

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

William H. Seals, Circuit Court Judge

\_\_\_\_\_  
CRAIG AUSTIN LIVINGSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000523

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

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S.C. SUPREME COURT

**INDEX**

INDEX ..... i

GUILTY PLEA TRANSCRIPT DATED APRIL 18, 2016 .....1

APPLICATION FOR POST-CONVICTION RELIEF .....31

RETURN.....39

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOVEMBER 29, 2017 ...44

ORDER OF DISMISSAL.....86

INDICTMENTS .....95

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY ) 2015-GS-26-1840

STATE OF SOUTH CAROLINA, )  
 )  
 Plaintiff, ) Transcript of Record

vs. )  
 ) April 18, 2016

CRAIG AUSTIN LIVINGSTON, )  
 )  
 Defendant. )

**B E F O R E:**

Honorable Steven H. John  
Horry County Courthouse  
Conway, South Carolina

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

George H. DeBusk, Jr., Esquire  
**Attorney for Plaintiff**

Johnny Gardner, Esquire  
**Attorney for Defendant**

**TAKEN BY:**

Dixie C. Eubank  
**Circuit Court Reporter**

**PREPARED BY:**

Kay H. Richardson  
**Circuit Court Reporter**

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I N D E X

APRIL 18, 2016

Pg.

By the Court .....	3
Sentence of the Court .....	28
Certificate of Court Reporter .....	30

E X H I B I T S

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(No exhibits were marked or admitted.)

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

3

1 (APRIL 18, 2016)

2

CRAIG AUSTIN LIVINGSTON HAVING BEEN

3

DULY SWORN, TESTIFIES AS FOLLOWS:

4

THE COURT: Yes, Solicitor?

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MR. DEBUSK: Your Honor, these are indictments 2015-GS-26-1840 and 1841, each for a single count of felony DUI involving death. The Defendant is Craig Austin Livingston. He's represented by Johnny Gardner. It's my understanding he wishes to plead guilty to these without recommendation from the State.

11

THE COURT: All right. Very good.

12

13

14

15

All right, Mr. Gardner, give me your attention, sir. You are coming before the Court and you are pleading guilty to two counts of felony driving under the influence, death resulting; is that correct, sir?

16

MR. LIVINGSTON: Yes, sir.

17

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19

20

THE COURT: All right, sir. Now, you understand that the potential sentence in this matter for felony driving under the influence where death results, potential sentence goes from a minimum of one up to twenty-five years; you understand that?

21

MR. LIVINGSTON: Yes, sir.

22

23

24

25

THE COURT: You understand that these crimes are listed as violent and serious by the State of South Carolina; you understand that?

MR. LIVINGSTON: Yes, sir.

1 THE COURT: Have you discussed those two categories,  
2 those being violent and serious with your attorney, Mr.  
3 Gardner?

4 MR. LIVINGSTON: Yes, sir.

5 THE COURT: I'm sorry. Did you say yes?

6 MR. LIVINGSTON: Yes, sir.

7 THE COURT: All right. Very good. All right. And you  
8 understand that with that, with those categories that affects  
9 the amount of time that you would spend in the Department of  
10 Corrections; you understand that?

11 MR. LIVINGSTON: Yes, sir.

12 THE COURT: And you've talked about that with Mr.  
13 Gardner, correct?

14 MR. LIVINGSTON: Correct.

15 THE COURT: And you understand that the offense being  
16 listed as serious that gives you strikes under the State's  
17 three-strike serious law; you understand that?

18 MR. LIVINGSTON: Yes, sir.

19 THE COURT: All right, sir. So, as an example, three  
20 most -- three serious offenses, the State can ask for life in  
21 prison without the possibility of parole. So, if this was  
22 your third serious offense, instead of the sentence being one  
23 to twenty-five years, the State could be asking for or would  
24 be asking for life in prison without the possibility of  
25 parole. Do you understand that?

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

5

1 MR. LIVINGSTON: Yes, sir.

2 THE COURT: All right, sir. Also, regarding these  
3 particular matters, you understand that these are the crimes  
4 that were indicted by the Horry County Grand Jury, true bill  
5 rendered on both of them on May 28th of last year; do you  
6 understand that?

7 MR. LIVINGSTON: Yes, sir.

8 THE COURT: You understand the matters come before the  
9 Court without negotiations or recommendations by the State;  
10 you understand that?

11 MR. LIVINGSTON: Yes, sir.

12 THE COURT: All right, sir. Understanding all these  
13 things, do you want to go forward now with your two guilty  
14 pleas?

15 MR. LIVINGSTON: Yes, sir.

16 THE COURT: Are you currently under the influence of any  
17 drugs or intoxicants of any kind, or currently do you have any  
18 of that in your system?

19 MR. LIVINGSTON: No, sir.

20 THE COURT: Are you suffering from any kind of physical,  
21 mental, emotional problem that would keep you from  
22 understanding what you're doing here today?

23 MR. LIVINGSTON: No, sir.

24 THE COURT: When you plead guilty, you give up  
25 constitutional rights, among those, the right to remain.

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

6.

1 silent. You speak to me, you're giving that right up; do  
2 understand that?

3 MR. LIVINGSTON: Yes, sir.

4 THE COURT: Other rights are, the presumption of  
5 innocence, the right against self-incrimination at a trial,  
6 the State has to prove your guilt beyond a reasonable doubt.  
7 If you plead guilty, you give those rights up. You understand  
8 that?

9 MR. LIVINGSTON: Yes, sir.

10 THE COURT: You're entitled to a jury trial. Twelve men  
11 and women would be sitting in that box over there, listening  
12 to the facts and evidence presented by the State to see if  
13 there are indeed enough facts and evidence to prove your  
14 guilty beyond a reasonable doubt. If you plead guilty, you  
15 give up those rights; do you understand that?

16 MR. LIVINGSTON: Yes, sir.

17 THE COURT: In that jury trial, with your attorney, you  
18 can question the witnesses and the evidence presented by the  
19 State. If you wanted to, you could present a defense,  
20 testify, call witnesses on your behalf. When you plead  
21 guilty, you give up all those rights; do you understand that?

22 MR. LIVINGSTON: Yes, sir.

23 THE COURT: You're coming before the Court and you're  
24 pleading guilty to two counts of felony driving under the  
25 influence, death resulting. Are you pleading guilty to those

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

7

1 freely and voluntarily?

2 MR. LIVINGSTON: Yes, sir.

3 THE COURT: Of your own freewill and accord?

4 MR. LIVINGSTON: Yes, sir.

5 THE COURT: Pleading guilty because you are indeed guilty  
6 of those crimes?

7 MR. LIVINGSTON: Yes, sir.

8 THE COURT: Did anybody promise you anything or threaten  
9 you or force you in any way to get you to plead guilty?

10 MR. LIVINGSTON: No, sir.

11 THE COURT: Now, you are here today with your attorney,  
12 Mr. Gardner; is that correct?

13 MR. LIVINGSTON: Correct.

14 THE COURT: Did you tell him everything you wanted to  
15 tell him about both these cases?

16 MR. LIVINGSTON: Yes, sir.

17 THE COURT: Have you had enough time to talk to him?

18 MR. LIVINGSTON: Yes, sir.

19 THE COURT: Do you need any more time to talk to him?

20 MR. LIVINGSTON: No, sir.

21 THE COURT: Are you satisfied with his help and  
22 representation?

23 MR. LIVINGSTON: Yes, sir.

24 THE COURT: Any complaints about his help or  
25 representation?

1 MR. LIVINGSTON: No, sir.

2 THE COURT: Do you believe he's done everything that you  
3 expected of him that you wanted him to do to try to help you  
4 in these cases?

5 MR. LIVINGSTON: Yes, sir.

6 THE COURT: Mr. Gardner, you represent the interest of  
7 your client, Mr. Livingston, in both these matters?

8 MR. GARDNER: I do, Your Honor.

9 THE COURT: And he comes before the Court tendering his  
10 pleas of guilty to the two offenses named, do you concur?

11 MR. GARDNER: I do, Your Honor.

12 THE COURT: And you believe he's coming before the Court  
13 of his own freewill and accord?

14 MR. GARDNER: He has.

15 THE COURT: And have you explained to him his  
16 constitutional rights, any defenses he might have, as well as  
17 the information, the evidence in the possession of the State?

18 MR. GARDNER: I have, Your Honor.

19 THE COURT: Thank you very much, sir.

20 All right, Solicitor, the facts of the cases, please.

21 MR. DEBUSK: Thank you, Your Honor. The victims in this  
22 case were Christopher and Miles Waddell. They were brothers.  
23 Christopher, age twenty-six, and Miles, age seventeen. They  
24 were both students and they were out of class on December 22nd  
25 of 2014 when they went down to do some Christmas shopping at

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

9

1 the mall in Myrtle Beach. They were returning home to their  
2 home in Loris, going north on Red Bluff Road between Highway  
3 905 and the City of Loris in the vicinity of Daisy High School  
4 -- Daisy School, I'm sorry, Your Honor. At the same time, the  
5 Defendant and four other individuals, Victoria Gaddy, Calvin  
6 Bennett, Brittany Bellamy and Latefa (spelled phonetically)  
7 Bennett had gotten together, they were all relatives and had  
8 gone to a place called Muncy's (spelled phonetically) in Green  
9 Sea and were drinking in that establishment. They'd stopped  
10 at a liquor store and bought -- Mr. Livingston had bought at  
11 least two bottles of vodka, small bottles. When they left  
12 Muncy's, according to the other witnesses in the vehicle,  
13 they'd asked Mr. Livingston if he was okay to drive, and he  
14 said he was. They -- that he had it and was driving his own  
15 truck. And they proceeded on southward to the City of Loris.  
16 After they got south of Loris, they got on Red Bluff Road.  
17 According to the witnesses, he swerved across the road. At  
18 that time they offered again to let another individual drive,  
19 that Latefa Bennett, she had a driver's license and was sober.  
20 He again declined. They proceeded down the road. They said  
21 he was driving at an excess rate of speed. South of Daisy  
22 School there's a long straight section there. At that time,  
23 the two Waddell brothers were driving north on that section  
24 with a car in front of them and a car behind them. According  
25 to the individuals that were driving those two cars, the first

1 car, was able to swerve onto the shoulder and barely missed  
2 being hit by Mr. Livingston's vehicle as it crossed the center  
3 line. The Waddell brothers also swerved, according to the  
4 accident reconstruction by the Highway Patrol MAIT team, had  
5 at least one wheel on the grass. The Defendant was completely  
6 over in his lane across, both wheels across the center double  
7 yellow line and he struck the Waddells' vehicle head-on in the  
8 left front section of their -- they were driving a Jeep  
9 Cherokee, the Defendant was driving a Ford Explorer. The --  
10 of course, the speed of the two cars hitting head-on, the  
11 force pushed the Waddells' car off the side of the road  
12 embedding it almost a foot in the mud on the soft shoulder,  
13 completely destroying the front end of the car. Christopher  
14 Waddell, the driver, age twenty-six was seen by the  
15 bystanders. He was talking at the scene but before they could  
16 get him to the hospital, he succumbed to several injuries  
17 including a lacerated liver, large hemorrhage in his  
18 peritoneal cavity where he lost in excess of about a gallon of  
19 blood. He died that evening either on his way to Grand Strand  
20 Hospital or at Grand Strand Hospital. The bystanders did not  
21 even realize that Miles Waddell was there he was so hidden in  
22 the destroyed car. The paramedics found him, transported him  
23 to the hospital. He got there alive. He stayed in Grand  
24 Strand Hospital for approximately a week. He then succumbed  
25 to some serious head injuries and died on the 29th of

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

11

1 December, 2014. An autopsy was done on the driver,  
2 Christopher. During the course of that autopsy, they did  
3 toxicology. He had no drugs or alcohol in his system. The  
4 Highway Patrol, of course, responded to the scene. They  
5 talked to the Defendant at the scene. He initially denied  
6 being the driver. One of the -- the person that was driving  
7 behind the vehicle, who saw the collision, saw that the  
8 Defendant was in fact the driver, he had a distinctive  
9 hairstyle at that time, told the patrol officers. He was --  
10 the Defendant was transported to Loris/McLeod Hospital for  
11 some injuries he received. Trooper Tart followed him there.  
12 Upon hearing of the situation of the Waddell brothers -- at  
13 that time he didn't know whether it was serious bodily injury  
14 or death but he knew he had a felony DUI on his hands. He  
15 informed the Defendant of his implied consent rights, placed  
16 him under arrest and a blood sample was taken by the staff of  
17 Loris/McLeod Hospital. That was sent to the South Carolina  
18 Law Enforcement Division where they tested it. And this  
19 sample was taken three hours after the wreck, immediately at  
20 the time of arrest but three hours after the wreck, and the  
21 blood alcohol was .180 -- .182 percent. According to the  
22 toxicologist from SLED, given that he was not drinking after  
23 the accident, projecting back, that would indicate a blood  
24 alcohol of at least .20 to .22 and possibly as high as .25 at  
25 the time the accident happened. In addition to that high

1 blood alcohol, Your Honor, the Defendant had marijuana in his  
2 system. He had actual THC, which according to the  
3 toxicologist indicates that he actively smoked marijuana within  
4 three or four hours of the wreck -- three or four hours of the  
5 blood sample, which would put it within an hour of the actual  
6 collision.

7 Your Honor, all the other witnesses in the car with the  
8 Defendant gave statements. The people before -- in front of  
9 and behind the victim's car gave statements. The doctors who  
10 treated Miles and the pathologist who examined Christopher  
11 said that the injuries from the accident were the cause of  
12 their death, that the Defendant failed to maintain his lane,  
13 crossed the double yellow line and was completely over in the  
14 lane of the victims when he hit them. Thus, satisfying the  
15 elements, Your Honor, of felony DUI.

16 We have some more information that we will present at the  
17 time of sentencing, Your Honor, and the victims' family are  
18 present and would like to speak at that time as well but  
19 that's the basic facts.

20 THE COURT: Thank you, sir.

21 All right, Mr. Livingston. You have heard the facts of  
22 these two cases stated by the Solicitor, further a brief  
23 summary of those same facts are set forth in your two  
24 indictments. My question to you is, are those facts true and  
25 correct?

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

13

- 1 MR. LIVINGSTON: Most of it is.
- 2 THE COURT: All right, sir. In what regard would those  
3 facts not be correct or need to be added to?
- 4 MR. LIVINGSTON: That the reason for my swerving of my  
5 vehicle the night of the accident.
- 6 THE COURT: And what would that be, sir?
- 7 MR. LIVINGSTON: Somebody -- my front-seat passenger  
8 grabbed my steering wheel.
- 9 THE COURT: All right, sir.
- 10 MR. LIVINGSTON: Which lead to my vehicle out of control,  
11 swerving out of control.
- 12 THE COURT: All right, sir. So, let me understand. Are  
13 you denying to this Court that you are the responsible party  
14 in this particular matter and that your actions caused the  
15 death of the two victims? Are you denying that?
- 16 MR. LIVINGSTON: No, sir. I was under the influence of  
17 alcohol.
- 18 THE COURT: All right, sir. And you were driving the  
19 vehicle and it was under your operation and control?
- 20 MR. LIVINGSTON: Yes, sir.
- 21 THE COURT: And based upon that, caused the collision ---
- 22 MR. LIVINGSTON: Yes, sir.
- 23 THE COURT: --- that caused the death of the two victims;  
24 is that correct?
- 25 MR. LIVINGSTON: Correct.

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

14

1 THE COURT: Have you understood my questions here today?

2 MR. LIVINGSTON: I believe I have.

3 THE COURT: All right, sir. In any way have you not  
4 understood my questions? You need to tell me now if there's  
5 in any way you have not understood my questions, I need to  
6 know that now.

7 MR. LIVINGSTON: I mean, as far as the alcohol that I had  
8 in my system, I feel like it didn't cause this accident but  
9 that the girl that grabbed my steering wheel which led to my  
10 vehicle out of control, swerving across the lane to cause the  
11 accident, and ---

12 THE COURT: All right, sir. So, from what you're telling  
13 me, I can take it in no other way other than you are denying  
14 responsibility for causing this wreck and causing the death of  
15 the two victims. That's the only way I can take the statement  
16 that you are making to the Court. Is that what you're telling  
17 me?

18 MR. LIVINGSTON: But I was the driver, though.

19 THE COURT: I appreciate that.

20 MR. LIVINGSTON: And I was under the influence of  
21 alcohol.

22 THE COURT: All right, sir. And you were operating and  
23 had control of that vehicle; is that correct?

24 MR. LIVINGSTON: Correct.

25 THE COURT: And you caused the death of these two young

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

15

1 boys; is that correct?

2 MR. LIVINGSTON: Correct.

3 THE COURT: And again, are you pleading guilty to these  
4 two crimes because you are guilty of these two crimes?

5 MR. LIVINGSTON: Yes, sir.

6 THE COURT: No question about that?

7 MR. LIVINGSTON: No, sir.

8 THE COURT: So, once again, have you understood my  
9 questions here today?

10 MR. LIVINGSTON: Yes, sir.

11 THE COURT: Have all the answers that you've given to me  
12 been the truth?

13 MR. LIVINGSTON: Yes, sir.

14 THE COURT: Did anybody tell you how to answer my  
15 questions?

16 MR. LIVINGSTON: No, sir.

17 THE COURT: They have been your answers solely; is that  
18 correct?

19 MR. LIVINGSTON: Correct.

20 THE COURT: And you're pleading guilty freely and  
21 voluntarily; is that correct?

22 MR. LIVINGSTON: Yes, sir.

23 THE COURT: I find there's been a substantial factual  
24 basis for the plea. I find the Defendant's decision to plead  
25 guilty has been done freely, voluntarily, knowingly, and

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

16

1 intelligently made. He has had the advice of competent  
2 counsel with whom he's satisfied. Therefore, Mr. Livingston's  
3 decision to plead guilty to two counts of felony driving under  
4 the influence, death resulting, is accepted.

5 Solicitor, you indicated that a representative of the  
6 victims wish to address the Court; is that correct?

7 MR. DEBUSK: That's correct, Your Honor.

8 THE COURT: Be glad to hear from them.

9 MR. DEBUSK: Your Honor, if I could, one moment before  
10 they speak. In this case, initially at the scene when the  
11 Trooper Tart spoke to the Defendant, he initially denied being  
12 the driver in this case. He said nothing about this grabbing  
13 of the steering wheel until some week later when he was  
14 interviewed by the Highway Patrol. The State would've  
15 presented evidence from the other individuals in the car that  
16 they never saw such a thing and from the front-seat passenger,  
17 Victoria Gaddy that she did not grab the wheel in any way as  
18 part of this trial. In addition, the Defendant sent a letter  
19 or purported to send a letter to another individual Brittany  
20 Bellamy in the vehicle attempting to get her to testify to  
21 that same story. She did not provide the letter to the State,  
22 Your Honor. All four of those individuals are on record with  
23 two recorded statements saying that they did not see any  
24 grabbing of the steering wheel.

25 The victims' family would like to speak, Your Honor.

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

17

1 First would be the father of the two boys, which is Tommy  
2 Waddell.

3 THE COURT: All right, sir. If you would like to come  
4 forward, please, sir. And, again, sir, if you would state  
5 your name for the record and then I'd be glad to hear from  
6 you, sir.

7 MR. WADDELL: Your Honor, my name is Tommy Lee Waddell.  
8 That's spelled T-O-M-M-Y L-E-E W-A-D-D-E-L-L.

9 I would like to request consecutive sentences for each of  
10 my sons. I would like to request the maximum sentence because  
11 it's been a maximum loss. Nothing can replace the loss except  
12 precious memories, which will remain forever. I'm thankful  
13 that I have the Lord on my side. I know without a doubt that  
14 Christopher and Miles are with him now. It's been a very  
15 tragic loss for me, my son Mathew, his wife Emily,  
16 Christopher's was to-be fiancé, my mother, my family and so  
17 many friends that Christopher and Miles had. I always  
18 remember that a mind is a terrible thing to waste, yet again,  
19 their wonderful precious memories always remain. I'm so  
20 blessed and thankful for that.

21 This has also been a great loss for Myra, her family and  
22 all her loved ones. We deal with this loss with great sorrow.  
23 Yet, I know and believe that Christopher and Miles are in a  
24 better place and that's heaven and that they're pain-free.

25 I'd like to thank God, I'd like to thank my attorney,

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

18

1 Danny Wilson, his wife Tara, our families, my church and my  
2 community for all their love and support during this most  
3 difficult time. I would also like to thank the Solicitor's  
4 office, Mr. Richardson, Mr. DeBusk, the Highway Patrol, and  
5 all involved with this trial for Christopher and Miles.  
6 Romans 2, Chapter 2, Versus 12 and 13 states that, For as many  
7 as -- as many as have sinned without the law shall also perish  
8 without the law and as many as have sinned in the law shall be  
9 judged by the law. Not the hearers or the law are just before  
10 God but the doers of the law shall be justified. Christopher  
11 and Miles have been justified. Romans 8:28 states, And we all  
12 know that all things work together for good to them that love  
13 God, to them who are called according to his purpose.  
14 Christopher and Miles have been called according to their  
15 purpose. I hope that Mr. Livingston knows Jesus Christ as his  
16 personal Lord and Savior. Romans 12 -- Romans 13, Verses 1  
17 and 2 states, Let every soul be subject unto the higher powers  
18 for there is no power but of God, the powers that are ordained  
19 of God, whosoever therefore resisteth the power, resisteth the  
20 ordinance of God and they that resist shall receive to  
21 themselves damnation. Revelations Chapter 21, Verse 8 states,  
22 But the fearful and unbelieving and the abominable and the  
23 murderers and the whoremongers and the sorcerers and the  
24 idolators and all liars shall have their part in the lake  
25 which burneth with fire and brimstone, which is the second

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

19

1 death.

2 One of Christopher's favorite verses from the Bible is  
3 John 14:14. It states, If you shall ask anything in my name,  
4 I will do it. Christopher can now do anything he wants.  
5 Miles' favorite verse comes from 2 Timothy, Chapter 4, Verse 7  
6 and it states, I fought a good fight, I finished my course,  
7 I've kept the faith. Miles has kept the faith.

8 Thank you so much for allowing me to speak on my sons'  
9 behalf. Neither of them deserved to die. Thank you.

10 THE COURT: Thank you, sir.

11 MR. DEBUSK: Your Honor, next would be Myra Gore, the  
12 mother of the victims.

13 THE COURT: All right, sir.

14 Again, ma'am, if you'd just state your name for the  
15 record then I'd be glad to hear from you.

16 MS. GORE: My name is Myra Gore, M-Y-R-A, Gore, G-O-R-E.

17 THE COURT: Thank you, ma'am.

18 MS. GORE: Christopher was a humble person, loved working  
19 with children. He worked at the Rec Department. He was going  
20 to school to be a nurse to help others. Christopher was going  
21 to give his fiancé, Mary Regan, a ring during Christmas  
22 holidays. Now, she will never know that. Christopher loved  
23 to read the Bible. Mr. Livingston made the choice to take  
24 Christopher and Miles, my gift from God, away from me. Miles  
25 was our free spirit. He was seventeen. His life had just

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

20

1 started. He was an A student. He loved football and he  
2 wanted to be just like his brothers. Mr. Livingston took,  
3 Christopher and Miles, our gift God gave me. We miss them so  
4 much. And Mr. Livingston deserves the maximum amount that he  
5 could get. I don't deserve to visit them in the graveyard.  
6 They need to be with us. But his choice that Mr. Livingston  
7 made took them away from us and they're no longer here with us  
8 to enjoy the future, college graduation, high school,  
9 children, grandchildren and to grow old with my children.

10 Thank you, Your Honor.

11 THE COURT: Thank you, ma'am.

12 MR. DEBUSK: Finally, Your Honor, we have Donnie Gore who  
13 is the stepfather of the two boys.

14 THE COURT: All right, sir. Again, if you'd just state  
15 your name for the record, I'd be glad to hear from you, sir.

16 MR. GORE: Your Honor, my name is Donnie Gore, D-O-N-N-I-  
17 E G-O-R-E.

18 THE COURT: Yes, sir.

19 MR. GORE: I am the husband of Myra and I was the  
20 stepfather. Being called a stepfather or having stepsons  
21 sometimes has a bad connotation, but Christopher and Miles  
22 were the type young man that any man would love to be able to  
23 call his sons. The first few years after Myra and I got  
24 married, Miles lived with us. Miles was quite a character.  
25 He was a free spirit. He thought of himself as a ladies' man

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

21

1 and the girls like him. He was very particular of his  
2 appearance when he went out, very conscious about his hair.  
3 He and I got along extremely well. We -- unfortunately, we  
4 were wrestling in the floor and he got a broke wrist. But we  
5 didn't always agree. I didn't care too much for Justin Bieber  
6 music and he thought that Justin Bieber was the greatest thing  
7 in the world at one time. When Christopher and Mathew would  
8 come over when we had some kind of special occasion, I would  
9 cringe because I knew that they would unmercifully pick on  
10 Miles, he was so much smaller. But as Myra stated, Miles  
11 really wanted to be like his brothers. So, he wound up  
12 returning to live in Loris with his dad because he wanted to  
13 play football, he wanted to be a part of the team, he wanted  
14 to be just like his brothers. And he was accepted by all of  
15 this teammates and his coaches because, as his high school  
16 coach said, Miles thought he was six-foot-five and two-  
17 hundred-and-seventy-five pounds instead of being one of the  
18 smaller players on the team. Christopher and Miles were good  
19 students. They attended church regularly. Christopher, as  
20 most people, when he walked up to you, he would say, how you  
21 doing, but Christopher was genuinely interested in how you  
22 were doing. If he asked you that question, it was just not a  
23 greeting. Whenever he greeted me, he would say, how you  
24 doing, Mr. Donnie, and his face would break out in the biggest  
25 smile you've ever seen in your life. They were both

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

22

1 respectful, courteous, polite, good students, the kind of boys  
2 a man would be proud to have as sons.

3 Mr. Livingston, I'm sure if he could go back, he would  
4 change the events that caused us to be here today, but he  
5 can't do that, nor can we change that. We still have a room  
6 in our house we still call Miles' room. And on that bed are  
7 Christmas presents that'll never be opened because Miles and  
8 Christopher won't ever come home. Regardless of the maximum  
9 sentence that you give Mr. Livingston, at some point one day,  
10 he'll return home to open Christmas presents but those at our  
11 house will never be opened. And I ask for the maximum  
12 sentence that you can give on Mr. Livingston.

13 Thank you, Your Honor.

14 THE COURT: Thank you, sir.

15 MR. DEBUSK: Your Honor, for the record, Mr. Livingston  
16 has prior convictions from 2004 for common law robbery, 2007  
17 for distribution of cocaine, distribution of cocaine base,  
18 went to the Department of Corrections for sentences on both of  
19 those.

20 Your Honor, Christopher Waddell was a graduate of Coastal  
21 Carolina and was going back to school get a nursing degree and  
22 as we said, Miles was a student at Loris High School when he  
23 died.)

24 Thank you, Your Honor.

25 THE COURT: Thank you, sir.

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

23

1 All right, Mr. Gardner, be glad to hear from you, sir.  
2 MR. GARDNER: Thank you, Your Honor. A few things about  
3 Craig Livingston is he is thirty-three years old. He  
4 graduated from Loris. He was born and raised in this county.  
5 He attended South Carolina State for a year and he went on to  
6 go to Horry/Georgetown Tech and also completed a semester  
7 there in 2013. At Loris High School, he lettered in football,  
8 basketball and track. He also played baseball and I found out  
9 Friday, if I'm not mistaken, he played baseball with Mathew.  
10 One thing Mr. Gore said, nothing we do here today is gonna  
11 bring anybody back. This is probably the saddest, most -- and  
12 also Mr. Gore said if Livingston could change anything for  
13 that day he most certainly would. This is one of the saddest  
14 cases that I've ever seen in court. As a balancing, and I  
15 know that the Court has to figure out what's the best thing to  
16 do, and Mr. Livingston knows that a minimum sentence is  
17 certainly not -- and he's not asking for that. He's asking  
18 that the Court be compassionate as much as it can based on  
19 these factors. He has his family here and they understand the  
20 gravity of this situation.

21 A recommendation from a lawyer is just that. The  
22 Solicitor's office can make a recommendation for a number of  
23 years and it's just what it is. I can stand here and say  
24 whatever, it doesn't -- it means whatever the Court thinks it  
25 means. But I think a favorable sentence for this Defendant,

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

24

1 because of the guilty plea, because he has some redeeming  
2 qualities, would be somewhere in the fifteen-year mark. We'd  
3 ask the Court to consider that.

4 I don't know if the family wanted to speak. I don't know  
5 if the Court would entertain that. I do know that -- I  
6 believe Mr. Livingston had something that he wanted to tell  
7 the Court.

8 THE COURT: If you'd inquire of them to see if anyone  
9 would like to address the Court.

10 MR. GARDNER: You'll have to come up here and state your  
11 name.

12 MS. FLORA LIVINGSTON: I'm Craig Livingston's mother. My  
13 name is Flora A. Livingston. First of all, I want to give  
14 honor to Jesus Christ -- and I thank God. I thank God that my  
15 son, I can say he's a good boy. He's good. We all make  
16 mistakes, but he's good. And we all know -- I'm gonna say  
17 this and I want everybody to understand that, they had say I  
18 can say what I want to say, but I can say this, three things  
19 we don't have no control over, that's Satanists, death and  
20 accident. God got control all of that. We go through what we  
21 go through here but God still in control. I know that. My  
22 son go to church ---

23 THE COURT: Could you turn towards me, please, ma'am. Do  
24 you mind -- if you'd turn towards me.

25 MR. GARDNER: Talk to the Judge, please.

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

25

1 MS. LIVINGSTON: Oh, I'm sorry.  
2 THE COURT: Yes, ma'am. Thank you. That's all right.  
3 MS. LIVINGSTON: I thought I could talk to the ---  
4 THE COURT: No, ma'am. No, you're speaking to me.  
5 MS. LIVINGSTON: Okay.  
6 THE COURT: Thank you, ma'am.  
7 MS. LIVINGSTON: Just like I say -- you want me to repeat  
8 that over again?  
9 THE COURT: No, ma'am. I heard you. There's no  
10 question, I heard you.  
11 MS. LIVINGSTON: Okay. That's all I can say ---  
12 THE COURT: Yes, ma'am, you go ahead.  
13 MS. LIVINGSTON: --- my son, I know he's sorry he can't  
14 bring life back but that was God's word and God see fit and --  
15 you know, another thing, he say he's going away for life but  
16 he didn't say who he's gonna call. And God know it could've  
17 been my son well as they son but God see fit and God love and  
18 God see who he call. None of us can change that. None of us  
19 can change that. We can stand here all day long and so  
20 whatever we want to say but it's still within God's hands.  
21 And family, I say to the family, I'm sorry what happened but  
22 we didn't have no control over that. It was God word. It was  
23 God word. If God intend for it, my son could've been the one  
24 but however God see fit, that's the one God take. So, I'm  
25 just ask the family, give them my love and I'm very, very

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

26

1 sorry but it happened and it can't bring them back. So,  
2 that's all I say. I put God first in everything because he  
3 made us, he didn't say who -- we didn't come in this world to  
4 stay, we come in this world to die, so that's the only thing,  
5 it's in God hand.

6 THE COURT: Thank you, ma'am.

7 Yes, ma'am. Just state -- tell me your name.

8 MS. REGINA LIVINGSTON: My name is Regina Livingston, I'm  
9 Craig's sister.

10 THE COURT: Yes, ma'am.

11 MS. REGINA LIVINGSTON: And I -- as I goes to visit him  
12 in the jailhouse, I can say this, he is deeply sorry for what  
13 has happened. He cannot change what has happened. He realize  
14 the situation that he's in only God himself can deliver him  
15 out of. He's been running and this is the way that God has  
16 his attention. I am deeply sorry and I know he's deeply sorry  
17 that it has happened this way. If he could change back the  
18 time, he would, but he can't. It's out of his control.  
19 Everyone that was in the vehicle that's with him, God has  
20 given them a second chance. As I hear the testimony or what  
21 the family has said about their kids, to me, they were -- they  
22 were in the God's care, they were in God's hand. God had to  
23 touch my brother to change his ways, not saying he's a bad guy  
24 at all, it's just that God needed his attention and this is  
25 the only way that God got his attention. So, again, I tell

State v. Livingston - 2015-GS-26-1840,1841  
BY THE COURT

27

1 the family, I am sorry. I know he's sorry, but only God can  
2 deliver him out of this situation and take him through the  
3 course of times that he have to go through.

4 THE COURT: Thank you, ma'am.

5 Mr. Gardner?

6 MR. GARDNER: Craig Livingston, Your Honor.

7 THE COURT: Yes, sir.

8 MR. LIVINGSTON: Your Honor, I'd like to let the Waddell  
9 family know that I am greatly sorry for their loss and for my  
10 actions involved in their loss. And that I tried everything  
11 that I could to prevent that accident from happening that  
12 night. Unfortunately, I can't predict what's gonna happen  
13 when somebody else is -- when they somebody else's involved  
14 while I'm driving my vehicle. But I'm greatly sorry for their  
15 loss and I'm suffering as well because I gots to live with  
16 this. And I ask that they have mercy, love, compassion,  
17 forgiveness towards me for the lives of their family and loved  
18 ones, Christopher and Miles Waddell.

19 THE COURT: Thank you, sir.

20 Yes, sir, Mr. Gardner?

21 MR. GARDNER: That's it, Your Honor. Thank you.

22 THE COURT: All right. Thank you.

23 Anything further, Solicitor?

24 MR. DEBUSK: Your Honor, I'd just say this, the State  
25 prosecutes people not based on ultimate justice and God's

State v. Livingston - 2015-GS-26-1840,1841  
SENTENCE OF THE COURT

28

1 hands but based on the actions on this earth. In this case,  
2 the action was getting behind the wheel when he was offered an  
3 alternative and driving anyway resulting in the death of two  
4 young men and that's what we ask you to take into account here  
5 when you pass your sentence, Your Honor. Thank you.

6 THE COURT: Thank you, sir.

7 SENTENCE OF THE COURT:

8 THE COURT: 2015-GS-26-1841, State of South Carolina,  
9 County of Horry versus Craig Austin Livingston regarding  
10 felony driving under the influence, death results. In this  
11 particular matter, the Court has heard from family members of  
12 the victims, family members of the Defendant and from the  
13 Defendant, this case is just an absolute tragedy, without  
14 question. No sentence this Court could impose can bring back  
15 the lives of the two young men that were lost. I cannot do  
16 that. I can only look at the situation that is before me, the  
17 fact that the Defendant has come before the Court, pled  
18 guilty, accepted responsibility for his actions.

19 The sentence of the Court in 2015-GS-26-1841 is the  
20 Defendant is committed to the State Department of Corrections  
21 for a determinate term of twenty years.

22 Regarding 2015-GS-26-1840, the sentence is the same to  
23 run concurrent, at the same time.

24 Thank you very much.

25 MR. DEBUSK: Thank you, Your Honor.

State v. Livingston - 2015-GS-26-1840,1841  
SENTENCE OF THE COURT

29

1           MR. GARDNER: Thank you, Your Honor.

2           (ADJOURNED.)

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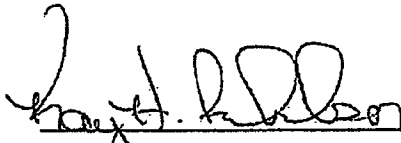
State v. Livingston - 2015-GS-26-1840,1841  
CERTIFICATE OF COURT REPORTER

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina versus Craig Austin Livingston, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on April 18, 2016, taken by Dixie C. Eubank.

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



Kay H. Richardson  
Official Court Reporter

November 4, 2016.

FORM 5

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
 )  
CRAIG AUSTIN LIVINGSTON 304858 )  
Full name and prison number (if any) of Applicant. )

IN THE COURT OF COMMON PLEAS

110

4592

v. )  
 )  
State of South Carolina )  
 )

APPLICATION FOR  
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention K.C.I. 4344 BROAD RIVER ROAD, COLUMBIA, SC 29210
2. Name and location of Court which imposed sentence Horry County, Conway S.C. 29526
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2015GS2601840 DUI/FELONY DRIVING UNDER THE INFLUENCE, DEATH
  - (b) 2015GS2601841 DUI/FELONY DRIVING UNDER THE INFLUENCE, DEATH
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) APRIL 18, 2016 20 YEARS CONCURRENT
  - (b) APRIL 18, 2016 20 YEARS CONCURRENT

CLERK OF COURT  
Horry County  
JUL 12 AM 11:00

- (c) \_\_\_\_\_
- 6. Check whether a finding of guilty was made:
  - (a)  after a plea of guilty \_\_\_\_\_
  - (b) after a plea of not guilty \_\_\_\_\_
  - (c) after a plea of nolo contendere \_\_\_\_\_

7. Did you appeal from the judgment of conviction or the imposition of sentence?  
NO

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
    - i. N/A
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. N/A
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. N/A
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. N/A
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_

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

- (a) COUNSEL DID NOT ADVISED ME OF THAT RIGHT AFTER I PLEAD.
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

(a) INEFFECTIVE ASSISTANCE OF COUNSEL

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

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

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

(a) SEE ATTACHMENT

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

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

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

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

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

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

iv. \_\_\_\_\_

(b) the name and location of the Court in which each was filed:

i. N/A

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

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

iv. \_\_\_\_\_

(c) the disposition thereof:

i. N/A

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

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

iv. \_\_\_\_\_

(d) the date of each such disposition:

i. \_\_\_\_\_ N/A

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

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

iv. \_\_\_\_\_

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

i. \_\_\_\_\_ N/A

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

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

iv. \_\_\_\_\_

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

\_\_\_\_\_ NO

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

(a) which grounds have been presented:

i. \_\_\_\_\_ N/A

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

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

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

i. \_\_\_\_\_ N/A

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

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

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

(a) INEFFECTIVE ASSISTANCE OF COUNSEL

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

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

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

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

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

(a) the name and address of each attorney who represented you:

- i. JAMES GALMORE
- ii. JOHNNY GARDNER 212 MAIN STREET CONWAY S.C. 29526
- iii. \_\_\_\_\_

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

- i. ARRAIGNMENT AND PLEA
- ii. SENTENCING
- iii. \_\_\_\_\_

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

I SEEK A REDUCED SENTENCE

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

NO

STATE OF SOUTH CAROLINA

VERIFICATION

County of Horry

16

4592

I, CHRIS A. LIVINGSTON, 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.

Craig Austin Livingston

SWORN to and subscribed before me this 05 day of July, 2016.

Melissa A. Spigner (L.S.)  
Notary Public

My Commission Expires: Dec. 1, 2025

2016 JUL 12 AM 10  
Notary Public

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

16

4592

I, LAURA A. LUNDGREN, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress,
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Laura A. Lundgren  
Applicant

SWORN or affirmed to and subscribed before me this  
05 day of July, 2016.

Melissa D. Spizna  
Notary Public

My Commission Expires: Dec. 1, 2025

CLERK OF COURT  
2016 JUL 12 AM 10:30  
MELBURN COUNTY

11. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (10):

- 1.) COUNSEL WAS INEFFECTIVE FOR NOT INVESTIGATING INTO CASE.
- 2.) COUNSEL WAS INEFFECTIVE FOR UNPROFESSIONAL ERRORS.
- 3.) COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE STATE WITH HELDING EVIDENCE.

CLERK OF COURT  
2016 JUL 12 AM 10:11  
MELBURN COUNTY

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY  
Craig Austin Livingston, #304858,  
Applicant,  
v.  
State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
2016-CP-26-4592

**RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on July 12, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Horry County. Applicant was indicted by the May 2015 term of the Grand Jury for Horry County for two (2) counts of felony DUI resulting in death (2015-GS-26-1840, 1841). Applicant was represented by Johnny Gardner, Esquire. On April 18, 2016, Applicant pled guilty as indicted to both counts. Applicant was then sentenced by the Honorable Steven H. John to twenty (20) years' imprisonment for each of the two counts, to be served concurrently. Applicant did not appeal his convictions or sentences.

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

## II.

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

## 1. Ineffective Assistance of Counsel

- a. "Counsel was ineffective for not investigating the case."
- b. "Counsel was ineffective for unprofessional errors."
- c. "Counsel was ineffective for not objecting to the state withholding evidence."

## III.

Applicant claims ineffective assistance of counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. 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.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

#### V.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an

evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

## VI.

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

## VII.

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

Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT BOLCHOŽ  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

VALERIE GARCIA GIOVANOLI  
Assistant Attorney General

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

By:   
ATTORNEYS FOR RESPONDENT

March 28, 2017

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 )  
 CRAIG AUSTIN LIVINGSTON, #304858, )  
 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS

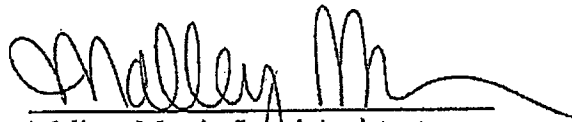
2016-CP-26-4592

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by e-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 e-mail:

**Mr. Steven W. Fowler, Esquire**  
**1018 Highway 17 South**  
**North Myrtle Beach, SC 29582**

DATED this 28<sup>th</sup> day of March, 2017.

  
 \_\_\_\_\_  
 Mallory Morris, Legal Assistant  
 For Respondent





1 (The hearing commenced at approximately 2:23 p.m.)

2 MR. JAMES: This is the matter of Craig Austin  
3 Livingston versus State of South Carolina, Docket No.  
4 2016-CP-26-4592. Mr. Livingston is present here in the  
5 courtroom today and is represented by Mr. Steve Fowler,  
6 Esquire. Mr. Livingston was indicted by the Horry  
7 County Grand Jury during the May 2015 term for two  
8 counts of felony DUI resulting in death. Mr.  
9 Livingston was represented by Johnny Gardner, Esquire,  
10 on those charges.

11 On April 18, 2016, Mr. Livingston pled guilty as  
12 indicted on both counts. Mr. Livingston was then  
13 sentenced by the Honorable Stephen H. John to 20 years  
14 imprisonment on each count to be served concurrently.  
15 Mr. Livingston did not appeal those convictions or  
16 sentences. Your Honor, there are no outstanding  
17 motions in this matter, and I cede the floor to  
18 opposing counsel.

19 MR. FOWLER: Your Honor, I would like to call  
20 Mr. Craig Livingston to the stand, please.

21 CRAIG A. LIVINGSTON, after being duly sworn,  
22 testified as follows:

23 THE CLERK: You may have a seat. State your name  
24 for the Court, okay.

25 THE APPLICANT: My name is Craig Livingston.

1 THE COURT: All right. Go ahead, Mr. Fowler.

2 DIRECT EXAMINATION

3 BY MR. FOWLER:

4 Q Mr. Livingston, you and I have spoken by phone on  
5 this, and we have spoken at length this morning; is  
6 that correct?

7 A Correct.

8 Q All right. And you're familiar with what a PCR  
9 hearing is; is that correct?

10 A Correct.

11 Q Okay. And we're here today to discuss your  
12 application that you filed with this court, an  
13 application for post conviction relief that the call of  
14 the case was provided just a few moments ago. And in  
15 that you allege a certain -- you make certain  
16 allegations against Mr. Johnny Gardner and his firm; is  
17 that correct?

18 A Correct.

19 Q Now, in terms of, I think, in this application at  
20 number 11, it says, state concisely in the same order  
21 the facts that would support each of the grounds set  
22 forth in ten. And ten, you are alleging ineffective  
23 assistance of counsel; is that correct?

24 A Correct.

25 Q Okay. That's a fairly broad and sweeping

1 terminology, you get into some of the specifics in the  
2 number 11. And one of those specifics is -- that you  
3 state is, counsel was ineffective for not investigating  
4 into the case. What exactly do you mean when you state  
5 that your legal counsel was ineffective for not  
6 investigating the case?

7 A Mr. Johnny Gardner was informed that Applicant,  
8 front passenger --

9 MR. JAMES: Okay, objection, Your Honor. He's  
10 just reading from a document.

11 THE COURT: Sustained. Answer the question in  
12 your own words.

13 Q Yeah, if -- obviously what the Court wants, but if  
14 you have notes you can look at them and refresh your  
15 memory in my opinion. But just in your own words, you  
16 know, just -- I'm sure you're familiar with this case,  
17 and I hope you are, I'm sure you are, based on our  
18 discussions -- tell me a little bit about in your own  
19 words, why was he not effective for not investigating  
20 the case.

21 A Well, on the night of the accident, the officers  
22 and the medic team, you know, asked me what had  
23 happened. And I told them that my front seat passenger  
24 had grabbed my steering wheel, which I later was  
25 represented by Mr. Gardner, and I told him the same

1 thing, that my front seat passenger grabbed my steering  
2 wheel.

3 He never contacted the medic team nor did he  
4 contact the law enforcement officers to ask why wasn't  
5 latent fingerprints tested on my steering wheel from my  
6 front seat passenger grabbing my steering wheel.

7 Q Okay. So not to reiterate, but you're saying  
8 that -- you're alleging that -- stating that someone  
9 else grabbed the -- let me rephrase it like this.

10 Was any kind of fingerprints done on the steering  
11 wheel?

12 A No, sir, not that I know of.

13 Q Even after -- did you indicate to Mr. Gardner,  
14 like you just said, that someone else had grabbed the  
15 steering wheel?

16 A Yes, sir.

17 Q Do you think if a testing would have been done on  
18 the steering wheel, that would have helped provide a  
19 defense in your case?

20 A Yes, sir.

21 Q Do you think if...

22 MR. JAMES: Objection, leading.

23 THE COURT: Sustained.

24 Q Why do you think -- based on that last question,  
25 what do you think would be the beneficiary of having

1 the steering wheel tested?

2 A It would prove that she contributed to this  
3 accident.

4 Q Okay, all right. Well, now, let me ask you this  
5 question. You talk about ineffective assistance of  
6 counsel. What were your discussions with Mr. Gardner  
7 about that testing? Did you tell him to test for it or  
8 not, or how did you -- what was his role in either not  
9 testing or testing for fingerprints? Did you let him  
10 know that that's something he should do?

11 A I did.

12 Q Okay. Did he do anything about it?

13 A No, sir.

14 Q Okay. Why not, to your knowledge?

15 A I believe he stated that it was contaminated  
16 probably at the scene.

17 Q Okay. But with that said, did you still say he  
18 should -- tell him he should do it?

19 A He should, yeah.

20 Q Okay. All right. In terms of that, was there  
21 anything else in terms of investigation that you think  
22 he should have looked into?

23 A Probably my warrants, my warrants and my warrant  
24 return.

25 Q Okay. What in your -- or what are you telling the

1 Court today? You said there were two things, the  
2 warrants and the return. What were the problems with  
3 the warrants?

4 A The warrants stated for one vial of blood, but the  
5 officer took two tubes of blood.

6 Q So was that something that you consented to, or  
7 was that something that the law enforcement told you to  
8 do in terms of the vials of blood, or what?

9 A I did not consent to it. A officer just said, he  
10 told the nurse to take two tubes of blood.

11 Q Okay. And was that at the hospital or what --  
12 where was that?

13 A At the hospital.

14 Q You said the officer told the nurse, so that was  
15 at the hospital?

16 A Yes, sir.

17 Q At the time of the incident?

18 A The accident, yeah.

19 Q Okay. So was that later used against you in  
20 court, or how was the two vials of blood relevant to  
21 your case in terms of the investigation?

22 A Well, the return wasn't executed.

23 Q Okay, all right. Well, let's kind of follow along  
24 here. We've talked about the warrants, we've talked  
25 about the return. Let's stay on that before we get to

1 the blood question. Are you saying that the warrants  
2 weren't -- tell me a little bit about the warrants,  
3 what were the problems with the warrants in your mind?

4 A The warrant was requesting one vial of blood.

5 Q Okay. So the warrant relates to the vial of  
6 blood; is that correct?

7 A Correct.

8 Q Okay. Now, you also mentioned the return. Tell  
9 me a little bit about the return, was there a problem  
10 with the return in your mind?

11 A Yes, sir. It didn't show that any vial of blood  
12 was taken from me.

13 Q Okay.

14 A It wasn't executed by a officer, signed signature,  
15 and it didn't have the judge's signature on it.

16 Q Okay. So you're saying that there was no proper  
17 document -- there was no proper authority provided on  
18 the return; is that correct?

19 A For two -- yes.

20 Q Okay. Well, let's go back to the vial of blood.  
21 You said that that was in the warrant, or was that --  
22 how did -- was that in some other documentation that  
23 they provided to you or requested to you?

24 A It was in the warrant.

25 Q Okay. And how were those vials of blood used, to

1 the best of your knowledge? Were they used  
2 potentially --

3 A To determine the BAC.

4 Q Okay. So they determined your blood alcohol  
5 content; is that what you're saying?

6 A Yes, sir.

7 Q Now, what was Mr. Gardner's role in that; did he  
8 get those vials of blood; I mean, did he do some  
9 further request of the Court or the toxicology to do  
10 further tests on them, or how did his -- how did his  
11 alleged ineffective assistance of counsel relate to  
12 those two vials of blood?

13 A I don't think he did any investigative work,  
14 because he just told me, he said, they got your blood,  
15 the blood came back two times over the legal limit.

16 Q Okay. Even though you said that that was your  
17 feeling -- okay, all right, very good. Now, you also  
18 state in here, counsel was ineffective for  
19 unprofessional errors. In your mind and if you could  
20 tell the Court, what are some of those unprofessional  
21 errors in this?

22 A Well, he didn't take notice of the warrant nor the  
23 return, nor did he try to suppress it.

24 Q Okay. Did he file any motions -- you said he did  
25 not file to suppress. Did he file any motions with the

1 Court before you came before the Court to plead?

2 A No, sir.

3 Q What were your discussions with him, how  
4 frequently did you talk to him before you went to  
5 court?

6 A For a total since I had him on my case, probably  
7 like five times.

8 Q And how long was he -- how long was he your  
9 attorney before the plea, like months or years or...

10 A Some months.

11 Q So how many months; do you know?

12 A Probably four.

13 Q Okay. So it wasn't -- okay, strike that. Did you  
14 feel that was enough time to adequately go over your  
15 case with you, the four months?

16 A Yes, sir.

17 Q Okay. So, well, could you have used more time to  
18 go over these things with him or --

19 A Yes, sir.

20 Q Okay, all right. There was a toxicology report;  
21 is that correct?

22 A Yes, sir.

23 Q Were there any issues with the chain of custody on  
24 that toxicology report?

25 A Yes, sir.

1 Q To your knowledge, what were they?

2 A It has a person by the name of Refrigerator,  
3 person by the name of Safe, from my understanding.

4 Q Okay. Well, those are appliances, not necessarily  
5 names, I guess. So do you think there were issues with  
6 the chain of custody?

7 A Yes, sir.

8 Q Okay. Did Mr. Gardner do anything to find out  
9 more about that chain of custody?

10 A No, sir.

11 Q Okay, all right. Do you feel like that chain of  
12 custody potential issue might have been helpful for you  
13 in your case if there had been a -- you had known more  
14 about it?

15 A Yes, sir. Because there wasn't a officer  
16 signature saying he executed that warrant, so how can  
17 you start a chain of custody.

18 Q Okay. So you have -- okay. Did your attorney  
19 file any kind of -- and I think I might have asked  
20 this, but just bear with me, please -- there was no  
21 suppression motions of anything; was there?

22 A No, sir.

23 Q All right. Is there anything else about the  
24 ineffective assistance of counsel about your attorney  
25 at the time that you would like to bring to the Court's

1 attention?

2 A The solicitor had mentioned that the victim  
3 toxicology report which I never receive, we never  
4 receive any toxicology report on the victims.

5 Q Okay.

6 A But he allow the solicitor to present that to the  
7 judge.

8 Q All right. Well, let's talk about that. Are you  
9 familiar with the term discovery?

10 A Yes, sir.

11 Q Okay. Did you receive any -- what discovery did  
12 you receive from your attorney's office that you know  
13 of?

14 A You mean like what was all presented?

15 Q Yeah. What information did he present to you  
16 about the case before you pled? I mean, did he  
17 provide -- you mentioned the warrant and return and  
18 other legal documents. Did he provide legal documents  
19 to you before you pled?

20 A Legal documents like such as?

21 Q The warrant, return and, you know, any --

22 A Yes, sir.

23 Q But you're saying that the others were not --  
24 their information was not provided to you; correct?

25 A Correct.

1 Q Okay. Did you ask him for it?

2 A Yes, sir.

3 Q Okay. Why did he not provide it to you, in your  
4 words?

5 A He said the State said they never received one.

6 Q Okay. Never received the toxicology -- never  
7 received what?

8 A A toxicology report on the victims.

9 Q Okay. Do you think if you had that information,  
10 it would have been helpful to you in your case?

11 A Yes, sir.

12 Q All right. In terms of the discovery, did he go  
13 -- how did he go over it with you, if at all?

14 A Well, mainly he said they have blood work that can  
15 say that my blood was two times over the legal limit,  
16 and he would advise me to plead guilty.

17 Q What did you say in response to that?

18 A I said, if you advise me to plead guilty, I'll  
19 plead guilty.

20 Q So you were -- were you going on his...

21 A His word.

22 Q His word, okay. Since the day of plea, have you  
23 investigated these matters more, or what has been your  
24 homework on this --

25 A Well, since I been sentenced, I've been at

1 Kirkland Correctional Institute, and I went to the law  
2 library. And I further discover that by the failure to  
3 do a return, it could have prejudiced my case.

4 Q All right. So since you've been to Kirkland,  
5 you've learned some additional things; is that correct?

6 A Correct.

7 Q All right. If you had known, then, at the date of  
8 the plea what you know now, would you have changed your  
9 mind or talked with your attorney differently, or what  
10 would have been -- how would you have reacted at that  
11 point if you know what you know now legally?

12 A I probably would have insisted on the trial.

13 Q Okay, all right. But -- okay, very good.  
14 Anything else about the ineffective assistance of  
15 counsel that you think is relevant here?

16 A No.

17 Q Very good.

18 MR. FOWLER: No further questions, Your Honor.

19 THE COURT: All right. Mr. James.

20 CROSS-EXAMINATION

21 BY MR. JAMES:

22 Q Mr. Livingston, something caught my eye, and I  
23 want to open up with this before I ask you any further  
24 questions. And I didn't see this before,  
25 unfortunately, but it appears that in response to

1 question 19 on your application for relief, you  
2 indicated that you seek a reduced sentence.

3 Are you seeking a reduction in your sentence  
4 today, or do you want to vacate your guilty plea and go  
5 back to the start and potentially seek a new trial?

6 A I mean, I was looking for a reduced sentence.

7 Q Okay. If I were to tell you that a sentence  
8 reduction was not available and that the only relief  
9 available to you would be to go back to square one and  
10 face a new trial, is that relief in which you are  
11 interested?

12 A Yes, sir.

13 Q Okay. Just had to make sure. Mr. Livingston, did  
14 your attorney explain to you the elements of the crime  
15 with which you were charged?

16 A Yes, sir.

17 Q And did he explain to you any available defenses,  
18 or did he tell you that there were no defenses  
19 available to you?

20 A He didn't explain any defense to me.

21 Q Do you recall waiving your rights at the guilty  
22 plea proceeding?

23 A Yes, sir.

24 Q Such as your right to remain silent?

25 A Yes, sir.

1 Q And your right to confront your accusers?

2 A Yes, sir.

3 Q Okay. And your right to a jury trial?

4 A Yes, sir.

5 Q Okay. Do you recall for the most part agreeing --  
6 do you recall hearing the solicitor, the State, set  
7 forth a series of facts during your guilty plea  
8 proceeding, a summary of what happened?

9 A Yes, sir.

10 Q Do you recall for the most part agreeing with  
11 those facts?

12 A No, sir. I really can't recall because I don't  
13 have a transcript.

14 Q Would it assist you if I brought you a copy of the  
15 plea transcript? That was a question, Mr. Livingston,  
16 would it assist you if I brought you a copy of the plea  
17 transcript?

18 A Yes, sir.

19 Q All right.

20 MR. JAMES: Your Honor, if I may approach the  
21 witness?

22 THE COURT: You may.

23 MR. JAMES: Your Honor, I have a copy of the plea  
24 transcript. I have high lit a portion ranging from  
25 page 12, line 21 to page 13, line 20.

1 Q Here you go, sir. Page 12. And if you could,  
2 please just read through that and refresh your memory,  
3 sir.

4 A Yes, sir.

5 Q So to ask my question again, upon hearing the  
6 facts that the State set forth, do you recall for the  
7 most part agreeing with those facts?

8 A For most of it, yes, sir.

9 Q Okay. To what extent did you disagree with the  
10 facts that the State set forth?

11 A That...

12 Q Well, this is cross-examination, I can explain it  
13 a little bit more clearly. Isn't it true that you told  
14 the Court that somebody else grabbed your -- the  
15 steering wheel?

16 A Yes, sir.

17 Q Okay. And the Court asked you if you were denying  
18 responsibility; correct?

19 A Correct.

20 Q And you responded, no, sir, I was under the  
21 influence of alcohol; correct?

22 A Correct.

23 Q And that you were driving the vehicle at the time?

24 A Correct.

25 Q And you thereafter proceeded to plead guilty

1 anyway?

2 A Correct.

3 Q Do you recall telling the Court that you were  
4 satisfied with your attorney?

5 A No, sir.

6 MR. JAMES: If I may approach the witness again,  
7 Your Honor.

8 Q I have high lit a portion of page 7 of the plea  
9 transcript ranging from lines 11 through 23. If you  
10 could, Mr. Livingston, please read through and refresh  
11 your memory.

12 A Yes, sir.

13 Q Do you recall telling the Court that you had  
14 enough time to speak with your attorney?

15 A Yes, sir.

16 Q And do you recall telling the Court that you did  
17 not need any more time to talk to him?

18 A Yes, sir.

19 Q All right.

20 MR. JAMES: Moment's indulgence, Your Honor.

21 THE COURT: All right.

22 MR. JAMES: I have no further questions for this  
23 witness, Your Honor.

24 THE COURT: Mr. Fowler?

25 REDIRECT EXAMINATION

1 BY MR. FOWLER:

2 Q The State's gone over several things that you said  
3 at the plea. But it was your testimony earlier that  
4 you learned a lot about legal matters after you got to  
5 SCDC; is that correct?

6 A Somewhat, yes, sir.

7 Q Okay. So at this point what you said during the  
8 plea might not always be correct at this point due to  
9 your research; is that correct?

10 A Correct.

11 Q And because of the --

12 THE COURT: Why don't we ask nonleading questions.

13 MR. FOWLER: Yes, sir.

14 THE COURT: Mr. James has been mighty kind not to  
15 object.

16 MR. FOWLER: Yes, sir. I'm just trying to  
17 articulate.

18 Q So how would you say that your research has helped  
19 you in terms of what went on that day at the plea?

20 MR. JAMES: Respectfully, Your Honor, I must  
21 object. It's both asked and answered and --

22 THE COURT: Sustained.

23 MR. JAMES: -- not relevant.

24 MR. FOWLER: No further questions, Your Honor.

25 THE COURT: You may step down.

1 (Witness excused.)

2 THE COURT: Call your next witness.

3 MR. FOWLER: Let me speak with my client for a  
4 moment.

5 (Discussion off the record.)

6 MR. FOWLER: Your Honor, we have no further  
7 witnesses.

8 THE COURT: State, call your first witness.

9 MR. JAMES: State calls Johnny Gardner.

10 JOHNNY GARDNER, after being duly sworn, testified  
11 as follows:

12 THE CLERK: Have a seat. State your name for the  
13 Court.

14 THE WITNESS: Johnny Gardner.

15 DIRECT EXAMINATION

16 BY MR. JAMES:

17 Q Good afternoon, Mr. Gardner.

18 A Good afternoon, sir.

19 Q Today in court has been very confusing, every time  
20 somebody calls our name we both look. How many times  
21 did you -- well, let's take a step back from there.  
22 How long have you been licensed as an attorney in the  
23 state of South Carolina?

24 A 25 years.

25 Q All right. How much of that is criminal?

1 A Mostly all of it, 95 percent probably.

2 Q Do you recall precisely when you began  
3 representing Mr. Livingston?

4 A I was looking through the file earlier, I think we  
5 got appointed in December or received a supplementary  
6 appointment in --

7 Q December of what year for total clarity?

8 A 2015. 2015.

9 Q Did you file a request for discovery pursuant to  
10 Rule 5 and Brady?

11 A I was appointed on this case. And the way that  
12 works is when Ms. West, the chief public defender, when  
13 somebody gets appointed, she files the appointment  
14 paperwork, Brady request, all that stuff. And then  
15 when the judge signs off on it, it gets sent back to  
16 the clerk, the solicitor, the appointed lawyer, so on  
17 and so forth.

18 Q Somebody at some point filed a Rule 5 Brady  
19 request?

20 A Yes.

21 Q And did you receive discovery in response to those  
22 motions?

23 A Yes, we did.

24 Q Okay. Did you review that discovery?

25 A We did. In fact, it took us a while to get -- the

1 highway department, when they do -- the MAIT team, when  
2 they do their investigations now, they send it out by  
3 computer. And the solicitor downloads it. And they  
4 had some mechanical problems, but we finally did get  
5 everything, got it in plenty of time, and we got every  
6 bit of it.

7 Q What all did you receive?

8 A Just the normal stuff that goes along with those  
9 cases. There was nothing abnormal about it. We got a  
10 copy of the witness statement, a letter, copy of the  
11 letter from the Defendant to a witness that he wrote  
12 while he was in jail, copy of the MAIT evaluation and  
13 their report, the blood alcohol report on the  
14 Defendant.

15 Q Did you notice anything missing or deficient in  
16 the materials that were provided?

17 A No, sir. No, sir.

18 Q Specifically, did you notice any deficiency in the  
19 warrant to seek Mr. Livingston's blood sample?

20 A No, I didn't. There's a protocol that they use  
21 for death cases and serious bodily injury cases. It's  
22 different from regular DUI's, but you know, it just  
23 follows the statute and get the blood drawn. It was  
24 done within the appropriate time. And chain of custody  
25 looked fine to me, you know.

1 Q On the stand Mr. Livingston expressed concern  
2 about the return to the warrant to draw his blood. Was  
3 that something that was known to you or that you  
4 identified?

5 A I didn't see anything wrong with it. I didn't --  
6 I mean, we never discussed that when we were talking  
7 about it. What we did -- what I did was go through  
8 page by page of the discovery. And it didn't appear to  
9 be an issue when we were going through it, or we would  
10 have done something about it.

11 Q So you went over the discovery page by page with  
12 Mr. Livingston?

13 A Something Ron Hazzard taught me about 24 years ago  
14 is on serious cases, just go out to the jail and sit  
15 with them and go through it page by page. If you have  
16 any questions, deal with it.

17 Q Did Mr. Livingston give you a version of events as  
18 to what occurred?

19 A Yes. And it was --

20 Q What did he tell you?

21 A -- very similar to what he said earlier. I'd like  
22 to point out, though, I think to put it in perspective,  
23 that early on, Mr. Livingston indicated in January that  
24 this was going -- that he wanted to do a guilty plea,  
25 this was never for trial, never for trial.

1           But we talked about what we would do if we went to  
2 trial. Mr. Livingston's focus was always on the  
3 passenger pulling the steering wheel and that that  
4 caused him to cross over the center and cause the  
5 wreck. The problem with that, if you want me to answer  
6 that?

7 Q       Well, I'll go ahead and ask the question to keep  
8 it clean. What problem is there with that story?

9 A       Well, that may be what happened, it may not be  
10 what happened. I don't know, I wasn't there. But the  
11 witnesses will deny, if that went to trial, would deny  
12 that that's what happened. That might be because of  
13 self-preservation or whatever.

14       But I think that we did -- Mr. Livingston and I  
15 did go over the elements, and we went over the proof  
16 that they had against him. And just to briefly, some  
17 of the proof that they had against him was there was no  
18 doubt he was the driver.

19       DUI cases -- I've been here all day, and I've  
20 heard you ask people, what were the defenses, and were  
21 there defenses. DUI cases aren't like bank robbery  
22 cases, you know. You have the guy in the car, you  
23 know, sometimes the Defense is it wasn't the driver, it  
24 was the other guy. That did not apply here.

25       Sometimes it wasn't -- the guy wasn't intoxicated.

1 That, I think, would be hard. I think that applied  
2 here. I think it would be hard to say that that would  
3 be a defense in this case. That was based on a  
4 toxicology report of THC or marijuana and also a very  
5 high blood alcohol report, so...

6 And then the other -- in a felony DUI offense, the  
7 other defense would be that, you know, he didn't cause  
8 the wreck. The MAIT team did a very good job  
9 investigating what they had to investigate, did he  
10 cross the line. And Mr. Livingston had crossed the  
11 line and caused the wreck. So those are the defenses.

12 In the vehicle, the police investigating this  
13 thing found signs of drinking, visible signs of  
14 drinking. There was a liquor bottle, one or two, and a  
15 beer container of some sort. And I believe, if memory  
16 serves me, when Mr. Livingston was taken to the  
17 hospital, he had on his person --

18 MR. FOWLER: Your Honor, I would like to object to  
19 this line. He's answered the question in terms of  
20 defenses, and I would like for the State to stay within  
21 the scope of the question.

22 THE COURT: He is. I'm overruling it, go ahead  
23 and answer it.

24 THE WITNESS: Well, you know, I do -- the bulk of  
25 my work is DUI defense work. And if you have a guy

1 that didn't take the breathalyzer test, for example,  
2 that doesn't mean that the case is over, it doesn't  
3 mean that he won the case or that he's not guilty. He  
4 might be not guilty. It's harder for the State to  
5 prove their case. But if the guy has indicators of  
6 alcohol consumption and then indicators of impairment,  
7 then the State can go forward with that case.

8       Here in this case, trying to limit my answers to  
9 defenses, I didn't see any defenses to this case  
10 because there was a blood alcohol report that was taken  
11 within the timeframe set forth in the statute. The  
12 chain of custody looked fine to me, and that blood  
13 alcohol, I think, was 18 at the time of the draw.

14       The cause of the accident was clear by the MAIT  
15 report. There were witnesses that would testify or had  
16 said that they would testify if this went to trial that  
17 the Defendant had been drinking, the Defendant was  
18 intoxicated, the Defendant had been driving at a high  
19 rate of speed.

20 Q       So what was your gauge of the State's case against  
21 your client, its strength?

22 A       Yeah, it was strong.

23 Q       What if any independent investigation did you do,  
24 either personally or through a hired investigator?

25 A       We didn't do any hire -- we didn't hire any

1 investigators. I got appointed on the case after the  
2 -- well after the wreck had occurred. Based on the  
3 strength of this case, it was not one where we could  
4 hire a toxicologist to dispute the blood alcohol level.  
5 I mean, if you have two experts, one for the State and  
6 one for the Defense, they might disagree by one or two  
7 levels, you know. One might say it was X amount, and  
8 the other one might say it was minus to that, okay.

9         And this is a .08 case, you wouldn't do that. You  
10 want to give the jury something to believe or choose  
11 not to believe. But when it's an 18, you get a witness  
12 that says, no, it wasn't 18, it was two degrees less or  
13 five degrees less or ten degrees less, first of all,  
14 it's going to be hard to do that. I don't think you  
15 could get that done, it would be a competent expert.  
16 So we chose not to -- we didn't get any expert  
17 witnesses regarding toxicology or blood alcohol.

18         As far as accident reconstruction, excuse me, we  
19 didn't feel it was necessary to hire an accident  
20 reconstruction expert based on the quality of the MAIT  
21 report. The fact that it was not -- didn't appear to  
22 have any other indicators that would have caused this  
23 wreck except for maybe the issue of the pulling on the  
24 steering wheel. And we had -- I had a number of  
25 conversations with Mr. Livingston about that. First of

1 all, I told him --

2 Q If we may, we'll get to that in just one moment.

3 A Okay.

4 Q There is just one more thing I want to touch on  
5 before we move on to that subject. Did you ever  
6 consider trying to get any kind of latent print testing  
7 out of the vehicle to corroborate or disprove your  
8 client's explanation?

9 A We never, ever discussed that. I never even  
10 thought about that. And I don't think that that would  
11 work. I think that Mr. Livingston said something when  
12 he was up here about spoilage or spoliation or  
13 contamination. I don't recall if his vehicle had an  
14 air bag, but if it did, you know, all bets would be off  
15 on any kind of fingerprint analysis.

16 But, you know, based on the time and everything, I  
17 don't think it would have done that. But, you know,  
18 assume for the -- and at the appropriate time I can  
19 follow up and tell you another reason why we didn't do  
20 that.

21 Q Please go on.

22 A Well, assume for the sake of argument that the  
23 passenger did pull the steering wheel down, okay. You  
24 would assume that if I'm the driver, I'm on the left  
25 side, I'm driving, passenger is on my right. If she

1 reaches the steering wheel and pulls down on it, she  
2 would pull me off the road. Mr. Livingston, if he was  
3 to say he overcorrected it, then he would overcorrect  
4 it, not only beyond his lane but all the way across and  
5 a continuation over into causing the accident.

6 I didn't think anybody would believe that based on  
7 the evidence. But if they did believe it, based on his  
8 condition, that I believe that the jury would be  
9 entitled to believe that but for his inebriation or  
10 impairment that he would have been able to correct it  
11 appropriately without going as far as he did into the  
12 other car.

13 We had that conversation over and over and over  
14 again. And I believe, still do believe, that  
15 Mr. Livingston understood that and decided that it  
16 would be in his best interest not to go to trial with  
17 that as his defense.

18 Q How did you enter into plea negotiations in this  
19 matter?

20 A There wasn't much give and take. The solicitor's  
21 office wasn't budging on it, they weren't reducing the  
22 charge, they weren't going down to anything. The best  
23 they would do is plead it, if I remember right,  
24 straight up and let the judge decide what the sentence  
25 would be. Mr. Livingston knew, I believe the judge

1 told him also, that the sentence for this case is  
2 minimum one, up to 25. I told Mr. Livingston I could  
3 not tell him what a judge would do on this case or any  
4 case. But I thought at a guilty plea, that the  
5 sentences would be concurrent.

6 Q And was he sentenced concurrent?

7 A Yes, sir.

8 Q You discussed with Mr. Livingston all of his  
9 constitutional rights?

10 A Yes, sir, I did.

11 Q His right to remain silent?

12 A Yes, sir.

13 Q Right to a jury trial?

14 A Yes, sir.

15 Q Right to confront witnesses?

16 A Yes, sir.

17 Q Did you explain to him about the burden of proof  
18 beyond a reasonable doubt?

19 A Yes, sir.

20 Q Ultimately whose decision was it to plead guilty?

21 A Mr. Livingston's.

22 Q If Mr. Livingston had insisted on going to trial,  
23 would you have been prepared and ready to take this to  
24 trial?

25 A Absolutely.

1 MR. JAMES: If I may have just one moment, Your  
2 Honor.

3 THE COURT: Um-hum.

4 Q Did you ever seek toxicology reports of the  
5 victims?

6 A No. And I...

7 Q Why not?

8 A I didn't -- I can't recall. But listening,  
9 sitting here thinking about it, I don't see what the  
10 relevance would be in it. You know, if -- even if  
11 there would have been blood alcohol in their system,  
12 this is a felony DUI statute.

13 And there's some crazy felony DUI law that came  
14 out of Horry County, I can't remember the name of it.  
15 Dantonio, that's an Horry County case. And it stands  
16 for the proposition that the jury gets to decide on,  
17 you know, your classical, I think it was an alleged  
18 speeding versus an alleged some other type of negligent  
19 driving, who caused the wreck which caused the death.  
20 In a criminal case the jury would get to decide that.  
21 And they are taking everything into factor. That MAIT  
22 report was pretty strong.

23 And the solicitor had in his possession a letter  
24 from the Defendant that I thought would kill him if he  
25 got on the stand. That was a figure of speech, I

1 apologize. That would not help his case if he got on  
2 the stand. It was where he had written some of the  
3 people either in the car with him or friends of his or  
4 people that he may want to testify.

5 MR. JAMES: I have no further questions for this  
6 witness, Your Honor.

7 THE COURT: All right. Cross?

8 CROSS-EXAMINATION

9 BY MR. FOWLER:

10 Q How did my client describe to you his concerns  
11 about the warrant and the return?

12 A He didn't. We didn't talk about a concern about  
13 the warrant or the return.

14 Q Did you go over the warrant and return with him?

15 A We went through every piece of paper. I didn't  
16 spend -- I imagine, I don't remember, but I imagine I  
17 would not have spent a lot of time about the warrant or  
18 the return.

19 Q With that there were two vials of blood taken  
20 fairly soon after the accident; isn't that correct?

21 A That's my -- I have no reason to dispute what he  
22 said earlier.

23 Q All right. Did you do anything about suppressing  
24 those two vials of blood?

25 A No, we didn't. And I didn't see -- I thought it

1 would not have any merit. I thought it would be -- if  
2 we filed a motion to do that, it would be a meritless  
3 motion. I didn't see any possible way of it.

4 Q Well, why would it be a meritless motion?

5 A What grounds would we have filed it under? Would  
6 have had no grounds. Judge, I got to take up some of  
7 your time, file this motion to throw out the blood  
8 report that was done by the statute.

9 Q Was there some sort of consent for one of the  
10 vials but not two of the vials?

11 A No, no, under felony DUI you don't have to give  
12 consent. My understanding is in a non-felony DUI, a  
13 regular DUI, the way it goes is they take you for a  
14 breath test. If you take the breath test and pass it  
15 and they suspect that you've been doing drugs, they  
16 take you to the hospital for a urine test.

17 The only time that the blood test is involved in a  
18 routine DUI is if the driver or the Defendant is  
19 physically unable to give a breath test. Then the  
20 trooper has to take the person to the hospital and he  
21 has to get a medical person -- trooper can't do it  
22 himself -- a medical person to say, this guy is unable  
23 to give a breath sample. Then they can ask him, would  
24 he submit or consent to a blood draw.

25 And in South Carolina he can say no, I do not.

1 consent to the blood draw, and that would be the end of  
2 that. He would be written down as a refusal. But in a  
3 felony DUI, you take them straight to the hospital, and  
4 they go straight to a blood draw even if he doesn't  
5 consent.

6 Q Is that what happened in this case?

7 A To the best of my knowledge, that's what happened  
8 in this case.

9 Q But is there an unlimited amount of blood vials  
10 that the officer -- the hospital personnel can take?

11 A I think they draw two. I have no reason to  
12 dispute what he said.

13 Q In terms of the chain of custody, you heard my  
14 client discuss earlier that there were no names or only  
15 appliance names, what have you, on the chain of  
16 custody. What investigation did you do into the chain  
17 of custody on these matters?

18 A All I did was read what the report said, you know.

19 Q All right. So did you inquire as to what person,  
20 you know, did these, what person was responsible for  
21 the chain of custody?

22 A No. The best of my knowledge from back in January  
23 whenever we looked at it was that there was nothing  
24 wrong with it. Normally the blood draw was done by a  
25 nurse, or a phlebotomist sometimes but usually a nurse.

1 She gives it to the trooper, the trooper puts it in one  
2 of these best evidence bags. Somebody takes it to  
3 Columbia, they put it in a safe or a refrigerator or  
4 something, and then it came for a toxicologist at some  
5 point in time will test it.

6 Q But you don't have the actual names of the people  
7 who did the testing?

8 A It might have been in there. But for that to be  
9 -- you know, in this day and age, you know, you're  
10 talking about a trial, right, would I call the  
11 witnesses. That would be to the State to call them.  
12 And, you know, I don't know if -- what the benefit of  
13 me challenging that would have been if it looked proper  
14 on its face.

15 Q In terms of expert witnesses, you stated that you  
16 chose not to go into an expert witness?

17 A Right.

18 Q In DUI cases like this, do you normally consider  
19 having an expert witness?

20 A I would not normally on a case that had an 18 as a  
21 blood alcohol. Unless the person -- if the witness --  
22 if the witnesses on this case would have said this guy  
23 had not been drinking, we had been whatever, you know,  
24 some nondrinking activity, we don't know why they think  
25 he was drinking, then, yeah, we might want to

1 investigate that because that on its face looks like  
2 it's a problem.

3 But if the witnesses say, we had been drinking, we  
4 stopped at the liquor store and bought two bottles of  
5 liquor and some beer --

6 Q Well, hold on. Are you saying that the witnesses  
7 said this?

8 A There is a witness statement in there that said  
9 it.

10 Q Well, I, you know, object to the hearsay. I don't  
11 want to get into that.

12 A I'm answering your question.

13 Q Well, I mean, I don't want any, you know --

14 THE COURT: You asked it, you're going to get an  
15 answer. So be careful what you ask for.

16 THE WITNESS: There is no need to get an expert in  
17 this case because the expert takes the facts, right,  
18 you know. Based on the following factors, is it your  
19 opinion within a reasonable degree of medical certainty  
20 that whatever your question is.

21 Well, based on the fact of all of the evidence  
22 that we had, I didn't see any reason to doubt that the  
23 18 was off by ten points or more.

24 Q And you also didn't do any kind of -- you didn't  
25 request a toxicology test of the victims; did you?

1 A That is correct.

2 Q Okay.

3 A They had zero culpability in the accident.

4 MR. FOWLER: May I have just a moment, Your Honor.

5 THE COURT: You may.

6 Q Was there any DNA testing as opposed to blood  
7 testing in this matter?

8 A Not that I'm aware of. I can't even think of a  
9 reason why they would want to do a DNA test on this  
10 case.

11 Q Okay. The felony DUI, did you go over that with  
12 my client?

13 A Yes. We went over the elements and everything.

14 Q When did you go over it with him in relation to  
15 the plea?

16 A Several times. You know, like I said, I don't  
17 know what day it was, but I know we went through all of  
18 the discovery, we went through all of the elements.  
19 Jarrett, one of the lawyers in my office, actually met  
20 with him in January when he said he wanted to do a  
21 plea. And I do know that I went over it again with him  
22 three days before the trial or for the guilty plea.

23 Q Was that a plea for involuntary manslaughter or  
24 felony DUI?

25 A He pled guilty to felony DUI. He wanted to plead

1 to manslaughter, but the solicitor wasn't budging on  
2 that.

3 Q Did you give my client any hope that it might  
4 be --

5 A No, not at all.

6 Q Okay.

7 A The solicitor makes the charges and the solicitor  
8 schedules the case.

9 Q You talked earlier about an accident  
10 reconstruction. Did your office look into anything  
11 like the road conditions, the weather or anything along  
12 those lines?

13 A The MAIT team did that report, and I don't  
14 remember what it was. But I remember it was clearly  
15 that -- it was clearly Mr. Livingston's vehicle had  
16 crossed over.

17 Q But as to the weather or road conditions, did you  
18 request any kind of report or testing on that?

19 A I'm sure it was in there. They -- I do remember  
20 that they estimated him only going 43.

21 Q All right. Did you in terms of the amount of  
22 years that Mr. Livingston might be up, did you indicate  
23 he would only get a maximum of ten years on this  
24 matter?

25 A Never.

1 Q What did you tell him?

2 A Told him what I said earlier, that this was a one  
3 to 25-year sentence and that I thought on a guilty plea  
4 that it would be concurrent. I did not think it would  
5 be consecutive.

6 Q Did you ever inquire about a negotiated plea with  
7 the Court or the solicitor?

8 A Like I testified earlier, I tried to get with  
9 George DeBusk, and he was not moving off of any of  
10 this. The only thing he would agree to was a trial or  
11 a plea straight up.

12 MR. FOWLER: Your Honor, may I have a moment?

13 THE COURT: Yes.

14 (Discussion off the record.)

15 MR. FOWLER: After consulting with my client, no  
16 further questions, Your Honor.

17 THE COURT: All right.

18 MR. JAMES: Nothing further, Your Honor.

19 THE COURT: You may step down, thank you.

20 THE WITNESS: Thank you, judge.

21 (Witness excused.)

22 THE COURT: Call your next witness.

23 MR. JAMES: No more witnesses, Your Honor.

24 THE COURT: All right. I'm going to deny the  
25 application and ask the State to prepare me an order to

1 that effect.

2 MR. JAMES: Thank you, Your Honor.

3 THE COURT: All right.

4 (The hearing concluded at approximately 3:15 p.m.)

5 (End of Transcript of Record)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Horry	)	
	)	
Craig Austin Livingston,	)	Case No.: 2016-CP-26-04592
S.C.D.C. No. 304858,	)	
	)	
Applicant,	)	
	)	<b>ORDER OF DISMISSAL</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Horry County  
 Clerk of Court  
 2018 MAR 13 PM 1:02  
 Horry County

This matter comes before the Court by way of an application for post-conviction relief filed by Craig Austin Livingston ("Applicant") on July 12, 2016. Respondent made its return on or about March 28, 2017. The Court convened an evidentiary hearing into the matter on Wednesday, November 29, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Johnny Gardner, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2015 term of the Horry County Grand Jury for two counts of felony DUI resulting in death (2015-GS-

26-01840, -01841). Johnny Gardner, Esq. represented Applicant, and George H. Debusk, Jr., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 18, 2016, Applicant pled guilty as indicted. The Honorable Steven H. John sentenced Applicant to imprisonment for concurrent terms of 20 years for each count. Applicant did not appeal his plea or sentence.

### **Present Application**

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

1. Ineffective assistance of counsel, in that:
  - a. "Counsel was ineffective for not investigating the case."
  - b. "Counsel was ineffective for unprofessional errors."
  - c. "Counsel was ineffective for not objecting to the state withholding evidence."

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### **A. Ineffective Assistance of Counsel**

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure

of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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 at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel’s alleged

errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

### *1. Failure to Investigate*

Applicant alleges Counsel was ineffective for failing to investigate the facts of his case. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the plea proceeding, the State set forth an exhaustive recitation of facts to show Applicant was heavily intoxicated on the date of the collision, refused at least one offer to drive

from a sober passenger, and ultimately swerved into oncoming traffic. (Tr. 8-12.) One vehicle swerved and avoided Applicant's truck, but Applicant struck the next vehicle head-on, resulting in death of the victims, brothers.<sup>1</sup> (Tr. 9-11.) Applicant clarified to the Court that he only swerved into traffic because the front-seat passenger grabbed the steering wheel, but otherwise affirmed in no uncertain terms that he was driving the vehicle, it was under his control, and that he was under the influence of alcohol. (Tr. 12-13.) Applicant stated he had enough time to speak with Counsel, declined any additional time, and confirmed his satisfaction with Counsel's representation. (Tr. 7-8.)

At the evidentiary hearing, Applicant testified he told the Multi-disciplinary Accident Investigation Team (MAIT) that another passenger in the vehicle grabbed the steering wheel, causing him to lose control. Applicant noted investigators did not take fingerprints of the steering wheel, and argued that print testing would have shown another person grabbed the wheel. Applicant testified he told Counsel to test for prints, but that Counsel only responded that the wheel had been contaminated at the scene. Applicant testified he and Counsel needed more time.

Counsel testified he received discovery pursuant to Rule 5 and Brady, and reviewed it. Counsel indicated he had plenty of time and got everything he needed, including witness statements, a letter from Applicant to the victims, the blood-alcohol report, and the MAIT report. Counsel testified he went over the discovery page-by-page with Applicant. Counsel concluded the witnesses at the scene would deny Applicant's claim that somebody grabbed the wheel, and further concluded there was no doubt that: (1) Applicant was the driver; (2) Applicant was intoxicated; (3) Applicant's vehicle crossed the line into oncoming traffic; and (4) open

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<sup>1</sup> Victim Christopher Waddell died that day either in route or shortly after reaching Grand Strand Hospital. Victim Miles Waddell was recovered from the wreckage and perished at Grand Strand Hospital after a week. (Tr. 10.)

containers of alcohol were present and visible in the vehicle. Counsel did not hire an investigator or an independent toxicologist, due to the high quality of the MAIT report and the severity of Applicant's intoxication, respectively. Counsel testified he never discussed testing for fingerprints with Applicant, and further noted that the deployment of the airbag would make testing for fingerprints impossible. Counsel did recall explaining to Applicant his story didn't matter—even if it were true, but for the impairment, he could have corrected for the interference. Counsel did not seek the toxicology of the victims because he did not believe it was relevant; Counsel concluded the victims had "zero culpability." Counsel noted Applicant never wanted a trial, but wanted a plea from the outset.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel demonstrated considerable familiarity with the facts of the case and provided compelling reasons why he did not seek to test the steering wheel for fingerprints—it was impossible and irrelevant. This Court agrees, and further notes that Applicant did not present to this Court any testing or results that such testing would have produced. Consequently, the Court is left with mere speculation as to how the proposed investigation would have impacted Applicant's case. For these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

## *2. Failure to Suppress Warrant*

Applicant alleges Counsel committed "unprofessional errors" by failing to suppress the warrant permitting law enforcement to draw blood from him after the collision. "A law enforcement officer can order a person suspected of Felony DUI to submit to any chemical test without first offering a breath test." State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 812 (2005); see also S.C. Code Ann. § 56-5-2946.

At the evidentiary hearing, Applicant argued the warrant permitting a blood draw stated to take one vial of blood, but the State took two at the hospital. Applicant contended the return was never executed to show the blood was taken, but also complained the vials of blood taken were used to find his BAC. Reviewing the toxicology report, Applicant argued there was a chain of custody issue due to the listed custodian names of "refrigerator" and "safe." Applicant complained Counsel never filed any suppression motions.

Counsel testified he reviewed the warrant and found no deficiencies in it. Counsel noted in addition to the warrant, the State had a statutory right and that, because this was a case of a felony DUI, no consent on the part of Applicant was necessary. Counsel indicated he found no deficiencies in the chain of custody and testified to the typical chain of custody process in a DUI case. Counsel noted the witnesses present at the scene uniformly agreed that Applicant was intoxicated.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Counsel, by good professional judgment, concluded there were no grounds upon which to challenge the blood draw, which returned a BAC of .182 at the time of the draw, *well* in excess of the legal limit. Indeed, in light of the great bodily injury and ultimate death of two individuals, law enforcement was absolutely justified in seeking a blood draw. Counsel demonstrated familiarity with the chain of custody and found no basis for challenge. Further, this Court finds no reason it should permit Applicant to deviate from his explicit admission of intoxication made at the plea proceeding. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

### ***3. Failure to Object to Withheld Evidence***

Applicant alleges Counsel was ineffective for failing to object to the State's failure to provide any toxicology report of the victims. During the recitation of facts at the plea

proceeding, the State indicated: "An autopsy was done on the [victim] driver, Christopher. During the course of that autopsy, they did toxicology. He had no drugs or alcohol in his system." (Tr. 11, ll. 1-3.)

At the evidentiary hearing, Applicant testified he asked for the victim's toxicology, but that Counsel replied he never got it. Counsel testified he never sought the victim's toxicology, notwithstanding his receipt of discovery. Counsel couldn't recall the victim's toxicology, but testified it wasn't relevant to the charges.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The toxicology report was not submitted to this Court and Applicant offered no other evidence to show how it would have been in any way relevant to his defense. No evidence was introduced to show any Brady violation on the part of the State. Nor did Applicant offer any reason why this Court should permit him to derivate from his explicit admission of intoxication made at the plea proceeding. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

*[Conclusion and signature on following page]*

### III. 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.

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:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 6 day of March, 2018.



WILLIAM H. SEALS, JR.  
Presiding Judge  
Fifteenth Judicial Circuit

Marian, South Carolina

DOCKET NO. 2015-GS-26-01840

HURRY CO  
2015 MAY 29

CLERK OF

DATE REC  
GRAN

C

WITNESSES

Matthew S Tarte South Carolina Dept of Public Safety

The State of South Carolina  
County of Horry

George H. DeBusk, Jr.  
15H00175

COURT OF GENERAL SESSIONS

MAY, 2015 TERM

ARREST WARRANT NUMBER

2014A2610203607  
CDR: 0395 58-05-2945(A)(2)  
DOA: 12/30/2014

THE STATE

vs.

ACTION OF GRAND JURY

TRUE BILL

Craig Austin Livingston  
B/M

DOB: [REDACTED]  
SSN: [REDACTED]

Johnny Goldman

ATTORNEY: Christopher D. Helms

Foreperson of Grand Jury  
Date: MAY 28 2015

Indictment for

FELONY DRIVING UNDER THE INFLUENCE

VERDICT

Jimmy A. Richardson, II, Solicitor

ORIGINAL

Foreperson of Petit Jury  
Date:

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

INDICTMENT


At a Court of General Sessions, convened on May 28, 2015, the Grand Jurors of Horry County present upon their oath:

FELONY DRIVING UNDER THE INFLUENCE - DEATH

CDR: 0395 56-05-2945(A)(2)

That Craig Austin Livingston did in Horry County on or about December 22, 2014 drive a motor vehicle while under the influence of alcohol, drugs, or a combination of both, and did an act forbidden by law and/or neglected a duty imposed by law in the driving of the vehicle, which act or neglect proximately caused the death of Miles Tommy Waddell, to wit: while operating a 1998 Ford SUV while under the influence of alcohol did cross the center line on Secondary 31 and strike a 2003 Jeep, occupied by the victims, head on, in violation of Section 56-05-2945(A)(2), S. C. Code of Laws, 1976, as amended.

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

  
JIMMY A. RICHARDSON, II  
FIFTEENTH CIRCUIT SOLICITOR

FILED  
2016 APR 18 PM 3:14  
MELBA HUBBARD  
CLERK OF COURT  
COURT DATE  
PLED GUILTY/TRIAL

DOCKET NO. 2015-GS-26-01841

C

WITNESSES

Matthew S Tarte South Carolina Dept of Public Safety

The State of South Carolina  
County of Horry

2015 MA

George H. DeBusk, Jr.  
15H00175

CLERK

COURT OF GENERAL SESSIONS

DATE

MAY, 2015 TERM

G

ARREST WARRANT NUMBER

2014A2610900550  
CDR: 0395 56-05-2945(A)(2)  
DOA: 12/30/2014

THE STATE

vs.

ACTION OF GRAND JURY

Craig Austin Livingston  
B/ M

TRUE BILL

DOB: [REDACTED]  
SSN: [REDACTED]

Johnny Gardner

*[Signature]*  
Foreperson of Grand Jury  
Date: MAY 28 2015

ATTORNEY: Christopher D. Heims

VERDICT

Indictment for

FELONY DRIVING UNDER THE INFLUENCE

Jimmy A. Richardson, II, Solicitor

ORIGINAL

Foreperson of Petit Jury  
Date:

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

INDICTMENT


At a Court of General Sessions, convened on May 28, 2015, the Grand Jurors of Horry County present upon their oath:

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CDR: 0395 56-05-2945(A)(2)

That Craig Austin Livingston did in Horry County on or about December 22, 2014 drive a motor vehicle while under the influence of alcohol, drugs, or a combination of both, and did an act forbidden by law and/or neglected a duty imposed by law in the driving of the vehicle, which act or neglect proximately caused the death of Christopher Lee Waddell, to wit: while operating a 1998 Ford SUV while under the influence of alcohol did cross the center line on Secondary 31 and strike a 2003 Jeep, occupied by the victims, head on, in violation of Section 56-05-2945(A)(2), S. C. Code of Laws, 1976, as amended.

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

  
JIMMY K. RICHARDSON, II  
FIFTEENTH CIRCUIT SOLICITOR

10:50  
2016 APR 18 PM 3:14  
MESSAGE TO THE COURT  
CLEAR UP COURT  
COURT DATE  
PLED GUILTY/TRIAL