC to speak with Mrs. Rookard.
16 She stated that there was a knock at the door and two guys
17 came in. She said that they were not inside long and that she
18 heard gunshots. She said that she went towards them and she
19 got shot. She stated that she turned to get away and
20 collapsed in the kitchen. She told us that the doctors stated
21 that she was shot once with it entering the right side of her
22 neck and exiting the left side a her back. She insisted that
23 she did not once with it -- hold on. She stated that she
24 turned turned to get away and collapsed in the kitchen. She
25 told us that the doctor said that she was shot once with it

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 entering the right side of her neck and exiting the left side
2 of her back. She insisted that she did not know the guys that
3 did this. She did not admit to the drug sales in the
4 residence. She stated that it was something her brother did
5 but she wa -- she would occasionally sell some also. I
6 presented her with a photo lineup with Mr. Nesbitt's photo in
7 it and she pointed out Mr. Nesbitt's photo and stated that he
8 looked like one of the guys. She scored it five outta ten as
9 bein' him.

10 Q. Okay, so she's not really sure either. She's 50 percent
11 sure that maybe that's you.

12 A. Yes, sir.

13 Q. So you've got Ms. Burgess that is 40 to 50 percent sure
14 it might be you but the hair was different, ---

15 A. Yes, sir.

16 Q. --- facial hair was different, ---

17 A. Yes, sir.

18 Q. --- you got the victim that's maybe 50 percent sure it's
19 you, correct, ---

20 A. Yes, sir.

21 Q. --- then you've got the victim's son, BJ Rookard, who
22 indicates essentially that the individual that did the
23 shooting was short ---

24 A. Yes, sir.

25 Q. --- and you're you're 6 foot tall.

CHARVUS T. NESBITT - DIRECT EXAMINATION BY MR. BROUGH

1 A. Yes, sir.

2 Q. And after reviewing all of this evidence and having
3 essentially no prior record other than a trespassing charge,
4 'parently you felt strongly compelled that you would receive a
5 sentence of greater than 40 years which is what you agreed to
6 accept, is that accurate?

7 A. Yes, sir.

8 Q. Did you review all of this?

9 A. Nope. No, sir.

10 Q. When you were asked by the Court, going back to your
11 transcript, sir, on page 7, beginning, sir, on line 13 the
12 Court asked ya and they said, "So, Mr. Nesbitt, you know what
13 you're doin'," if you could please on page 7 line 15 read your
14 answer.

15 A. Says, "Mr. Nesbitt," "Yes, sir, I'm pleadin' guilty but
16 to no contest," but it got content, I said it wrong with no
17 contest, that's what it got on transcript.

18 Q. Okay, so my question to you is, sir, have you had an
19 opportunity now to review the evidence in your case?

20 A. I have now, then I didn't.

21 Q. Well that's what I'm sayin', now have you had an
22 opportunity to review the evidence ---

23 A. Yes, sir.

24 Q. --- in your case? Having seen the evidence that now
25 exists, would you have entered this plea?

CHARVUS T. NESBITT - CROSS-EXAMINATION BY MS. GIOVANOLI

1 A. Hell nah.

2 Q. Would you have gone to trial?

3 A. Yes, sir.

4 Q. Are you asking this court to give you a new trial on this
5 case?

6 A. Yes, sir.

7 Q. And are you asking to do so because you feel that not
8 having the information that you needed that your plea was
9 involuntary?

10 A. Yes, sir.

11 Q. Do you feel that your lawyer was effective in advising
12 you as to what the evidence was and your chances at trial,
13 your rights to cross-examine, confront the witnesses against
14 you?

15 A. No, he wasn't.

16 Q. If you could take your plea back, would you go to
17 trial?

18 A. Yes, sir, hell yeah.

19 Q. Please answer any a the State's questions, sir.

20 CROSS-EXAMINATION BY MS. GIOVANOLI:

21 Q. Good morning, Mr. Nesbitt.

22 A. How you doin'?

23 Q. Alright, thank you. Okay, uh, you stated earlier on in
24 your testimony that you were in possession of evidence that
25 you didn't see prior to entering your plea, ---

CHARVUS T. NESBITT - CROSS-EXAMINATION BY MS. GIOVANOLI

1 A. Yes, ma'am.

2 Q. --- that what, uh, uh, what, uh, all the evidence that
3 you've been reviewing up there is that all the things that you
4 did not see?

5 A. Yes, ma'am.

6 Q. So it's your testimony today that you were never provided
7 with that and you never discussed that with your attorney.

8 A. I didn't even have a motion a discovery, I just got it.

9 Q. Just got it today?

10 A. Yesterday.

11 Q. Yesterday, from whom?

12 A. The mail room at Perry Correctional Institution.

13 Q. Well who sent it?

14 A. Mr. Brough Brough.

15 Q. And, uh, when did you retain Mr. Brough for this
16 action?

17 A. Sometime beginning a the year.

18 Q. This year? Um, ---

19 A. No, the ---

20 Q. --- your application was filed ---

21 A. Last year, ---

22 Q. --- in ---

23 A. --- last year.

24 Q. Okay. Uh, let's -- going forward to, um, the evidence
25 that you've just now reviewed, ---

CHARVUS T. NESBITT - CROSS-EXAMINATION BY MS. GIOVANOLI

1 A. Um-hum.

2 Q. --- um, in those reports it states that some of the
3 victims were 40 to 50 percent sure that you were a a part of
4 the crime, is that correct?

5 A. Yes, ma'am.

6 Q. Okay. Um, how sure were your co-defendants that it was
7 you? Are you aware of the said -- the statements that they
8 gave law enforcement?

9 A. Yeah, after they pled.

10 Q. Are you aware that any deals that they made with the
11 State?

12 A. Yes, ma'am.

13 Q. Okay. Do you know where your brother is now?

14 A. Yes, ma'am.

15 Q. Where is he?

16 A. Livesay.

17 Q. And how much time is he serving?

18 A. Fifteen years.

19 Q. And did he plead guilty to any of these offenses?

20 A. No, ma'am, not my offense.

21 Q. No, the offenses for which he was charged arising out of
22 this same incident?

23 A. No, ma'am.

24 Q. So what is he serving 15 years for?

25 A. Think accessory after the fact.

CHARVUS T. NESBITT - CROSS-EXAMINATION BY MS. GIOVANOLI

- 1 Q. Okay, s -- and that was regarding the same incident.
- 2 A. Yes, ma'am.
- 3 Q. Okay, so he pled guilty to those charges.
- 4 A. Yes, ma'am.
- 5 Q. And do you know where, um, Hazel Stoudemire is?
- 6 A. Approximately. I hear he's at Lieber, I don't know for a
7 fact but that's what they say.
- 8 Q. Is he also serving time with charges that arose from this
9 incident?
- 10 A. Yes, ma'am.
- 11 Q. Okay. You, are you aware of a deal that he made with the
12 State?
- 13 A. Yes, ma'am.
- 14 Q. And are you aware of statements that he gave to law
15 enforcement?
- 16 A. Afterwards yes -- well durin' -- I was aware of them but
17 I didn't have 'em in full detail.
- 18 Q. And there was one other co-defendant, Johnathon
19 Petty, ---
- 20 A. Um-hum.
- 21 Q. --- okay, and are you aware of where he is now?
- 22 A. No, I don't. I don't know where he's at.
- 23 Q. Are you aware of any deal that he made with, uh, the
24 State?
- 25 A. Yes, ma'am.

CHARVUS T. NESBITT - CROSS-EXAMINATION BY MS. GIOVANOLI

1 Q. Okay. And did he plead guilty to any offenses arising
2 from this incident?

3 A. Same thing my brother done pled to.

4 Q. Okay. And these are all your family members?

5 A. Thought they was family members, Johnathon Petty's is a
6 friend a my brothers.

7 Q. So they aren't all your family members?

8 A. Petty's not.

9 Q. Okay. You testified earlier that, um, well let me get it
10 straight. Isn't it correct that there were two guns used in
11 the armed robbery?

12 A. It's what they say.

13 Q. Were both of those guns were were registered in your
14 name?

15 A. That's what they say.

16 Q. Well were they or were they not?

17 A. Say what now?

18 Q. Were they registered in your name?

19 A. One of 'em was.

20 Q. The one that they found.

21 A. Yes, ma'am.

22 Q. Okay. And that was reported stolen, correct?

23 A. Yes, ma'am.

24 Q. Okay. Is it not -- is it true that you reported that
25 stolen immediately after this incident?

CHARVUS T. NESBITT - REDIRECT EXAMINATION BY MR. BROUGH

1 A. Unfortunately I did.

2 Q. Oh, I have nothing, no further questions.

3 A. Thank you.

4 THE COURT: Redirect, Mr. Brough?

5 MR. BROUGH: Yes, just briefly, Your Honor.

6 REDIRECT EXAMINATION BY MR. BROUGH:

7 Q. Mr. Nesbitt, I believe you indicated you received that
8 information yesterday, have we gone over information before
9 then?

10 A. Yes, sir.

11 Q. But you wanted a copy for yourself, correct?

12 A. Wanted a copy for myself.

13 Q. Okay. I was under the impression you already had a copy,
14 is that correct?

15 A. Yes, sir.

16 Q. Okay. Uh, now in terms of your co-defendants giving
17 statements against you, your co-defendants were all charged
18 with this offense, correct?

19 A. In the beginning we all was charged with the same thing.

20 Q. They pointed the finger to you as being the shooter,
21 right?

22 A. Yes, sir.

23 Q. So all of your co-defendants indicated that you were the
24 shooter ---

25 A. Yes, sir.

CHARVUS T. NESBITT - RECROSS-EXAMINATION BY MS. GIOVANOLI

1 Q. --- but I'm a little confused about somethin' because in
2 the statement from Mr. Rookard it indicated that the shooter
3 was short ---

4 A. Yes, sir.

5 Q. --- so all of your co-defendants who are also charged
6 with this crimes were pointing a finger at someone that did
7 not match the description that one of the witnesses whose
8 mother was a victim gave, is that correct?

9 A. Yeah, unfortunately it is, it's sad, ain't it?

10 Q. So that evidence was inconsistent with the State's own
11 witnesses who would have had to testify.

12 A. Absolutely.

13 Q. Now your other co-defendants did they have records?

14 A. Yes, sir.

15 Q. Where was Mr. Petty after this incident?

16 A. He ran.

17 Q. He ran?

18 A. Yep, he ran.

19 Q. No, further questions.

20 THE COURT: Recross, ma'am?

21 MS. GIOVANOLI: Yes, briefly Your Honor.

22 RECROSS-EXAMINATION BY MS. GIOVANOLI:

23 Q. Uh, did you see, uh, Mr. Rooker [sic] in the house
24 whenever you entered? Did you see Mr. Rooker in the house
25 when you entered?

CHARVUS T. NESBITT - RECROSS-EXAMINATION BY MS. GIOVANOLI

1 A. How could I see Mr. Rooker in the house?

2 Q. I'm asking you the question.

3 A. Nope.

4 Q. Okay. Did -- uh, you stated earlier that you weren't
5 gonna snitch on your brother, correct?

6 A. Yes, ma'am.

7 Q. Okay. Did the State ever approach you and offer you a
8 deal?

9 A. Actually through my attorney Mrs. Pat Anderson they did.

10 Q. Okay, and what was -- did you accept or reject that
11 offer?

12 A. I never gave her a yes or a no.

13 Q. Okay, but, uh, you testified that you got rid of
14 Mrs. Anderson because she wanted you to you snitch on your
15 brother.

16 A. My family them got rid a Ms. Pat Anderson, at the time I
17 was ignorant to the law and I just went along with them.

18 Q. You said your family, you mean the co-defendants?

19 A. No, my ---

20 Q. Other family.

21 A. --- my mother them and ---

22 Q. Okay.

23 A. --- and my other brothers.

24 Q. Okay, so did you ever cooperate with law enforcement in
25 this case?

CHARVUS T. NESBITT - RE-CROSS-EXAMINATION BY MS. GIOVANOLI

1 A. Nope.

2 Q. Okay, no further questions.

3 THE COURT: Okay. Alright, Mr. Nesbitt, thank you, I
4 appreciate it, ---

5 THE APPLICANT: Yep.

6 THE COURT: --- have a seat ---

7 THE APPLICANT: Yes, sir.

8 THE COURT: --- at counsel table.

9 (Whereupon, the Applicant left the stand.)

10 THE COURT: Alright, Mr. Brough, any additional
11 witnesses?

12 MR. BROUGH: No, Your Honor.

13 THE COURT: Okay. Alright, any witnesses for the State?

14 MS. GIOVANOLI: Yes, Your Honor, the State would call
15 Fletcher Smith.

16 (Whereupon, the witness came forward.)

17 THE COURT: Mr. Smith, you raise your right hand, sir,
18 place your left on the Bible.

19 FLETCHER NATHANIEL SMITH, JR.,
20 having been first duly sworn, testified as follows:

21 THE COURT: Alright, sir, if you'll take a seat,
22 state ---

23 THE WITNESS: Thank you.

24 THE COURT: --- state your full name for the record,
25 please.

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

1 THE WITNESS: Fletcher Nathaniel Smith, Jr.

2 DIRECT EXAMINATION BY MS. GIOVANOLI:

3 Q. Good morning, Mr. Smith.

4 A. Yes, ma'am, good morning.

5 Q. Um, how long have you been practicing criminal law?

6 A. Oh, uh, thirty-five years. I've been an assistant
7 prosecutor and I've worked as an attorney for state senate for
8 a while.

9 Q. Okay, and what do you do now?

10 A. Uh, I I'm a ge -- general practice lawyer in Greenville,
11 South Carolina.

12 Q. Um, how did you come to represent Mr. Nesbitt?

13 A. Uh, someone someone in his family contacted me and, uh,
14 retained me, uh, and, uh, I went and interviewed him and and
15 they retained me on his behalf, I was a paid lawyer.

16 Q. Okay. You, uh, do you recall when this was when you were
17 retained?

18 A. No, ma'am, I don't.

19 Q. Um, do you recall how early on in his criminal
20 proceedings?

21 A. Tell you the truth no, 'cause I forgot ---

22 Q. Okay.

23 A. --- about all this stuff.

24 Q. Okay, uh, you said that you met with, uh, the
25 Applicant ---

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

- 1 A. Yeah, um, ---
- 2 Q. --- and ---
- 3 A. --- hum.
- 4 Q. --- do you recall where that took place?
- 5 A. Don't recall that either.
- 6 Q. Okay. Was he in prison? was he out?
- 7 A. He coulda been in jail, uh, coulda been in jail at the
- 8 time.
- 9 Q. Um, did you discuss the indictments with the Applicant?
- 10 A. Yeah, we, uh, received discovery, uh, I's got some dis --
- 11 discovery from, uh, Ms. Georgia Anderson, I received some a
- 12 the discovery I believe from the, uh, solicitor's office ---
- 13 Q. So ---
- 14 A. --- and if you look at the recitation of the, uh,
- 15 solicitor's recitation to the Court, basically a lot of that
- 16 was what was included in in the discovery and we went over
- 17 with, uh, Mr. Nesbitt.
- 18 Q. Okay. You said a lot of that, all of that?
- 19 A. All of that.
- 20 Q. Okay. Did you actually file a motion for discovery?
- 21 A. I think I did, I think I did. I I think if the records,
- 22 uh, should reflect that I filed a Rule 5 and a Brady motion.
- 23 Q. Okay, uh, let's go back, uh, if your memory serves you
- 24 well, how many times did you, approximately how many times did
- 25 you ---

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

1 A. And ---

2 Q. --- meet Mr. Nesbitt?

3 A. --- I I don't know but, uh, when we got closer and closer
4 to trial, I think he and I met pretty good and we went over
5 the evidence in detail and I think the record will reflect
6 that probly I gave him 'bout two weeks to give me some sort of
7 indication as to what he wanted to do after we had gone over
8 the information because, uh, he had some conflicts in what he
9 was going to say about the incident but he put himself inside
10 the trailer along with the other individuals and so we
11 discussed along the line the hand of one is the hand of all
12 even if he does say that he's not the shooter.

13 Q. You say he put himself in the trailer, did he give a
14 statement to law enforcement regarding those ---

15 A. No, it's basically our conversation ---

16 Q. Oh, ---

17 A. --- you know.

18 Q. --- okay, so he told you he was in the trailer. Okay,
19 and, um, with regard to going over the discovery with the
20 Applicant, did you review all the discovery with him?

21 A. All the discovery that I had but, you know, I don't have
22 it with me but all of it I can't remember every detail a every
23 police report and every statement that was given but by and
24 large we went over the evidence with regard to the particular
25 witnesses that were going to be against him which were three

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

1 individuals who were involved in the conspiracy to go inside
2 and rob this guy and then there was the, uh, evidence where
3 where he was talking about with two witnesses and the
4 solicitor indicated they were gonna have problems with those
5 witnesses during his recitation to the Court so Mr. Nesbitt
6 was well aware of, you know, the strengths and weaknesses of
7 his case.

8 Q. As Mr. Nesbitt was reading into the record some a those
9 statements that were offered as exhibits in this hearing, did
10 that refresh your recollection?

11 A. Yeah, to some extent yes.

12 Q. Okay. Do you recall those statements and that in
13 evidence in that discovery?

14 A. Yeah, we knew that there was some witnesses out there
15 that couldn't, you know, some who were victims who couldn't
16 actually identify him properly, I mean, with percentages but
17 the fact a the matter is he, the people who went in there with
18 him that actually resulted in shooting that lady's daughter in
19 the neck and murdering the other fella, uh, had him a hundred
20 percent and so when you make an assessment although I know
21 Mr. Brough ask him own questions when you make an assessment
22 on the hand a one, the hand a all, he doesn't have to be the
23 one to actually be the shooter but if he's there participating
24 in that crime he can go down with life in prison.

25 Q. Well do you recall the guns that were used in this case?

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

1 A. I think, uh, they said something was like a machine gun
2 type and that this fellow had bought bought those two guns
3 prior to the incident, that Mr. Nesbitt, my client, had bought
4 the guns and had supplied the guns to the individuals who were
5 involved in the ---

6 Q. Based on your recollection, were those guns registered in
7 the Applicant's name?

8 A. That's what was reported.

9 Q. Okay. Did you have any evidence of that?

10 A. Yes, I think the police reports indicated that and the
11 solicitor made a representation, I think he's a very honorable
12 solicitor, that those, uh, items were registered in his name.

13 Q. Okay, and is, uh, after this hearing is -- was there any
14 piece of evidence that you don't recall seeing that maybe
15 wasn't provided to you?

16 A. No, I I think there, if had any been, been any Brady
17 violations, I'm certain Mr. Rough [sic] was a great lawyer,
18 woulda probably brought that to the attention of the Court.

19 Q. Um, are you aware of a ballistic report done in this
20 case?

21 A. Uh, I'm certain there was, I can't remember, I mean, I'm
22 certain there was. I I don't know if the gun that they
23 actually found at the scene actually matched up with the
24 bullets that were taken outta the victim or that were, you
25 know, recovered so I think the other weapon may have been,

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

1 never been recovered and the other thing about it was that
2 these individuals in order to try to, try to get out of the
3 crime, uh, actually tried to file po -- false police report,
4 uh, and make it seem as if the gun had been stolen out of the
5 vehicle as I recall and at ---

6 Q. Go go ---

7 A. --- yeah, ---

8 Q. --- ahead, were you gonna ---

9 A. --- at the, ---

10 Q. --- say something?

11 A. --- but well, you know, I don't mind going to trial, I
12 plan for trial, I don't plan for guilty pleas. I don't think
13 any defense lawyer, public defender, anybody else I know of
14 plan for guilty pleas, we plan for trial and this guy wanted
15 to go to trial after we gave him all the information then by
16 God we would have gone to trial, we would have been ready to
17 go and we would have proceeded. He decided he wanted to give
18 up his constitutional rights after I gave him the odds I
19 thought that he was most probably going to be convicted and
20 that he was gonna spend the rest of his life in prison without
21 the negotiated plea.

22 Q. Okay, and so that was your advice to him.

23 A. That was my advice.

24 Q. Okay, but you still ---

25 (Indiscernible cross-talk.)

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

1 A. I still stand behind that device [sic].

2 Q. Okay, and so you s -- but, uh, at the time you gave him
3 that advice but whose decision was it to plead ---

4 A. It was his decision, he, as I said in the Court record
5 this man is highly intelligent, I mean, you know, he he, this
6 is not a dummy, this fella is not, this fella.

7 Q. And, um, um, can you -- based on your recollection what
8 was your investigation outside a the discovery of this case?
9 Did you talk to any witnesses?

10 A. I don't know if I talked to any witnesses per se, I
11 can't, I can't recall.

12 Q. Okay. Uh, well do -- were the other three co-defendants
13 represented by counsel?

14 A. They were.

15 Q. Did you ever talk with their counsel?

16 A. No, I didn't talk to their counsel.

17 Q. Were you able to talk to the victims in this case?

18 A. I think I did, I I I look, I can't recall, I I ---

19 Q. Okay.

20 A. --- can't recall.

21 Q. Did you feel you had sufficient time to prepare for
22 trial?

23 A. Yeah, we had sufficient time to prepare.

24 Q. Okay, that let me go back because you told me that you
25 discussed the case with Applicant, you gave him two weeks to

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

1 decide whether he wanted ---

2 A. Yeah, I ---

3 Q. --- to plea?

4 A. --- think, I think based on what I read in the record
5 there was two weeks where he could consider whether or not he
6 wanted to take it.

7 Q. Okay, and did he give you a a answer after those two
8 weeks?

9 A. Yes, ma'am, and he was very close to his family, I think
10 he had a a girlfriend at the time and he discussed it with
11 those individuals as well so I -- that -- and so they
12 participated, I didn't put any pressure on him, but they
13 participated in helping him make his decision.

14 Q. Okay, and whose idea was it to plead under *Alford*?

15 A. Well, the decision was his to plead under *Alford* because
16 if he's going to say, he's gonna come in here, he's gonna say,
17 Well, I didn't do the crime, I didn't do, I wasn't the
18 shooter, fine, okay, you're not the shooter but the hand a one
19 if you'll look at the record is the hand of all so I don't
20 think he got on the train, he didn't get on the choo-choo
21 train early enough and that's why he didn't get the plums that
22 the other three individuals got so he came on late, by him
23 comin' on late and they were pointing the finger at him he got
24 zapped.

25 Q. Do you think he understood the hand of one is the hand of

FLETCHER N. SMITH, JR. - DIRECT EXAMINATION BY MR. GIOVANOLI

1 all?

2 A. Oh yes, he did I think, ha.

3 Q. And you negotiated this, uh, ---

4 A. I negotiated with, uh, Mr. Derrick Bulsa.

5 Q. Bulsa, okay. And just to clarify for the record there is
6 no piece a discovery that you received and reviewed that you
7 didn't review with with the Applicant?

8 A. That's correct.

9 Q. Did you provide him with his own copy of the discovery?

10 A. I don't think I did.

11 Q. Okay. Did he request this -- his own ---

12 A. I don't ---

13 Q. --- copy?

14 A. No, he hadn't requested any.

15 Q. Okay.

16 A. I may have, I don't know, I mean, sometime that my
17 paralegal, somebody else do it, I'll tell the paralegal go and
18 send it to him but ---

19 Q. Did you -- were you -- did you have the opportunity to
20 r -- to review your file in this case?

21 A. No, I mean, basically I reviewed the, uh, ---

22 Q. Transcript?

23 A. --- transcript this morning.

24 Q. Okay. Okay, no further questions.

25 THE COURT: Cross-examination, sir.

FLETCHER N. SMITH, JR. - CROSS-EXAMINATION BY MR. BROUGH

1 MR. BROUGH: Thank, Your Honor, may it please the Court.

2 THE COURT: Yes, sir.

3 CROSS-EXAMINATION BY MR. BROUGH:

4 Q. Mr. Smith, I believe you stated your advice was that if
5 he didn't enter this plea he would most probably be convicted
6 at trial and receive a life sentence, is that correct?

7 A. That's what -- yeah, murder.

8 Q. Okay. Uh, would it be a fair statement if I were to say
9 that even after trial it's not necessarily a life sentence on
10 a murder case, you could receive 30 years or sometime in
11 between?

12 A. Yeah, and I think that was mentioned in the record too.

13 Q. Okay. Um, at the time he entered the plea, would you
14 agree with his statement that he was 23?

15 A. Yeah, I I'm certain he was 23.

16 Q. Okay. And and so the two of you discussed the fact that
17 when he got out he would then be in his 60s, he would be 63,
18 correct?

19 A. Yeah, maybe, I guess you would add it up, yeah.

20 Q. Now the legal theory that you're referring to on the hand
21 of one is the hand of all, uh, you know, I -- that was the
22 basis for the negotiations, is that correct?

23 A. The basis of the negotiation Mr. Bulsa wanted to put him
24 away for murder ---

25 Q. Okay. ---

FLETCHER N. SMITH, JR. - CROSS-EXAMINATION BY MR. BROUGH

1 A. --- and ---

2 Q. Uh, ---

3 A. --- he's tellin' me that he didn't do, he wasn't the
4 shooter, the evidence was showing that based on his three
5 co-defendants who said he was the shooter the assessment had
6 to be made as to what probability was gonna be that he was
7 gonna get convicted and what was the probability that he was
8 gonna get convicted of murder, with three other people
9 pointin' the finger at you that's pretty high probability
10 there.

11 Q. Alright. Would you agree with me out of the four
12 individuals charged that Mr. Nesbitt's record was the only one
13 pretty much that was relatively clean?

14 A. That's true and and you and I who practice in this area
15 we've had clients who have relatively clean records and some
16 of 'em got life in prison.

17 Q. Now you you reviewed the evidence and the statement of of
18 Ms. Rookard's son, BJ Rookard too, correct, ---

19 A. Yeah, whatever ---

20 Q. --- and ---

21 A. --- statements the -- yeah, the solicitor provided us
22 with all the statements.

23 Q. Okay. Uh, so you were aware in your review of the
24 discovery that the son indicated that the shooter was someone
25 who was short.

FLETCHER N. SMITH, JR. - CROSS-EXAMINATION BY MR. BROUGH

1 A. Coulda been, I mean, I don't have the statement in front
2 me right now but I'm certain that's what it said, okay, let's
3 let's ---

4 Q. Oh, ---

5 A. --- move it on.

6 Q. --- okay. Uh, but the co-defendants indicated that
7 Mr. Nesbitt was the shooter, right?

8 A. Yes, sir.

9 Q. And the co-defense [sic] are all individuals with
10 records ---

11 A. That's correct.

12 Q. --- who are also charged with murder ---

13 A. That's correct.

14 Q. --- and it's essentially them and their testimony that
15 caused you to advise him knowing the way that you did.

16 A. Yes, sir. Yes, sir.

17 Q. Okay. Despite the fact that their testimony what they're
18 saying does not match up with the witnesses at the scene a the
19 crimes who weren't co-defendants.

20 A. Yes, Mr. Brough, and you know what the judge's charge is
21 gonna be, right? You can believe part a what a witness says
22 or none a what a witness says and you can cut and paste,
23 right? So if you cut and paste in those three individuals,
24 his gun, at least one a the guns, right, that he can identify,
25 it's a high probability my guy's gonna go down the tubes.

FLETCHER N. SMITH, JR. - REDIRECT EXAMINATION BY MS. GIOVANOLI

1 Q. That's based on your assessment that the jury's gonna
2 believe the co-defendants.

3 A. Right, and I think most jurors who don't have criminal
4 records would do that.

5 Q. Alright, no further questions.

6 THE COURT: Redirect?

7 MS. GIOVANOLI: Just briefly, Your Honor.

8 THE COURT: Yes, ma'am.

9 REDIRECT EXAMINATION BY MS. GIOVANOLI:

10 Q. So he was looking at 30 to life for murder, correct?

11 A. Yes, ma'am.

12 Q. And why did you think he would get life?

13 A. Because if you get up there and and and I just think that
14 if you get charged with murder, the jury, you got a lady, that
15 lady's daughter's shot through the neck and then you got the
16 other guy who's killed while they're trying to rob somebody
17 who's sellin' marijuana, I think there's a high probability
18 you'd get convicted of murder.

19 Q. He was also charged with an a armed robbery and attempted
20 murder ---

21 A. Right, ---

22 Q. --- and ---

23 A. --- and ---

24 Q. --- a gun charge that was ---

25 A. Yeah, it's a tragic, a tragic situation for him.

FLETCHER N. SMITH, JR. - RECROSS-EXAMINATION BY MR. BROUGH

1 Q. Aside from the weak ID, uh, uh, from the, from the
2 victims and the criminal record of the three co-defendants who
3 were cooperating, um, there was also two guns that were
4 registered to the Applicant and and in your ex -- experience
5 is that enough to find somebody guilty of murder based on the
6 hand of one is the hand of all?

7 A. Well I got, I got a guy who's serving 40 years right now
8 in in, uh, in jail, uh, in Greenville essentially the same
9 thing.

10 Q. Okay. And he also reported one a the guns stolen
11 immediately after the incident.

12 A. Yeah, didn't look good.

13 Q. Alright, uh, I have nothing further.

14 THE COURT: Thank you. Recross, sir.

15 MR. BROUGH: Just briefly.

16 RECROSS-EXAMINATION BY MR. BROUGH:

17 Q. Based on your review and and recollection, would it be
18 fair to indicate that Mr. Byers who was one of the
19 co-defendants was an individual who was short and had
20 dreadlocks?

21 A. Yeah, I mean, if if you tell me that's Mr. Byers, that's
22 fine.

23 Q. Well, he was one the individuals that gave a statement
24 against Mr. Nesbitt, correct, ---

25 A. Correct.

FLETCHER N. SMITH, JR. - RECROSS-EXAMINATION BY MR. BROUGH

1 Q. --- but he also matched the description of the shooter
2 from the victim's son, uh, correct?

3 A. It's possible, yes.

4 Q. No further questions.

5 THE COURT: Okay. Alright, thank you, Mr. Smith, you
6 may ---

7 THE WITNESS: Thank Your Honor.

8 THE COURT: --- step down, I appreciate it.

9 THE WITNESS: Yes, sir.

10 THE COURT: Anything further from the State?

11 MS. GIOVANOLI: Uh, may this witness be excused?

12 THE COURT: Yes, ---

13 THE WITNESS: Thank Your ---

14 THE COURT: --- absolutely.

15 THE WITNESS: --- Honor, appreciate it.

16 THE COURT: Have a great day, ---

17 MS. GIOVANOLI: Thank ---

18 THE COURT: --- Mr. Smith.

19 MS. GIOVANOLI: --- Your Honor.

20 THE WITNESS: Yes, sir.

21 MS. GIOVANOLI: Nothing further from the State.

22 THE COURT: Okay. Alright, any arguments need to be
23 placed on the record?

24 MS. GIOVANOLI: And if Your Honor will like ---

25 THE COURT: I I don't need it, I I just afford you the

MOTIONS AND MATTERS

1 opportunity. Mr. Brough, anything you'd like to put on the
2 record, sir?

3 MR. BROUGH: Um, Your Honor, I think that the the
4 evidence speaks for itself, that my client was advised that he
5 would essentially receive a life sentence if he went to trial,
6 uh, that was the reason that he had pled under *North Carolina*
7 *vs. Alford*, uh, quite frankly even after trial it wasn't a
8 guarantee he would receive a life sentence, he could have
9 received something less than that, he could have even received
10 in theory less than the time that he received in exchange for
11 a *North Carolina vs. Alford* plea, um, and in reviewing the
12 evidence and looking at it objectively, I don't think that
13 there's any reason to believe that if my client had had the
14 information in front of him and knew what the actual evidence
15 was that he would not have proceeded at trial and we would
16 indicate that this is an involuntary plea. He indicated on
17 the record he was pleading not guilty at the time, he
18 indicated that he was not happy with Mr. Smith's
19 representation on the re -- in the transcript, uh, which that
20 the Court has, um, and quite frankly in reviewing everything
21 now that he sees the evidence out there he would have
22 proceeded to trial, that's what he's asking the Court to do,
23 to give him the opportunity to go to trial on this case.
24 Thank Your Honor.

25 THE COURT: Alright.

MOTIONS AND MATTERS

1 MS. GIOVANOLI: And, ---

2 THE COURT: Yes, ma'am.

3 MS. GIOVANOLI: --- Your Honor, the main, the i -- main
4 issue with this case is a claim of ineffective assistance of
5 counsel and pursuant to *Strickland* counsel's representation
6 and performance in this case must have fallen below the
7 reasonable standard given the prevailing professional norms.
8 Um, in this case counsel testified that in his view of the
9 case he was gonna be guilty for numerous reasons. The
10 evidence was there were identifications made by the victims
11 and while weak, he -- there were also three other
12 identifications made by co-defendants all pointing the finger
13 at the Applicant, not only that, there were two guns involved
14 in the incident and they were both registered to the
15 Applicant. As counsel also testified that the Applicant told
16 him that he was in the house, he wasn't the shooter, okay, if
17 he wasn't the shooter, there's ample evidence to find him
18 guilty pursuant to the hand of one is the hand of all. Um, I
19 believe the testimony is very straightforward that everything
20 was discussed, um, with with the Applicant, all evidence, uh,
21 discovery and, uh, Brady material was received by the defense
22 and reviewed with cou -- fro -- with counsel and Applicant,
23 um, Applicant made the decision to plead under *Alford*, he
24 claims he wasn't the shooter, we go back to the hand of one is
25 the hand of all. Um, I I feel that the Applicant has failed

MOTIONS AND MATTERS

1 to meet his burden of proof in proving that counsel's, um,
2 representation fell below the reasonable standard and, uh,
3 therefore the application should be dismissed.

4 THE COURT: Okay. Alright, thank you very much.
5 Alright, I've had the opportunity to listen to the testimony
6 and I've read the transcript of the record as well, uh, um,
7 and I'll respectfully deny the application, find that the
8 Applicant has not met his burden of demonstrating that trial
9 counsel's performance was deficient and I find no prejudice
10 that may have resulted from any deficient performance. After
11 having read the transcript it sounds as though the guilty plea
12 proceeding was very exhaustive and thorough, all of the
13 appropriate questions were asked, clearly defense, the
14 defendant, uh, the Applicant was advised of all his applicable
15 constitutional rights, um, and that and it was clear in the
16 record as well that there were some problems with some a the
17 testimony from the witnesses, um, that was acknowledged not
18 only by the State but it was acknowledged by the defense
19 attorney in his, uh, uh, when he addressed the Court as well;
20 however, on balance looking at totality of the evidence that,
21 uh, the advice that was given to the defendant was sound, um,
22 it was not -- and it was reasonable under the circumstances,
23 um, clearly in the colloquy the defendant made all of the
24 decisions based on the information that was outstanding,
25 questions about witnesses, uh, obvi -- were obviously known at

MOTIONS AND MATTERS

1 the time because the transcript represents that they were
2 known at the time, um, having said that, again, I'll
3 respectfully deny the application for failure to meet the
4 burden of proof. Alright, thank you very much.

5 MS. GIOVANOLI: Thank Your Honor. And, Your Honor, would
6 you like a proposed order?

7 THE COURT: Please.

8 MS. GIOVANOLI: Is thirty days sufficient?

9 THE COURT: Yes, ma'am.

10 MS. GIOVANOLI: Thank you.

11 THE COURT: Thank you very much. Good luck to ya,
12 Mr. Nesbitt.

13 THE APPLICANT: Yes, sir.
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1 CERTIFICATE OF REPORTER

2
3 I, Margaret A. Woods, Court Reporter in and for the State
4 of South Carolina at Large, hereby certify that I reported the
5 preceding case on March 23, 2017 at the time and place
6 heretofore set forth; and that the foregoing pages numbered
7 from 4 through 52, inclusive, constitute a true and accurate
8 transcription of my stenographic notes of the said proceeding.

9 I further certify that I am neither attorney nor counsel
10 for, nor related to or employed by any of the parties
11 connected to the action, nor am I financially interested in
12 the action.

13 September 26, 2017

14
15 Margaret A. Woods

16 Margaret A. Woods, Court Reporter
17 in and for the State of South Carolina at Large.
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249 pages

CH 003F9BC467 from SCCH December 29, 2010 at 10:32:40

SPTSL435

.ICHR.003F9BC467.SCCH.20101229 10:32:40

TO: SPTSL435-24289 20101229 10:32:40 003F9BC467
FROM: SCCH-10208359 20101229 10:32:40

ICHR REQUEST FOR RAP SHEET

ORI-SC042015A FBI-971343FD7 PUR-C

ATN-BARNETTE, BARRY

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REQ ORI-SC042015A 7TH JUDICIAL CIRCUIT

SID-SC01927111 FBI-971343FD7

NAME-NESBITT, CHARVUS TARRELL SEX-M RACE-B

HEIGHT-601 WEIGHT-174 EYES-BRO HAIR-BLK SKIN- BORN-SC

FPC-

HENRY-

PALM PRINTS AVAILABLE

1-FINGERPRINT IMAGES ON THIS SUBJECT ARE STORED ON SCAFIS.

DATE RECORD ENTERED--02/06/2010

DATE OF LAST UPDATE--12/10/2010

ADDITIONAL IDENTIFIERS

NAME

BIRTH

DATES MARKS

SOC SEC

248751776

NESBITT, CHARVUS JARREL

CONTRIBUTOR/SUBJECT

DOA/RCVD CHARGE/DISPOSITION/ETC

NESBITT, CHARVUS TARRELL

02/06/2010

SC0420000 SPARTANBURG CNTY SO

CASE-2010020308

ATN-422100161993

WARR-34452EY

CIT-16-11-620-MISDEMEANOR

ARREST CHARGE 01-ENTERING
PREMISES AFTER WARNING
OFFENSE DATE-02/06/2010
PALM PRINTS AVAILABLE

CIT--MISDEMEANOR

DOC-42 WARR-34452EY

COURT CHARGE 01-ENTERING
PREMISES AFTER WARNING
COURT DISP-CONVICTED
COURT DATE-03/25/2010
ATN-422100161993

NESBITT, CHARVUS JARREL

12/10/2010

SC0420000 SPARTANBURG CNTY SO

CASE-2010121318

ATN-422100174345

Applicant's

3-23-17 (2)

SPARTANBURG COUNTY SHERIFF'S OFFICE
INVESTIGATION REPORT

Applicant's

3-23-17

SC0420000	TYPE : ☐ PRELIMINARY ☐ CONTINUING	CASE : 2010120318
INCIDENT TYPE : Murder/Attempted Murder		VICTIM : Daniel Landrum and Jermeka Rookard
LOCATION : [REDACTED] Spartanburg SC; 29303		

On 12/07/10 I responded to [REDACTED] in Spartanburg County for a shooting. Upon arrival I learned that there was one person deceased inside the residence and one victim transported to the hospital. The residence was secured by Uniform Patrol Deputies. I contacted Detective Richie Foster and gave him the information for the search warrant for the scene. I had been advised that there were four witnesses that had been secured at a trailer across the street. I asked for them to be transported to the Sheriff's Office to be interviewed. There were a few Investigators that were asked to go to the Sheriff's Office to interview the witnesses.

I went next door to [REDACTED] and interviewed Raymond and Maralyn Phillips. They stated that they heard the gunshots, which one of them described as a banging noise, and then heard glass breaking. Mrs. Phillips stated that she went down the hall and looked out of the window in their back door, and Mr. Phillips stated that he looked out of the window in the living room. They stated that they saw two black males getting off the ground and one of them was wrapped up in the curtain. Mrs. Phillips stated that one of the males had what appeared to be a gun in his hand when he got up. The two subjects ran around the end of their trailer and they lost sight of them. I left statement forms with them and asked them to write me a statement about what they saw. I later picked those statements from them and they are in the case file.

The search warrant arrived and the Forensic unit started processing the residence. A number of investigators arrived to conduct a neighborhood canvas of the area. I was advised that the gun located inside of the back door was a .45 caliber and the shell casings inside were .45 caliber. The thought on this is that one of the suspects dropped this weapon.

I came back to the Sheriff's Office to see how the interviews were going with the witnesses that were in the trailer when this happened. Inv. Lorin Williams went in the interview room with Starr Burgess. He then called me into the room. Miss Burgess was crying and told Inv. Williams that Mr. Landrum's backpack was in her car. She stated that Jacob Patten told her she should take it to his residence and she was scared because she knew what was in it. She said that she put it in her car so that nothing would happen to it. This answered a big question for us because we thought the suspects may have taken it with them until this point. I called Deputy Nix and advised him of this and told him to tell the Uniform Patrol Deputy to watch the car to make sure no one went into the car. She later signed a permission to search for us to get the backpack out of her car. Miss Burgess and Mr. Ferguson were allowed to leave after this. I went back to the scene to get an idea of everything that had been found to this point and what ID felt like needed to be done at a later date.

On 12/08/10 I asked Sgt. Allan Wood to call Ruger and inquire about the gun that was found in the residence. I then called Denise Hamlett at 864-279-0788. She had left a note with the Deputy at the crime scene stating that she had observed several black males at the incident location on Friday or Saturday in a white Crown Victoria. I met with her at her residence at [REDACTED]. She started describing what she saw and I called Investigators Williams and Foster to meet me there to see if anything matched up with what they were getting from Margaret Brown. We left there and then I learned that Sgt. Wood had discovered who purchased the Ruger and that subject was Charvus Tarrel Nesbitt. Sgt. Wood had called Inman Gun and Pawn to find out whom they sold the gun to, and he was told that Mr. Nesbitt had been in that morning to get a copy of his receipt because he needed to report the gun stolen. Sgt. Wood sent an email out to the Sheriff's Office to advise them that Mr. Nesbitt may be calling to file a report and to let us know once the report was completed. It was later learned that Mr. Nesbitt filed the report with Inman PD.

Several Investigators went towards Inman and located Mr. Nesbitt and his vehicle. They followed the vehicle to get an idea of some place he may be going so that we could attempt to identify the second suspect before approaching him. I called Miss Burgess and picked her up and brought her to the Sheriff's Office. I prepared a photo line-up with Mr. Nesbitt's photo and asked Inv. Andy Clark to present the line-up to her. I did not tell Inv. Clark which subject in the line-up was the suspect. He went in the interview room with her and I

219 RLB

stayed out of the room. He came back out and told me which photo she identified (it was Mr. Nesbitt's), and told me that she was 40-50% sure he was one of the suspects. I went to [REDACTED] Inman SC to find Juleasa Richards who is Charvus' ex-girlfriend. I told her that I was working on a complaint where Charvus' vehicle was described, but the person described had short dreadlocks so I did not think it was Charvus. I told her that I would like to know of people he hangs out with that could match this description. The first person she mentioned was Hazel whom she stated was Charvus' cousin. She could not remember his last name. I got my computer and found a picture of Hazel Stoudemire and showed her his picture. She said that was his cousin. She also stated that Charvus' brother Teddy had short dreads and he also drove a white Crown Victoria.

I came back to the Sheriff's Office and started doing more research on Charvus, his brothers, and Hazel. We had a picture of Hazel with short dreads, but not of Teddy. The picture of Teddy shows him with rows in his hair and it is from 2005. The picture of Hazel showed a tattoo on his face and neck. I completed the line-up and then used a pen and marked out the tattoos, and then marked out the identical places on the other five photos. I met with Miss Burgess and presented the line-up to her. She was unable to identify anyone from the line-up. She and I spoke for a little while about the incident. She stated that it didn't make any sense because neither of the guys said anything about a Robbery or anything like that. She said they just started shooting. She said that once the shooting happened and they were running around that one of them fell at the door when they couldn't get it open. I came back to the Sheriff's Office and met with the other Investigators and we decided to start running down the last phone calls in Mr. Landrum's phone the next day.

On 12/09/10 we checked with SRMC to see if we could speak with Jermeka Rookard. We were told to come then because she was talking well and not too medicated. Inv. Foster and I went to ICU at SRMC to speak with Ms. Rookard. She stated that there was a knock at the door and two guys came in. She said that they were not inside long and that she heard gunshots. She said that she went towards them and she got shot. She stated that she turned to get away and collapsed in the kitchen. She told us that the doctors stated that she was shot once with it entering the right side of her neck, and exiting the left side of her back. She insisted that she did not know the guys that did this. She did admit to the drug sales in the residence. She stated that it was something her brother did, but she would occasionally sell some also. I presented her with a photo line-up with Mr. Nesbitt's photo in it, and she pointed out Mr. Nesbitt's photo and stated that he looked like one of the guys. She scored it 5 out of 10 as being him. She stated that she didn't see the other guy very well. I then presented her with a line-up with Teddy Byers and she did not recognize anyone in it, and also a line-up with Daniel Byers and she didn't recognize anyone there either. We then left the ICU. We left the hospital and went back to the scene to check the caller ID at the house. When we were leaving there Inv. Williams stated that he had spoken with Steve, a number in Mr. Landrum's phone who had sent texts before and after the incident, and he was going to meet with him at his job, Great American Paper. We met up with Inv. Williams and went to Great American Paper with him. Steve told us that Mr. Landrum used to work there. He said that Mr. Landrum had some items stolen from his vehicle during work, and had a couple of suspects in that case. We went to the office to inquire on more information on these possible suspects. We were helped by Tim Kinley with Great American Paper. He and another office person were able to find the information needed on those persons for us. While we were there I asked them if they had anyone with the last name Byers working there. Mr. Kinley immediately said "Yeah, Teddy Byers." Later that day I made contact with Ms. Rookard in an effort to locate her son B.J. I wanted to meet with him to show him the line-ups to see if he could identify anyone from the line-ups. I spoke with her cousin who was watching him and made arrangements to meet with them. When I was leaving to meet with him I asked Inv. Williams to call Mr. Kinley with Great American Paper to ask what mobile phone number they had for Teddy Byers. The number they had for him was one of the last numbers to call Mr. Landrum, and one of the last numbers that he called from his phone. I then asked Inv. Williams and Foster to meet with Miss Burgess to show her the line-ups. I met with B.J. and presented him with line-ups of Nesbitt, Teddy Byers, and Daniel Byers. He was unable to identify anyone from the line-ups. He then told me that he did not see their faces at all. I was then called by Inv. Williams and advised that Miss Burgess identified Teddy Byers from the line-up as the person in the mobile home that did the shooting.

All of the Investigators met at the Sheriff's Office and I completed the Supplemental Reports to obtain arrest warrants for Charvus Nesbitt and Teddy Byers. I also completed a Search Warrant for [REDACTED] in Inman which is what we showed as the residence for both of the suspects. I met with Judge Gowan who issued

[Handwritten signature]

warrants against both Nesbitt and Byers for Murder, Attempted Murder, and Possession of a Firearm in the commission of a violent crime. He also signed the search warrant for the residence.

On 12/10/10 the S.W.A.T. team assembled at the Sheriff's Office to execute the search warrant on Gaines Dr. Inv. Williams went by the residence and neither of the two Crown Victorias was at the residence. It was decided not to execute the search warrant at that time since it did not appear that the suspects were there. A short time later Inv. David Taylor rode by [REDACTED] and observed both Ford Crown Victorias at that residence. He then observed one of them leave the residence with a black male driver. The one that left was Teddy Byers' vehicle. They followed it and made a traffic stop on it, and Charvus Nesbitt was the one driving the vehicle. I left the office and went to [REDACTED] to make sure the other vehicle was still there and had not left. Mr. Nesbitt was taken into custody and transported to the Sheriff's Office. I then went to the office once other units arrived to the area of Nesbitt Dr. to watch that residence.

Mr. Nesbitt was in an interview room when I arrived and I went over his rights on a Pre-Interrogation Waiver Form with Inv. Kevin Murphy as a witness and he notarized the form. I started speaking with Mr. Nesbitt about his gun. He told me that he had called 411 on Tuesday to try and report his gun stolen. He said that he spoke with Officer Nodine with the Inman PD and he told him that he had to have his serial number to report it stolen. He told me that he was driving his brother's vehicle when it broke down and he started walking. He said that he saw his mother and got a ride with her. He stated that they got back to the car later with the wrecker and he discovered that the gun was missing from the vehicle. He told me that this was at approximately 6:30-7:00 pm on Tuesday. I told Nesbitt that we had found his gun at the scene of a shooting and asked him what he knew about it. He told me that he didn't know anything about it. I told him that it was at Anchor Mobile home park and explained to him where that was. He told me that he had never been there, and was not there that day. I told him that I knew that was not true because he had been identified by two witnesses as being there, and his gun was there. Mr. Nesbitt told me that he didn't have anything else to say. I left the room and left Mr. Nesbitt in the room. I was then contacted by Sgt. Wood who advised me that the S.W.A.T. team was requesting a search warrant for [REDACTED]. I stuck my head back in the room and asked Mr. Nesbitt if Teddy was at the house on Nesbitt. He told me that he should be, he said that he was there when he left. I typed the search warrant for the house and turned it over to Inv. Taylor who was taking it to a magistrate. Mr. Nesbitt knocked on the door of the room and asked to go to the bathroom, so I took him to the bathroom. On the way back to the interview room I asked him if he wanted something to drink which he did so I gave him a bottle of water. After a couple of minutes of him being back in the room, I went in there with him. I told him that I knew he said he didn't have anything to say, but I asked him to listen. I told him that it's funny that his gun was found on the scene, and two witnesses pick him out of six photos saying he was one of them in the house. He picked up his water and drank it, then put it down. I then said that Teddy was in there and going to give him up. He then reached and got another drink of water and then put it down. He just said "man I'm thirsty." I got up and walked out and was told that Teddy Byers was on his way to the office.

Investigator Lorin Williams brought Mr. Byers to the office and we went in the interview room with him. He was given his rights on a Pre-Interrogation waiver form which he signed both that he understood and waived his rights. Mr. Byers stated that he did not know anything about the shooting. He said that he was on Nesbitt Dr. that night and was hanging out with a friend at his house by the name of John Petty. He said that his brother came and picked him up and he saw his car broken down on the side of the road. We asked him to complete a voluntary statement on what he was telling us. We went back into the interview room once Mr. Byers had completed the statement. We read over the statement and signed it and gave him his copy. Investigator Williams began asking him about the statement and phone calls that he says he made. Mr. Byers seemed to realize that he had told us something different from what he had said before with his phone calls. He then said that he didn't have his phone and he must have left it in his car and it was stolen when Charvus' gun was stolen. Mr. Byers stated that he would take a polygraph. He was given a polygraph by Inv. Jason Bryant which indicated deception. Mr. Byers then provided another written statement. This statement basically said that he called the victim to set up a drug purchase and Charvus and Hazel Stoudemire were the ones that went to the trailer. He also stated that Hazel was the one who dropped the gun inside the trailer. He said that they were getting onto Hazel for dropping the gun after they left. Mr. Byers also stated that John Petty was with them, but he stayed in the vehicle.

(u) RAS

I went back in with Charvus and told him what Teddy had stated about this incident. I told him that according to what Teddy had said, that he had to be the shooter in this case. Charvus stated that he did not believe me that Teddy would say anything like that. I told him that it was on video and we could show it to him. I took him into Inv. Bryant's office and we showed him part of the video where Teddy told this part of the story. I took Charvus back to the interview room and asked him about what Teddy said. He said that he thought he was Teddy's brother but he guessed he wasn't. I asked Charvus about this and asked him to tell me what happened. I offered Charvus a chance to tell me that it was an accident and he didn't. He told me that he guessed he needed a lawyer and I left the interview room. Charvus asked to go to the bathroom so I took him to the bathroom, then he was transported to the jail.

I was at the jail when I received a call from Inv. Richie Foster who advised me that Hazel Stoudemire had come into the office. He stated that Mr. Stoudemire told them that he was one of the people who went into the trailer. I got back to the office and Hazel was writing a written statement. He was able to provide a number of facts that only the people who went inside the trailer would be able to tell. Once he had completed his statement I went to the jail and signed warrants on Mr. Stoudemire and John Petty. Hazel implicated Mr. Petty in this incident as well as Mr. Byers.

On Saturday 12/11/10 I received a call that Charvus wanted to talk again. I went to the jail along with Inv. Williams. Charvus had completed an inmate grievance form to speak with us. We took him into the interview room at the jail and completed another Miranda Form with him. He said that he would take us and show us where the gun was thrown out. I asked Charvus about the gun, and asked him if the gun malfunctioned. He looked at me and said "now you know the gun didn't malfunction." I asked him if he shot by mistake, and he said "yeah, it was a mistake." We got Charvus dressed to leave the jail and we took him by the incident location. He directed us to drive up to Fairforest Rd. from Viaduct and turn right onto Fairforest. He then told us to turn right onto Asheville Hwy. He then took us around Heron Circle onto bus. 85 south. We got to New Cut Rd. and he said that he threw the gun out between New Cut and Fairforest Rd. on business 85. We took Charvus back to the Sheriff's Office to obtain a written statement from him. We took him up to the interview room, gave him a coke, and some statement forms and a pen. He stayed in there for approximately 10 minutes and we were watching him in the observation room. He started to write on one of the forms, then he scratched it out and folded up the papers. We went back into the room and he said that he was going to let his previous statements stand. He was then transported back to the detention center. Inv. Williams and I went back to business 85 and walked the side of the road and were unable to locate a gun there.

INVESTIGATOR : William R. Gary <i>WRG</i>	DATE : 01/04/11
APPROVING OFFICER : <i>Alan Wood</i>	DATE : 01-04-11



SPARTANBURG COUNTY SHERIFF'S OFFICE
CHUCK WRIGHT, SHERIFF

AFFIDAVIT OF PHOTOGRAPH IDENTIFICATION

Case Number: 10120318
Date: 12/01/10
Time: 1335 HRS
Location: 8045 HOWARD ST MFG JC

I, STARR BURGESS, have viewed a group of SIX photographs this 8th day of DECEMBER, 2010, from which I have positively identified photograph number 1619572 displayed to me by DET ANDY CLARK of the Spartanburg County Sheriff's Office as the person who STOLE WITH FEMALE WHITE AT THE TRAILER. I AM 40% TO 50% SURE THIS IS HIM. THE FROM WHAT I CAN REMEMBER HE HAS A LITTLE BIT LONGER HAIR AND HIS FACIAL HAIR WAS FULLER; on the day of , 20 .

Signature: [Signature]

Print Name: STARR BURGESS

Address: [Redacted]
SPARTANBURG, SC

Phone: (864) 804-1040

SWORN to before me this 8th day of DECEMBER, 2010.

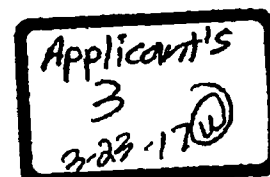
Notary Public for South Carolina
My commission expires: 6-4-17

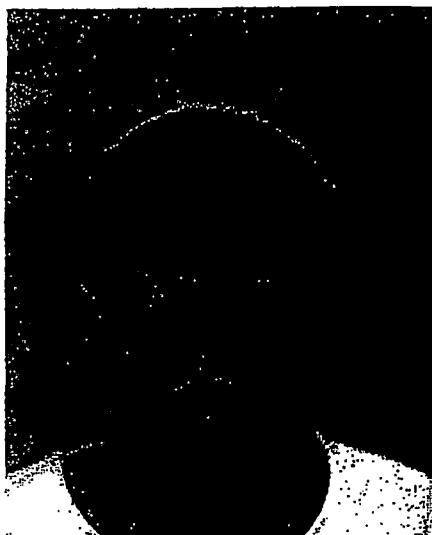
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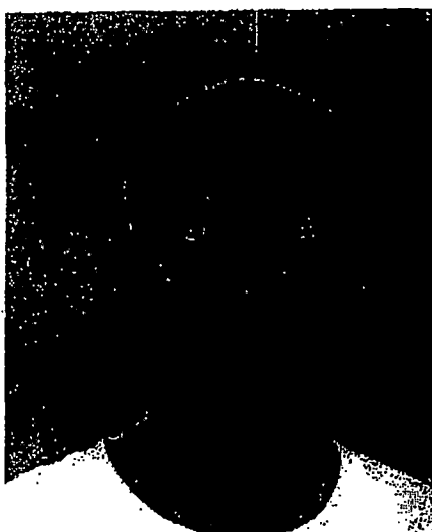


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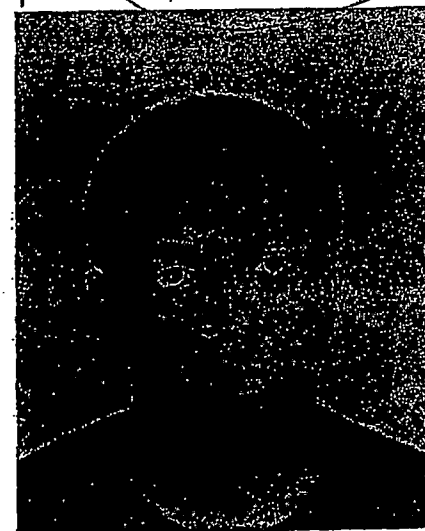
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1619617

CASE#		VOLUNTARY STATEMENT		PAGE 1 of 2	
STATEMENT OF: BJ Rookard		AGE: 11	DATE: 12/7/10		
ADDRESS: [REDACTED]		SPRING SC 29303			
PHONE # 541-7311/4912	DOB: 4/23/99	SSN:			

Tonight I was at home with my mom (Jermella Rookard), uncle (Temayne Landrum), sister (Kemyjah "Kiki" Scott), my uncle's girlfriend (Star) and my mom's boyfriend (Tim). Me, my mom, my sister and Tim were all sitting on the wooden bar stools at the bar in the kitchen when somebody knocked at the door. My uncle and his girlfriend Star were in the bedroom playing around. My uncle said "who is it" and then opened the door. Two black guys dressed in all black walked inside. The one in front was short and had on a jacket. I could see that he had dread locks under his hat. I didn't really see what the other guy looked like. Next thing I know, the guy with dread locks started shooting.

I have read this statement consisting of 2 pages(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at 8:17 P.M. on the 7 day of Dec 2010

WITNESS: [Signature]

X BJ Rookard
Signature of person giving voluntary statement

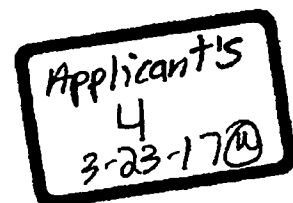
SWORN to before me this _____

day of _____, 20____.

(Seal)

Notary Public of South Carolina

My Commission expires: _____



VOLUNTARY STATEMENT

STATEMENT OF:

BJ Rootard

AGE:

DATE:

12/7/10

ADDRESS:

PHONE #

DOB:

SSN:

my uncle and then he shot my mom. He dropped the gun and ran to my mom's bedroom. The guys jumped out the window. ~~one~~ I looked at the gun and saw that it was black + silver. Tim ~~raped~~ ran across the street to Mike Patters and Jale come over and told me and Kiki to go to his house (across street).

My uncle sells weed and has a lot of money. He keeps it all in a bag under the kitchen sink. He has a gun that is all black that he usually keeps in a shoebox in my mom's room. Since I have been home from school, only about 3 people came to buy weed. The only one I can remember is a light skinned guy named Steve. [End of statement]

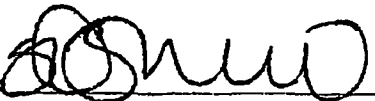
untrue [Sgt] statement as told by Rootard

I have read this statement consisting of 2 page(s), and I swear that the statement that I have just given is the truth, the whole truth, and

nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at 8:17 P.M. on the 7 day of Dec 20 10

WITNESS



X BJ Rootard

Signature of person giving voluntary statement

SWORN to before me this _____

day of _____, 20____.

(Seal)

Notary Public of South Carolina

My Commission expires: _____

STATE OF SOUTH CAROLINA

County of SPARTANBURG, SC

SEARCH WARRANT

DATE 12/10/10OFFICER D. W. Taylor

COPY

COUNTY OF SPARTANBURG, SC

AFFIDAVIT

Personally appeared before me, one D. W. Taylor
Who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this county:

DESCRIPTION OF PROPERTY SOUGHT

The person of Teddy Lamont Byers B/M DOB: [REDACTED]. Any firearms that are .45 caliber or other object that could fire a .45 caliber projectile or would expelled a .45 caliber shell casing, any bullets or shell casings that are found in the residence that are .45 caliber or similar size.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

The address of [REDACTED] Inman SC, 29349. From the Spartanburg County Sheriff's Office travel north on Asheville Hwy. until it intersects with John Dodd Rd. Turn left onto John Dodd Rd. and travel until Nesbitt Dr. turns off to the right. The residence will be on the left and is a brick duplex with the number [REDACTED] marked on the mailbox. There is a white Ford Crown Victoria with black bumpers in the driveway displaying SC tag number [REDACTED]. This search is to include the residence, the previously listed vehicle any outbuildings and cartilage area.

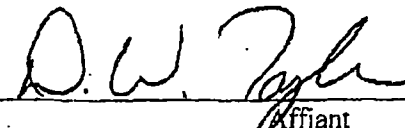
REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY
SOUGHT IS ON THE SUBJECT PREMISES

See Attachment

Sworn to and Subscribed before me

This 10th day of DEC; 2010
Signature of Judge.

12:26 pm


AffiantAddress 8045 Howard St.
Spartanburg SC, 29303
Phone 864-503-4610

COPY

COUNTY OF SPARTANBURG, SC

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF SPARTANBURG COUNTY, SC

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

The address of [REDACTED], Inman SC, 29349. From the Spartanburg County Sheriff's Office travel north on Asheville Hwy. until it intersects with John Dodd Rd. Turn left onto John Dodd Rd. and travel until Nesbitt Dr. turns off to the right. The residence will be on the left and is a brick duplex with the number [REDACTED] marked on the mailbox. There is a white Ford Crown Victoria with black bumpers in the driveway displaying SC tag number [REDACTED]. This search is to include residence, the previously listed vehicle any outbuildings and cartilage area.

Now, therefore, you are hereby authorized to search premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY SOUGHT

The person of Teddy Lamont Byers B/M DOB: [REDACTED]. Any firearms that are .45 caliber or other object that could fire a .45 caliber projectile or would expelled a .45 caliber shell casing, any bullets or shell casings that are found in the residence that are .45 caliber or similar size.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

ANY SPARTANBURG COUNTY MAGISTRATE

Within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable; and, if not, to such person as soon thereafter as is practicable: in the event the identity of such person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Spartanburg, SC
12/20/2018

[Signature] (L.S.)
Signature of Judge

COPY

**REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY
SOUGHT IS ON THE SUBJECT PREMISES**

On December 7, 2010, at approximately 1750 hrs., Deputies with the Spartanburg County Sheriff's Office were dispatched to a shooting at [REDACTED] in Spartanburg. Upon arrival Deputies found Daniel Tremayne Landrum, and his sister Jerneka Rookard shot in the residence. Landrum died and Rookard survived. There was a .45 caliber pistol found along with .45 shell casings on the floor by the back door of the residence. There were also narcotics found in the crime scene. Witnesses/victim told investigators that the two suspects appeared to be expected by Landrum who opened the door and let them in when they knocked on the door, and started to get some marijuana together to sell when the shooting started. Witnesses/victim state that it sounded like more than one gun and that one of the suspects appeared to have a gun in his hand when he ran from the scene after they broke a bedroom window and jumped from it. There were no other calibers of shell casings found at the scene. Witnesses/victim told Investigators that Landrum and Rookard were selling marijuana. Witnesses/victim that had been with the victim's during drug deals told Investigators that when people came to the residence to purchase drugs they would call the victims before coming to the residence. During the course of the investigation it was discovered that one of the suspects dropped the pistol found at the back door. The serial number was checked on the gun, and it was sold by Inman Gun and Pawn. According to Morris Williams with Inman gun and pawn the gun was sold to Charvus Nesbitt. Mr. Williams stated that Mr. Nesbitt came by the Pawn Shop the morning of 12/08/10 asking for a receipt because he needed to report it stolen. Witnesses in the area of the homicide stated that they saw two black males running to a white Crown Victoria leaving the area. A check through the South Carolina Department of Motor Vehicles shows that Nesbitt has a Crown Victoria registered to him. Investigators went to Nesbitt's residence and observed a white Crown Victoria at the residence. Mr. Nesbitt was identified as being one of the two suspects by witnesses/victim at the scene. The second suspect was described as being dark skinned with dreadlocks. Through a record search this Investigator was able to determine that Teddy Byers, a cohabitant of Nesbitt, closely matched the description of the other responsible party. A search of Landrum's mobile phone shows an incoming call from phone number 864-497-2718 at 1726 hours and an outgoing call to the same number at 1732 hours. It has been determined that Mr. Byers' mobile phone number is 864-497-2718. Mr. Byers was placed in a line-up and identified as one of the suspects, and his phone was one of the last ones calling the victim. It was also determined through SCDMV that Mr. Byers has a Crown Victoria, and it was stated to be white by persons who know Byers. It is believed that evidence could be located in their residence and in their vehicles. Investigators feel that evidence taken from the scene such as glass, pieces of a window curtain, blood, or other items could have been deposited in the vehicle since it was apparently driven from the incident location. These items could also be embedded in or on their clothing, and the other firearm has yet to be located. Mr. Nesbitt was arrested on 12/10/10 for this case and charged with Murder, Attempted Murder, and Possession of a Firearm during a violent crime. He left from the residence driving the white Ford Crown Victoria that belongs to Mr. Byers. He was arrested after a traffic stop and that vehicle was towed to the county impound for later processing. Mr. Nesbitt stated that the listed address is where Mr. Byers has been staying for some time because he and his wife are separated. He also stated that Mr. Byers was at the house when he left. It is believed that Mr. Byers is in the residence and there are outstanding warrants on him for the same charges as Mr. Nesbitt, and the other evidence could be located there since he has been staying there for some time. This is the suspect's residence and the search of the residence is necessary as evidence could be transferred from the vehicle to the residence, and the residence would be a common place for the storage and care of clothing and firearms.

Sworn to and Subscribed before me

This 10 day of Dec; 20 10

[Signature]
Signature of Judge

12:26 pm

COPY

[Signature]
Affiant
Address 8045 Howard St.
Spartanburg SC, 29303
Phone 864-503-4610

RETURN

175

I received the attached Search Warrant 12/10, 20 10, and have executed it as

Follows: On 12/10, 20 10 at 12 52 o'clock P M,

I searched (the person) described in the warrant and (the premises)

I left a copy of the warrant with [REDACTED]
Name of person searched or "at the place of search" with.
Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: ① WALLET CONTAINING PERSONAL

PAPERS, CARDS AND SC DRIVER'S LICENSE OF TEDDY LAMONT BYERS OFF COFFEE TABLE IN
LIVING ROOM @ 1342 HAS. NOTHING ELSE TAKEN.

This inventory was made in the presence of D. TAYLOR, R. FOSTER, J. BRYANT, A. WOOD, B. HOWARD

AND C. WRIGHT, B. PARRIS

I swear this inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 13

Day of December, 2010

Wm. R. Clark (L.S.)
Signature of Judge

[Signature]
(Signature of Executing Office)

Spartanburg, SC

2:47 pm

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Charvus T. Nesbitt, #349711,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

2016-CP-42-0103

ORDER OF DISMISSAL

2017 APR 26 PM 2:02
M. HOPE BLACKLEY

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed January 13, 2016. Respondent made its Return on July 12, 2016. An evidentiary hearing into the matter was convened on March 23, 2017 at the Spartanburg County Courthouse. Christopher Brough, Esquire, represented Applicant. Valerie Garcia Giovanoli, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Fletcher N. Smith, Jr., Esquire, also testified. This Court had before it a copy of the records of the Spartanburg County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the appellate records, the PCR application, Respondent's Return and the plea transcript.

PROCEDURAL HISTORY

Charvus T. Nesbitt ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the March 2011 term of the Spartanburg County Grand Jury for murder, possession of a weapon during the commission of a violent crime (2011-GS-42-1414, counts 1 and

Ag 9,

2), and attempted murder (2011-GS-42-1415). Applicant was subsequently indicted at the January 2012 term of the Spartanburg County Grand Jury for attempted armed robbery (2012-GS-42-0349). Fletcher N. Smith, Esquire, represented Applicant. On February 23, 2012, Applicant pleaded guilty under North Carolina v. Alford¹ before the Honorable Roger L. Couch. Judge Couch sentenced Applicant, pursuant to a negotiated sentence, to imprisonment for concurrent terms of 40 years for murder, 30 years for attempted murder, and 20 years for attempted armed robbery.

Applicant then left the courtroom, at which time the Deputy Solicitor brought to Judge Couch's attention that he had not addressed the weapons charge. Judge Couch then imposed a concurrent five year sentence for the possession of a weapon charge. However, Applicant was not brought back into the courtroom for further proceedings. On February 23, 2012, a motion for reconsideration or new trial was filed on the weapons charge. An amended motion was filed on March 7, 2012. Judge Couch heard the motion on April 26, 2012. Kenneth P. Shabel, Esquire, represented Applicant at this hearing. On May 24, 2012, Judge Couch issued an Order vacating the conviction and sentence on the weapons charge but affirming the other convictions and sentences.

Applicant filed a timely notice of appeal. Kenneth P. Shabel, Esquire, represented Applicant on appeal. The South Carolina Supreme Court affirmed Applicant's conviction as modified. State v. Nesbitt, 411 S.C. 194 (Ct. App. 2015). The Remittitur was returned on January 30, 2015.

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

1. Failure to Investigate by Trial Counsel;

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

- a. "Trial Counsel failed to talk to necessary defense witnesses";
2. Ineffective Assistance of Trial Counsel, in that:
 - a. "Trial Counsel failed to subpoena and call necessary defense witnesses at trial";
3. Involuntary Plea, in that:
 - a. "Due to Trial Counsel's lack of preparation, Applicant was forced to plead under North Carolina versus Alford."

2017 APR 26 PM 2:02
M. HOFE BLACKLEY

At the hearing, Applicant proceeded on his claims of ineffective assistance of plea counsel and involuntary plea.

SUMMARY OF TESTIMONY

Applicant testified to the following:

Applicant retained Georgia Patricia Anderson initially to represent him. He and his family decided to relieve her and retain Fletcher N. Smith, Jr., when he realized that Anderson wanted him to cooperate with the State in exchange for a plea deal. Applicant had three other co-defendants who participated in the crime: Teddy Byers (Byers), Hazel Stoudemire (Stoudemire), and Johnathon Petty (Petty). The State alleged that Applicant was the shooter. Applicant was fully aware of what an Alford plea was and the consequences of entering one. Applicant was also informed of the law of the hand of one, hand of all, by his plea counsel.

Applicant testified that he reviewed all of the discovery with which he was provided. However, Applicant claimed he was in possession of more discovery than what he was originally provided with. Applicant pled under Alford because he believed he would be convicted. Applicant confirmed that he had only one prior conviction from 2010 for trespassing. Applicant introduced his criminal history into evidence as Applicant's Exhibit 1. Applicant then identified an investigative report that was part of the discovery in his case and introduced it as Applicant's Exhibit 2. Applicant

had never seen the investigative report until it was provided to him by his PCR counsel. The investigative report contained an identification of Applicant made by a witness to and victim of the incident. The certainty of one witness when identifying Applicant as the assailant was 40-50% and the certainty of the victim was 5 out of 10. Applicant introduced an affidavit of identification as Applicant's Exhibit 3. In the affidavit, one of the witnesses identified Applicant from a photo line-up, but noted that she was only 40-50% sure and that he had different facial and head hair. Applicant was unaware of the low certainty percentage or the distinguishing statement when he reviewed the evidence with his plea counsel. The victim's son was also a named witness who had given a statement. He described the detail that two black men entered into the house. The son described one as short and the other taller. The son stated that the shooter was shorter and had dreadlocks and he wasn't able to see what the other man looked like. Applicant is 6 feet tall and taller than his co-defendants.

The gun used in the shooting was recovered. The gun was registered in Applicant's name. The gun was also reported stolen. Applicant's Exhibit 4, a voluntary statement by an eleven year old witness of the incident and resident of the home in which the shooting occurred, was introduced into evidence. The witness stated that he only got a good look at one of the two guys that entered the house that night and that he was short and had dread locks. Applicant also introduced the search warrant, into evidence as Applicant's Exhibit 5. The search warrant indicated that Byers was cohabitating with Applicant and that evidence could be located in their home and vehicles.

Applicant testified that all of the evidence presented to this Court had not been seen by Applicant prior to entering his plea. Had Applicant known about this evidence, he would have insisted on going to trial. Applicant claims his plea was involuntary based on the deficient advice

Page 7

given to him by his plea counsel.

On cross examination, Applicant admitted that he reported the gun stolen immediately after the incident. Applicant was offered to make a deal with the State in exchange for his cooperation, which he turned down. Applicant refused to cooperate with the State. Applicant was aware that all of his co-defendants singled him out as the shooter. Applicant was also aware that one of his co-defendants (Petty) fled after the incident, but was later recaptured.

Counsel testified to the following:

Counsel has been practicing law for thirty-five years. He has his own general practice. He has handled many criminal cases although he does not exclusively practice criminal law. Counsel was retained to represent Applicant. Counsel requested discovery and rule 5 Brady material. He received all of the discovery in the case and reviewed all of it with Applicant. Counsel went through all of the evidence in detail with Applicant and then gave him two weeks to decide if he wanted to plead or go to trial.

Counsel believed the likelihood of conviction was high for Applicant and advised him of such. Counsel also advised Applicant that pleading under Alford was in his best interest. Counsel informed Applicant of all of his Constitutional rights. Counsel informed him of the elements of the crimes for which Applicant was charged and the potential sentences for those crimes. Applicant decided to plead to the charges and Counsel did not unduly pressure or coerce him to plead. Counsel was aware that Applicant was twenty-three and had a pretty clean record, however he testified that being young and having a clean record does not preclude a judge from sentencing you to the maximum. Assistant Solicitor Bulsa wanted to put Applicant away for life. Counsel was aware of

the inconsistencies in victim's statements, but there were still three co-defendants all pointing the finger at Applicant, the two guns used were registered to Applicant, and Applicant had reported the recovered gun stolen immediately after the incident. Applicant had also placed himself inside of the victim's home at the time of the shooting which invoked the hand of one, hand of all doctrine.

APPLICABLE LAW

Ineffective Assistance of Counsel

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Cherry, 306 S.Ct. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the 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).

Involuntary Plea

Applicant alleges that his plea was involuntary. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In Boykin the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S.Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of

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the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. See Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance in this case and Applicant's plea was made voluntarily. Counsel advised Applicant of all of the charges and the possible sentences the charges carried. This Court further finds that Applicant was fully aware of his rights and those rights that he was waiving.

This Court finds Counsel's testimony with regard to fully reviewing all of the discovery with Applicant to be credible, while finding Applicant's testimony that he was not aware of some of the discovery to be not credible. The record is clear that during the plea hearing, Counsel indicated that he had a full understanding of the inconsistencies in the victim identification, but that he also had a full understanding of all the other inculpatory evidence the State had against Applicant. Applicant was also present at this plea hearing and did not question anything put forth to the plea court by his

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counsel. Counsel was aware of the statements made by victims, witnesses, and Applicant's co-defendants and was presented with no potential witnesses that could testify in favor of Applicant. This Court finds that Counsel conducted a thorough investigation of the case and reviewed all of the discovery with Applicant. After review of the discovery, it was Applicant's own decision to plead pursuant to Alford instead of going to trial.

Accordingly, 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 specific and 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. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied and dismissed with prejudice. This Court finds Applicant made the decision to plead pursuant to Alford on his own accord upon the sound advice of learned counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any undue pressure or coercion.

Accordingly, this Court finds Applicant has not met the burden of proof to illustrate that Counsel rendered ineffective assistance or that his plea was made involuntary. Therefore, these allegations are denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

RB 7

2017 APR 26 PM 2:53
M. HOPE BLACKEY

This Court also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

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

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this

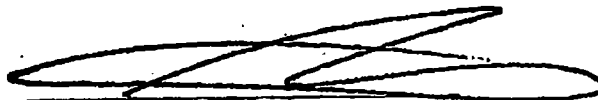
21

day of

April

M. HOPE BLACKLETT

2017 APR 26 PM 2:02



ROBIN B. STILWELL
Presiding Judge
Seventh Judicial Circuit



Greenville, South Carolina

WITNESSES

SPARTANBURG COUNTY
REPORT MADE

Compute.

CARD FILED ☒

INDEXED ☒

CHECKED SIGNATURE ☒

ASSESSMENT AND FINE CARD MADE **Compute.**

ARREST WARRANT NUMBER

M751483 (Count One)

M751457 (Count Two)

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury **MAR 25 2011**
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. **11-GS-42-1414**

The State of South Carolina

County of Spartanburg

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAR 28 2011 TERM

THE STATE
vs.

Charvus Tarrel Nesbitt

Indictment for

**COUNT ONE-MURDER, COUNT TWO-
POSSESSION OF WEAPON DURING
VIOLENT CRIME**

SC Code 16-03-0010, 0020, 16-23-490
CDR Code 116, 549
Class FEL-EXM

CLERK OF COURT
SPARTANBURG COUNTY
MAR 29 AM 9:23
M. HOPE BLACKLEY

2013 MAR 27 AM 10:50
M. HOPE BLACKLEY

NP Count 2 pursuant to
Court Order dated Mar 24 2013
by Judge Couch
3/27/13 Det B. Bulva

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on MAR 2nd 2011, the
Grand Jurors of Spartanburg County present upon their oath:

COUNT ONE-MURDER

The Defendant Charvus Tarrel Nesbitt did in Spartanburg County on or about December 7, 2010, feloniously, willfully, and with malice aforethought, kill one [REDACTED], by shooting him with a gun and the victim died as a proximate result thereof, all in violation of Section 16-3-0010, 0020, Code of Laws of South Carolina, (1976, as amended).

COUNT TWO- POSSESSION OF WEAPON DURING VIOLENT CRIME

That the defendant, Charvus Tarrel Nesbit, did in Spartanburg County on or about December 7, 2010, visibly display a firearm during the commission or attempted commission of a violent crime, to-wit: Murder, in violation of Code §16-23-490, CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.

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


Deputy Solicitor

COUNTY OF SPARTANBURG

STATE VS.

Charvus Tarrel Nesbitt

AKA:

Race: BLACK Sex: M Age: 23

DOB: [REDACTED]

Address:

City, State, Zip: Tamm SC 29349

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Murder / Murder

INDICTMENT/CASE#: 2011GS4201414

A/W#: M751483

Date of Offense: 12/7/2010

S.C. Code §: 16-03-0010,

CDR Code #: 0116

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS *Alford Plea* *No Contest*

in violation of § 16-03-0010, of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

BULSA, DERRICK

SC Bar# 15264

Defendant

Attorney for Defendant

SC Bar# 5165

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 40 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 12/11/10☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5%)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

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

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2135

Sentence Date: 2/13/12

COUNTY OF SPARTANBURG

STATE

VS.

Charvus Tarrel Nesbitt

AKA:

Race: BLACK Sex: M Age: 23

DOB:

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☐ CONVICTED OF or ☒ PLEADS

TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

In violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ § 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

BULSA, DERRICK

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2/13/12☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 12/10/10☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114(BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCA Surcharge)	\$5
3% to County (if paid in installments)	\$3.90
TOTAL	\$133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

INDICTMENT/CASE#: 2011GS4201414 #

A/W#: M751457

Date of Offense: 12/7/2010

S.C. Code § 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

PTUP _____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

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

Presiding Judge

Judge Code: 2135

Sentence Date: 2/13/12

SCSD (REVISED 1-2-78)

1. REPORT MADE

2. CARD FILED

3. INDEXED

4. CHECKED WARRANTS

5. CHECKED SIGNATURE

6. ASSIGNMENT AND
FILE CARD MADE

ARREST WARRANT NUMBER

CRIMINAL VIOLATION

Computer

Computer

M751456

Foreperson of Grand Jury
Date:

Foreperson of Petit Jury
Date:

11-GS-42-1415

County of Spartanburg

COURT OF GENERAL SESSIONS

TERM

Charvys Tarrel Nesbitt

SC Code: 16-3-0029
CDR Code: 3410
Class FEL-A

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on MAR 25 2011, the
Grand Jurors of Spartanburg County present upon their oath:

ATTEMPTED MURDER

That Charvus Tarrel Nesbitt did in Spartanburg County on or about December 7,
2010, with malice aforethought attempt to kill [REDACTED] by shooting her in the
neck, with the intent to kill the said victim, in violation of §16-03-0029, of *THE CODE OF
LAWS OF SOUTH CAROLINA*, (1976, as amended).

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

DRB
DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG
STATE VS.

Charvus Tarrel Nesbitt

At A:

Race: BLACK Sex: M Age: 23

DOB:

Address:

City, State, Zip: Tymer SC 29349

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Murder / Attempted Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS4201415

A/W#: M751456

Date of Offense: 12/7/2010

S.C. Code §: 16-03-0029

CDR Code #: 3410

SENTENCE SHEET

Alford Plea

☐ CONVICTED OF or ☒ PLEADS No Contest

In violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

BULSA, DERRICK

SC Bar# 15264

Defendant

Attorney for Defendant

SC Bar# 5165

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 12/10/10☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (DUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 183.90

Clerk of Court/ Deputy Clerk

Court Reporter: Shirley

SCCJA 90.5 (02/01/11)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

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

\$ _____ paid to Public Defender Fund

Other: _____

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

Presiding Judge

Judge Code: 21/35Sentence Date: 2/13/12

WITNESSES

Spartanburg County Sheriff's Office

REPORT MADE

CARD POLICE

INDEXED

Spartanburg County Sheriff's Office

CHECKED WARRANTS

CHECKED SIGNATURE

ASSESSMENT AND

ARREST WARRANT NUMBER

TRAFFIC VIOLATIONS

Direct Indictment

ACTION OF GRAND JURY
True Bill

John Cothran 1/9/2012
Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCUMENT
12-GS-42-0349

The State of South Carolina

County of Spartanburg

Barry Barnette, *Solicitor*

COURT OF GENERAL SESSIONS

IAN 09 2012

TERM

THE STATE
vs.

Charvus Nesbitt

Indictment for
ATTEMPTED ARMED ROBBERY

SC Code: 16-11-330 (B)
CDR Code: 26
Class FEL/C

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JAN 18 AM 10:54
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA }
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on JAN 09 2012 the
Grand Jurors of Spartanburg County present upon their oath:

ATTEMPTED ARMED ROBBERY

That Charvus Nesbitt did in Spartanburg County on or about December 7, 2010,
attempt to rob [REDACTED] while armed with a pistol, a deadly weapon, in violation
of §16-11-330 (B), CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.

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


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

195

COUNTY OF SPARTANBURG

STATE

VS.

Charvus Tarrel Nesbitt

AKA:

Race: BLACK Sex: M Age: 23

DOB:

Address:

City, State, Zip: Sumter SC 29399

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Robbery / Attempted armed, or allegedly armed, robbery

INDICTMENT/CASE#: 2012GS4200349

A/W#: 2012GS4200349

Date of Offense: 12/7/2010

S.C. Code § : 16-11-0330(B)

CDR Code #: 0026

SENTENCE SHEET

Alford Plea

☐ CONVICTED OF or ☒ PLEADS No Contest

in violation of § 16-11-0330(B) of the S.C. Code of Laws, bearing CDR Code # 0026

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

BULSA, DERRICK

15264
SC Bar#

Defendant

Attorney for Defendant

5765
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2/13/12☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 12/10/10☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
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Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (DUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

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

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2/35Sentence Date: 2/13/12