



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

December 27, 2018

**ORIGINAL**

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
PO Box 116330  
Columbia, SC 29211

Re: Henry Delos Anderson v. The State

Dear Mr. Shearouse:

Enclosed are two copies of the Supplemental Appendix in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Kathrine H. Hudgins  
Appellate Defender

KHH/lms

Enclosure

cc: Janell Gregory, Esquire

**RECEIVED**  
DEC 27 2018  
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Newberry County

Honorable G. Thomas Cooper, Circuit Court Judge  
\_\_\_\_\_

HENRY DELOS ANDERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002065  
\_\_\_\_\_

SUPPLEMENTAL APPENDIX  
\_\_\_\_\_

KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
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PO Box 11589  
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(803) 734-1330

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Attorney General

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Assistant Attorney General  
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1000 Assembly Street, Room 519  
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

RECEIVED  
DEC 27 2018  
S.C. SUPREME COURT

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THE LAW OFFICES OF LAURA M. SAUNDERS, LLC  
Laura M. Saunders  
Attorney At Law

P.O. Box 731  
102 Church St.  
Laurens, SC 29360

(864) 681-4444 phone  
(866) 654-0282 E-fax  
lmsaunderslaw@gmail.com

COPY

July 5, 2017

Via US Mail

The Honorable G. Thomas Cooper, Jr.  
P.O. Box 1557  
Camden, SC 29021

Re: *Henry Anderson, #358826 vs. State of South Carolina*  
*C/A No. 2014-CP-36-00401; Proposed Order*

Dear Judge Cooper, Jr.:

Enclosed you will find (2) copies of a Proposed Order Granting PCR for Petitioner Henry D. Anderson. This matter was before you on June 5, 2017 in Laurens. Thank you for the additional time to submit the Proposed Order. I have also e-mailed a copy of the Order in Word format to you and your Law Clerk in the event you would like to make changes.

Should you approve this order, kindly sign and return it to me in the self-addressed enclosed envelope. I will ensure that the Order is properly filed with the Clerk of Court. Thank you for your consideration. Should you have any questions, please do not hesitate to call.

With Kind Regards, I am,

Yours truly,



Laura McCall Saunders

Enclosures  
LMS/haf

Cc: *Henry D. Anderson #358826*  
*Justin Hunter, Esquire*

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF NEWBERRY )  
 )  
 HENRY ANDERSON #358836 )  
 Plaintiff, )  
 vs. )  
 STATE OF SOUTH CAROLINA, )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 EIGHTH JUDICIAL CIRCUIT  
 CASE NO.: 2014-CP-36-0401  
 MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET

COPY

Plaintiff's Attorney: LAURA SAUNDERS, Bar No. 77957 Address: PO BOX 731 LAURENS SC 29360 Phone: 864-681-4444 Fax 866-654-0282 E-mail: lmsaunders@gmail.com Other:	Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other:								
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)									
<b>SECTION I: Hearing Information</b>									
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO									
<b>SECTION II: Motion/Order Type</b>									
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.									
Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant _____ Date submitted: _____									
<b>SECTION III: Motion Fee</b>									
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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF NEWBERRY )  
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 HENRY ANDERSON #358836 )  
 Plaintiff, )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA, )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 EIGHTH JUDICIAL CIRCUIT

CASE NO.: 2014-CP-36-0401

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

COPY

Plaintiff's Attorney: LAURA SAUNDERS, Bar No. 77957 Address: PO BOX 731 LAURENS SC 29360 Phone: 864-681-4444 Fax 866-654-0282 E-mail: lmsaunders@gmail.com Other: _____	Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____								
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STATE OF SOUTH CAROLINA  
COUNTY OF NEWBERRY  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-36-0401

COPY

HENRY D. ANDERSON #358826,

STATE OF SOUTH CAROLINA,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: LAURA M. SAUNDERS  
PO BOX 731, LAURENS SC 29360 864-681-4444

Attorney for :  Plaintiff  Defendant  
or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and resenrchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.



**FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE**  
**(Instructions for Information Only-Not to be filed with Form 4C)**

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA  
COUNTY OF NEWBERRY

HENRY D. ANDERSON #358826,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT  
CA# 2014-CP-36-0401

ORDER GRANTING  
POST-CONVICTION RELIEF

COPY

This matter is before the Court pursuant to Henry Delos Anderson's (hereinafter "Petitioner") Application for Post-conviction relief (hereinafter "PCR") filed with the Newberry County Clerk of Court on August 25, 2014. Petitioner filed his original application for PCR with the Newberry County Clerk of Court within the one year statute of limitations on August 25, 2014 and an Amended Petition on May 5, 2017. On September 17, 2014, Laura M. Saunders, Esquire was appointed to represent the Petitioner by the Newberry County Clerk of Court.

This matter came before the Court on Monday, June 5, 2017 for an evidentiary hearing. Based upon the foregoing, the Court now issues this Order granting the Petitioner post-conviction relief and remands Petitioner's the cases for a new trial. Petitioner waives his request for a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

I. FACTS AND PROCEDURAL HISTORY

Petitioner is presently confined in the South Carolina Department of Corrections. Petitioner was indicted for Criminal Sexual Conduct First Degree (2013-GS-36-0238), Kidnapping (2013-GS-36-0239) and Pointing and Presenting a

Firearm (2013-GS-36-0240) by the Newberry County Grand Jury during the April 2013 term. Petitioner was represented at trial February 10-14, 2014 by Mr. Thomas Mosley, Esquire (hereinafter "trial counsel") of Columbia, South Carolina. The Petitioner was found guilty at trial on February 14, 2014. The Honorable Frank R. Addy, Jr. presided over the trial. Petitioner was concurrently sentenced to twenty (20) years confinement for Criminal Sexual Conduct First Degree and thirty (30) years confinement for Kidnapping, along with a concurrent five (5) years for Pointing and Presenting a Firearm,

On June 5, 2017, Petitioner's evidentiary hearing was held before this Court in Laurens, South Carolina. At the hearing, Petitioner was present with his attorney Laura M. Saunders (hereinafter "PCR counsel") of Laurens, SC, and Assistant Attorney General Justin Hunter was present and representing the State of South Carolina. Petitioner called two witnesses: himself and former trial counsel, Mr. Thomas Mosley, Esquire. At the close of the hearing, this Court took the matter under advisement and granted both parties leave to submit a proposed order in favor of their position.

In making the following Findings of Fact and Conclusions of Law, this Court considered the arguments made at the evidentiary hearing, the testimony given at the hearing, the Petitioner's initial and amended applications, the trial transcript, the records of the Newberry County Clerk of Court, the transcript of the 2013 bond hearing, as well as the other evidence submitted at the hearing.

## II. FINDINGS OF FACT

The State argues that even if trial counsel's performance was deficient, the Petitioner does not make the required showing of prejudice because of the overwhelming evidence of guilt presented at trial. This Court disagrees with the State. Petitioner claims that trial counsel's conduct and performance was deficient and fell below the objective standard of reasonableness under professional norms during each critical stage of representation, and as such Petitioner was denied effective assistance of counsel and suffered prejudice. This Court agrees.

The evidence, testimony and arguments of PCR counsel point out several instances during trial counsel's representation of Petitioner where trial counsel was deficient in his representation, thereby causing Petitioner to suffer prejudice. The evidence reveals that counsel was deficient in his representation during three critical stages of representation of a defendant: bond hearing, plea negotiations and at trial.

Bond Hearing: Petitioner argues that after Petitioner's initial bond hearing on March 22, 2013, trial counsel failed to procure an Order for Bond for his client. At the hearing, the Honorable Frank R. Addy, Jr. indicated at the hearing that his order would likely include home detention with GPS monitoring:

**THE COURT:** Uh, what I would -- what I'm thinking is that, uh, if anything I would place him on house arrest if he were to live in Greenville, which I think is better. That's further away than Mountville. He'd be under house arrest and that would be monitored by a GPS system of some kind. I don't know if the family has the resources to investigate that or to afford that.

(Tr. 11, L. 03-10) ...

**THE COURT:** Let me take the matter under advisement; this is a very serious situation.

At the same time, Mr. Anderson does not have any prior criminal history.

Certainly, any part of my Order would have to place him residing with Mr. Anderson and also, uh, certainly GPS monitoring to assure that house arrest is abided by.

(Tr. 12, L. 17-24)

Judge Addy indicated that he was taking the matter of bond under advisement, but his statements on the record clearly indicate that he was considering home incarceration. Petitioner presented his uncle at the bond hearing who testified that Petitioner could live with him and that he would be able to financially support Petitioner if he were released. Judge Addy also indicated that he was taking the matter under advisement so that trial counsel could further discuss his representation of Petitioner for the case in chief and not just for bond purposes:

**THE COURT:** I -- I understand. I'm going to think about it. Clearly, Mr. Mosley, I'd feel a lot more -- a lot more comfortable if you were on the case permanently and I'm sure that's something that you discussed with the family.

**MR. MOSLEY:** Yeah.

**THE COURT:** I know you here just for the purpose of Bond, but let me think about it and I will issue an Order. If not today, in the coming days.

(Tr. 13, L. 17-25; Tr. 14, L. 1)

On March 29, 2013, Petitioner wrote to the Clerk of Court for Newberry County in an attempt to follow up on his bond hearing. Petitioner testified that he called trial counsel on March 29, 2013 to follow up as well. A copy of Petitioner's

letter is attached hereto as "Exhibit A". Petitioner's letter referenced Judge Addy's on the record statements regarding the possible home incarceration bond. Petitioner also indicated in his letter that he no longer had counsel. Trial counsel testified at the evidentiary hearing that he could not afford to "run up and down the road" when the family had not retained him in full. However, trial counsel was never formally relieved by the Court. Petitioner remained incarcerated until his trial the following year. Petitioner testified he was unable to go to work, unable to attend church, unable to attend school or assist his lawyer in the preparation and/or payment of his defense.

Plea Negotiations: Petitioner argues that trial counsel failed to convey the State's plea offer to Petitioner, which was conveyed to trial counsel by the State on October 24, 2013 via electronic mail. This plea offer was to plead guilty to Criminal Sexual Conduct-Second Degree and dismiss the Kidnapping charge, a recommendation of concurrent sentencing to Pointing and Presenting a Firearm, and no direct indictment for Possession of a Weapon During the Commission of a Violent Crime. At the evidentiary hearing, Petitioner testified that he never received this plea offer. Petitioner also testified that after he was convicted at trial he received a copy of his client file from trial counsel, which contained the October 24, 2013 e-mail offer from the Solicitor to trial counsel. A copy of the initial offer is attached hereto as "Exhibit B". A second plea offer was conveyed via e-mail by the State on October 31, 2013. Petitioner also testified that the second offer was never communicated to him by trial counsel. A copy of the initial offer is attached hereto

as "Exhibit C". After the second offer was emailed to trial counsel on October 31, trial counsel responded to the email in reply "unless there is a more reasonable plea offer I will not be representing Mr. Anderson". See Exhibit C. Petitioner testified that if he had received a plea offer from the State by trial counsel, he would have accepted the State's offer. Petitioner submitted two letters at the evidentiary hearing to corroborate this assertion. One letter, dated October 15, 2013 from Petitioner to the Clerk of Court indicated that he wanted to plead guilty. This letter is located in the Newberry Clerk of Court's file, and is attached hereto as "Exhibit D" and was clocked by the Clerk of Court as received on October 17, 2013. The second letter, dated November 1, 2013 from Petitioner to Assistant Solicitor Taylor Daniel requested a plea offer. This letter also indicated that Petitioner had not received any plea offers. This letter was provided by the State to PCR counsel and is attached hereto as "Exhibit E". Petitioner and trial counsel both testified that trial counsel was formally relieved as counsel of record for Petitioner on November 12, 2013. The original plea offer, which was never conveyed to Petitioner, expired on November 8, 2013. Had Petitioner accepted this offer, his maximum sentence would have been twenty (20) years with concurrent sentencing, compared to the thirty (30) year sentence Petitioner received at trial.

Trial: At trial, counsel failed to request that the Jury be charged with the lesser included offenses of Criminal Sexual Conduct – Second Degree and Criminal Sexual Conduct – Third Degree. Instead, trial counsel requested that in addition to

the charge of Criminal Sexual Conduct – First Degree, the jury should only receive a charge of Assault and Battery – Third degree:

**THE COURT:** Mr. Mosley, have you had a chance to review the charges?

**Mr. Mosley:** Kind of sort of but not, I see you are charging them with the primary charge. And then we have the lesser included offense of second degree. I guess you are giving them what...

**THE COURT:** I basically gave them three options because just from the testimony that I was working off of yesterday, there could be a reasonable question as to whether the defendant had a weapon in his possession at the time of the intercourse. Obviously the central issue in this case is certainly the question of consent. But at the same time a jury is entitled to believe a part of a witness' testimony and reject the remaining part. And conceivably they could conclude that there was forced coercion but a weapon not involved or aggravated, from the testimony of the victim yesterday or the testimony of Ms. [REDACTED], I believe that she did state that she was pushed against the car with the defendant's hands upon her back.

**MR. MOSLEY:** I didn't hear that.

**THE COURT:** I may have mischaracterized that. Solicitor, what is your take on the charges and the options on that particular question. What was your recollection, Solicitor?

**MR SCOTT:** Your honor, the gun was always present. I don't know, I tend to agree with you that she was unclear whether he had it in his hands during the coitus, I guess, that it was always there and she was always very keen to its presence.

**THE COURT:** I don't disagree that that does become a jury issue though in light of the defendant having denied the gun being in his possession.

**MR. SCOTT:** Then I guess the analysis would be all or nothing. Because, I don't know, his version is just strictly consensual. Her's is that there was a deadly weapon involved.

**THE COURT:** And I am happy to go that route, Mr.

Mosley, if that is the way you feel, if you feel it is an all or nothing that is fine.

**MR. MOSLEY:** I tend to think and I may talk to my client about this but the fact that the gun is in evidence and it goes to confuse the jury, give them a lesser included offense, at the time everything is the same except with second degree. But it tends to go adverse to what the charge is and this whole notion of kidnapping. Because if you take the second degree out, in other words, this just may well be an all or nothing because if you take the gun out and there is no kidnapping, in other words, we take the gun out and there is no kidnapping, if you take the kidnapping out then there is almost like the case goes away. Because if she comes out the door to the house to get with him and there is no gun, she voluntarily came out of the house. So, when did the kidnapping occur. So it is almost like an all or nothing type of thing. And to charge the lesser included offense there is a question as though the state don't know what they are doing. And it is almost like, well, we really don't know who we are going to charge everything. They are the ones that knew from the beginning this case and they could have made the choice, well, we will just charge with second degree because we can't prove the gun. They based their whole case on, well, it has got to be rape because kidnapping occurred.

**THE COURT:** I understand and if you are telling me for tactical reasons you would rather go all or nothing that is fine. I know that you said you wanted to speak with your client for just a few moments about that. I will afford you that opportunity. ...

(Tr. 582, L. 15-25; Tr. 583-84, L. 1-25; Tr. 585, L. 1-8)

...

**THE COURT:** We are back on the record. The defendant is present. We were discussing jury charges. Mr. Mosley, what was it that you were seeking from the court?

**MR. MOSLEY:** Well, we were deciding the charges with regard either or in the three categories in criminal sexual conduct in the first, second, third degree. That the scheme of things, I think when you take the sex out of it there may be an aggravated assault or even a simple assault charge that may be more conducive in terms of the facts that come out in court.

**THE COURT:** Which level of assault are you suggesting that the Court charge?

**MR. MOSLEY:** Simple Assault.

**THE COURT:** Simple assault and battery?

**MR. MOSLEY:** Simple assault.

(Tr. 585, L. 16-25; Tr. 586, L. 1-5)

### III. LAW AND CONCLUSIONS OF LAW

In a PCR proceeding, the Petitioner bears the burden of establishing that he is entitled to the relief sought. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence. Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e) SCRPC)

The standard for judging claims of ineffective assistance of counsel is found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cronic v. United States, 446 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Generally, in supporting any allegations of ineffective assistance of counsel, a PCR applicant must satisfy a two-prong test. Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the applicant must demonstrate that trial counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). "Under this prong, the proper

measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. (quoting Strickland, 466 U.S. at 688) (internal alteration marks omitted); see also Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001) (stating that the applicant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness). Second, the applicant must demonstrate that trial counsel's "deficient performance prejudiced the [applicant] to the extent 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

Absent a showing of per-se prejudice under Cronic, an applicant must show "actual prejudice" under Strickland. See Nance, 367 S.C. at 552, 626 S.E.2d at 880 (citing Strickland, 466 U.S. at 692, 104 S.Ct. 2052; Cronic, 466 U.S. at 666 and n. 41, 104 S.Ct. 2039). "Where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable, and prejudice may be presumed." Cronic v. U.S., 446 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006).

Petitioner argues that 1) trial counsel was ineffective by failing to secure an Order for Bond after his representation of the Petitioner at a bond hearing and he suffered prejudice by remaining incarcerated 2) trial counsel was ineffective because he failed to convey the State's plea offers to Petitioner and he suffered prejudice based on the fact that at trial he received a sentence of thirty (30) years versus the

(20) years he could have received by accepting a plea offer; and 3) trial counsel was ineffective for failing to request the proper lesser-included offenses to be charged to the jury at trial. Pursuant to the facts and law stated above, I find the trial counsel was deficient in his representation of the Petitioner, and as such Petitioner has suffered prejudice. I further find that the above failures constitute ineffective assistance of counsel under Strickland and its progeny.

Bond Order: After the March 22, 2013 bond hearing, an Order for Bond was never issued and placed in the Clerk of Court's file. Although Judge Addy indicated he would issue the Order, counsel for Petitioner failed to secure an Order granting his client a bond resulting from the hearing on March 22, 2013. It is clear from the record that if trial counsel had adequately represented the Petitioner pursuant to professional norms, and followed up to ensure that Judge Addy's intended order was issued, a bond order would exist in the Court's file and Petitioner would have been released on home incarceration. Instead, the Petitioner testified that he remained incarcerated until his trial the following year, and that if he were released on the home incarceration bond, he would have been able to go to work, attend church and school and could have better assisted trial counsel in the preparation and/or payment of his defense.

Plea Offer: In 2009, the South Carolina Supreme Court overturned a denial of post-conviction relief, and adopted a case by case analysis of whether counsel's failure to communicate a plea offer to his client constitutes deficient performance. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009). In Davie, the Court analyzed

the decisions of other state and federal courts, and concluded that the failure of counsel to communicate a plea offer does constitute “unreasonable performance under prevailing professional standards” and the prejudice prong can be satisfied using a case by case analysis of the facts of each individual case. Specifically, the Davie Court concluded that “Plea counsel’s failure to convey the State’s initial plea offer constituted deficient performance, and the difference in the sentence petitioner received versus the sentence contained in the plea offer was proof of prejudice.” Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009).

In the instant case, I find that Petitioner presented sufficient evidence that trial counsel failed to convey the plea offers of October 24, 2013 and October 31, 2013 and this constitutes deficient performance. Although trial counsel testified that he believes he did convey the plea offer to Petitioner at some point, the letters in the Clerk’s file corroborate Petitioner’s assertion that he did not have knowledge of the plea offer. Furthermore, Petitioner received a sentence of thirty (30) years on the kidnapping charge. Had Petitioner pleaded guilty to the initial offer as he testified, the kidnapping charge would have been dismissed. Thus, Petitioner would have only been exposed to a maximum of twenty (20) years on the reduced Criminal Sexual Conduct - Second Degree charge. By applying a similar Davie analysis, I find that Petitioner has provided sufficient proof to the Court that he suffered prejudice.

Failure to request lesser included offenses: I find that trial counsel was ineffective for failing to request that the Court charge the lesser included offenses of

Criminal Sexual Conduct -Second and -Third degree. At Petitioner's trial, the jury would have been entitled to the lead charge, along with lesser included offense of CSC-2d degree and possibly CSC-3d degree. Instead, trial counsel chose to argue that the jury should be charged with CSC-1<sup>st</sup> degree, along with a charge of Assault and Battery – Third Degree. See Transcript, Page 585. Trial counsel failed to request or present any arguments in favor of a jury instruction to the lesser included offenses of CSC-2d degree and CSC-3d degree, although there was ample evidence at trial to support an argument for the lesser included offenses. Instead, trial counsel requested a jury instruction on CSC-1<sup>st</sup> and Assault and Battery – 3d degree. The trial judge denied trial counsel's request. Trial counsel was unable to articulate a valid reason for this trial strategy at the PCR hearing. I find that trial counsel failed to meet the standard of objective reasonableness under prevailing professional standards.

#### CONCLUSION

For the foregoing reasons, Petitioner's application for Post-Conviction relief is hereby GRANTED and remanded for a new trial.

AND IT IS SO ORDERED.

\_\_\_\_\_, 2017  
Laurens, South Carolina

\_\_\_\_\_  
The Honorable G. Thomas Cooper, Jr.  
Presiding Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Newberry County

Honorable G. Thomas Cooper, Circuit Court Judge

\_\_\_\_\_

HENRY DELOS ANDERSON,

RECEIVED  
DEC 27 2018  
S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

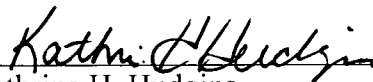
RESPONDENT

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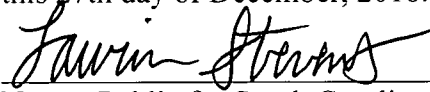
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Supplemental Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Supplemental Appendix has been served on Henry Delos Anderson, #358826, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 27th day of December, 2018.

  
Kathrine H. Hudgins  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 27th day of December, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.