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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

DARNELL KHAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001282

APPENDIX

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1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF RICHLAND
4 2011-GS-40-3251, 3252, 3253

5 State of South Carolina

6 vs.

7 Darnell Khan

8

9 Columbia, South Carolina

10 May 22, 2014

11 Before the Honorable Brooks P. Goldsmith

12

13 APPEARANCES

14 For the State: Dan Goldberg

15 For the Defendant: Mark Sawyer

16

17 Reported by: Michael C. Watkins

18 Official Court Reporter

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1 Guilty Plea:

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2 Certificate:

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NO EXHIBITS

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1 MR. GOLDBERG: Please the Court, Your Honor? Dan
2 Goldberg for the State. Before you is Darnell Khan with his
3 attorney, Mark Sawyer of the public defender's office. Mr.
4 Khan is before you today to enter a guilty plea on three
5 indictments; indictment 2011-3253, originally charged with
6 murder pleading today on the charge of voluntary
7 manslaughter, also 2011-3252, burglary first, and 2011-3251
8 attempted armed robbery. The State and the defense have
9 entered into negotiations whereby the defendant is to be
10 sentenced to a range of 20 to 30 years with the actual
11 number to be left in the discretion of the Court. Our
12 intentions today, Your Honor, are to have the guilty plea
13 accepted and defer sentencing mitigation and victim impact
14 until a later date such that all parties can be present for
15 that proceeding.

16 THE COURT: Do you agree with that, Mr. Sawyer?

17 MR. SAWYER: I do, Your Honor.

18 THE COURT: Have you explained to your client the
19 charges contained in these indictments, the possible
20 punishment and have you explained to him his constitutional
21 rights?

22 MR. SAWYER: I have, Your Honor. As you can see I
23 handed up an extensive advisement of rights sheet.

24 THE COURT: I did see that. Do you agree with his
25 decision plead guilty to these three charges?

1 MR. SAWYER: I do, Your Honor.

2 THE COURT: Based on your investigation of the facts
3 and circumstances of these cases, do you believe it likely
4 that the State could convince a jury of his guilt on each of
5 the charges beyond a reasonable doubt?

6 MR. SAWYER: I do.

7 THE COURT: Now, Mr. Khan, how old are you, sir?

8 THE DEFENDANT: Thirty-one.

9 THE COURT: What kind of work have you normally done?
10 Never worked?

11 THE DEFENDANT: I did, but fast food, little bit of
12 everything.

13 THE COURT: Have you ever been in criminal court
14 before?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: And the last time would have been
17 approximately how long ago?

18 THE DEFENDANT: 2009

19 THE COURT: Now, when you were in court in 2009, what
20 happened to you as a result of you being in court? Were you
21 found not guilty or did you plead guilty or --

22 THE DEFENDANT: I pled guilty.

23 THE COURT: You pled guilty.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: And did you get probation or get time

1 served, do some time or what?

2 THE DEFENDANT: Nine months credit for time.

3 THE COURT: Have you ever been treated for the abuse of
4 alcohol, abuse of drugs or treated for any mental illness?

5 THE DEFENDANT: No, sir.

6 THE COURT: In the past 24 hours, have you taken any
7 medication, any drugs or have you consumed any alcohol?

8 THE DEFENDANT: No, sir.

9 THE COURT: Are you aware today of any physical,
10 nervous or emotional problem you might have that would
11 interfere with your ability to understand what's going on
12 here today?

13 THE DEFENDANT: No, sir.

14 THE COURT: Your attorney and the solicitor both tell
15 me they believe you wish to plead guilty to those three
16 charges, one of them being voluntary manslaughter, another
17 being attempted armed robbery, and finally burglary in the
18 first degree; is that right?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: The solicitor is going to give me some
21 facts about the cases, please listen to what he says.

22 MR. GOLDBERG: Thank you, Your Honor. This incident
23 took place at approximately 1:15 a.m. on the morning of
24 January 27th of 2009 at [REDACTED] Morningside Drive here in
25 Richland County, that's the residence of Jeremy Jamal Scott.

1 Also present at the location is the victim in the murder
2 case, James Willie Smith. At that particular time the
3 victims, unknown to them, heard persons attempting to kick
4 in the back door of the residence. During that time a shot
5 was fired from a handgun that had been protruding into the
6 house through either a window or door panel that had been
7 broken out by the intruder. The shot actually struck the
8 victim, Mr. Smith, in the upper torso and he did pass away as
9 a result of those injuries. Richland County Sheriff's
10 Department -- as I indicated this was in 2009 -- worked the
11 case for quite some time. Unfortunately the investigation
12 turned cold until some information was received by the
13 sheriff's department some time later I believe in late 2010
14 indicating that they had a witness who was willing to
15 provide information. Contact was made with that witness who
16 turned investigators onto Mr. Darnell Khan, the defendant
17 before you, as a suspect in the case. As a result of that
18 statements were taken from multiple witnesses, including two
19 defendants later identified as codefendants in this matter
20 that were charged, a Craig Starkey and a Demetrius Carlos.
21 Mr. Starkey gave a statement implicating Mr. Khan as being
22 involved in the robbery and the shooting as well as
23 implicating himself. Ultimately investigators were able to
24 make contact with Mr. Khan, he was advised of his rights,
25 waived his rights and gave a statement admitting to his

1 involvement in this robbery as well as firing off one shot
2 into the house during an attempted robbery and then fleeing
3 the scene. He later was reinterviewed in 2011 by the
4 sheriff's department and after advice of rights gave another
5 statement again admitting his involvement, this time
6 indicating that he did have a .9-millimeter pistol that was
7 used which was, in fact, the same weapon used to kill the
8 victim -- or same caliber of weapon used to kill the victim.
9 He also implicated Mr. Starkey and Mr. Carlos as being
10 involved in the robbery and the incident as well. At that
11 time he was placed under -- well, he'd already been charged
12 with the crime. Those are the basic facts of the case, Your
13 Honor, at this time. Once we come back for sentencing
14 obviously I can go back into a little bit more detail but I
15 believe that does give rise to the substantial factual
16 basis. As a side note, Mr. Starkey and Mr. Carlos' cases
17 are still pending as well.

18 THE COURT: I'm sorry, the last thing you said was they
19 are scheduled what?

20 MR. GOLDBERG: Their cases are still pending.

21 THE COURT: Pending.

22 MR. GOLDBERG: Yes, sir.

23 THE COURT: Mr. Kahn, you heard the solicitor's
24 statement of facts concerning these three charges. Do you
25 agree with what he told me?

1 THE DEFENDANT: Yeah, pretty much. Yes, sir.

2 THE COURT: You do agree with what he said?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. Are you guilty of each of these
5 charges?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Has your attorney explained to you your
8 right to have a trial by jury on these charges if you wanted
9 a trial by jury?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you ever had a jury trial?

12 THE DEFENDANT: No, sir.

13 THE COURT: Well, bear with me just a moment. If you
14 were to have such -- and even as you stand there now you're
15 entitled to have one -- but if you were to have a jury trial
16 among other things the Court would instruct the jury that
17 you're presumed innocent and that the burden would be upon
18 the State to prove your guilt to the jury beyond a
19 reasonable doubt. You would have the right to cross examine
20 any witnesses that the State might call to testify against
21 you, and, of course, you could have your own witnesses
22 testify for you. You could testify yourself or not, and if
23 you decided not to testify the Court would instruct the jury
24 that they could not hold that against you because you have a
25 constitutional right not to testify. If you had made any

1 incriminating statements, confessions, things such as that,
2 you would have the right to challenge the State's right to
3 use that evidence against you. Of course, you would have
4 the right to challenge the State's right to use any evidence
5 against you. You do understand you have all of these
6 rights?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And do you understand by pleading guilty
9 you're giving up all of these rights?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Is that what you wish to do?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Have you had enough time to discuss these
14 matters with your attorney?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Has he answered all of your questions?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: He has done everything you've asked him to
19 do, everything you would expect him to do in representing
20 you?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Are you satisfied with his services?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Mr. Khan, has anyone threatened you or
25 coerced you in any way to make you or cause you to plead

1 guilty to these three charges?

2 THE DEFENDANT: No, sir.

3 THE COURT: Are you pleading guilty to these charges
4 freely and voluntarily?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Has anyone promised you anything or held
7 out any hope of reward as an inducement to get you to plead
8 guilty other than the negotiated 20 to 30 years, other than
9 that?

10 THE DEFENDANT: No, sir.

11 THE COURT: Are you pleading guilty to these three
12 charges because you are guilty of each of these charges?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. The Court finds there is a
15 substantial factual basis for each of the pleas, and that
16 the decision to enter the pleas have been made freely and
17 voluntarily with the advice of an attorney with whom the
18 defendant states he's satisfied and the Court accepts the
19 pleas. Sentencing deferred to a later date. Did y'all
20 decide whether y'all wanted me to try to retain exclusive
21 jurisdiction or do you want to have the right to go to some
22 other judge for sentencing?

23 MR. GOLDBERG: I'll leave that in the discretion of
24 counsel and the judge.

25 MR. SAWYER: Right now I would say I would prefer you

1 to retain jurisdiction since Mr. Khan has already been
2 before you. If there's some issue that comes up later I
3 think we can just re-approach you and figure it out then.

4 MR. GOLDBERG: I would also just for the record note
5 that Mr. Khan should be confined at Alvin S. Glenn Detention
6 Center still until the date of his sentencing as opposed to
7 being moved to the department of corrections.

8 THE COURT: Right. He has not been sentenced.

9 MR. GOLDBERG: Correct, yes, sir.

10 THE COURT: All right.

11 (End of the plea hearing.)

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1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of the proceedings had and
5 evidence introduced in the trial of the captioned case
6 relative to appeal in the Court of General Sessions for
7 Richland County, South Carolina, on the 22nd day of May,
8 2014.

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

11

12

November 18, 2015

13

14



Michael C. Watkins

15

Court Reporter

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State of South Carolina) In the Court of General Sessions
) Fifth Judicial Circuit
 County of Richland) 2011-GS-40-03251, -03252,
 and -03253

State of South Carolina,)
)
 Plaintiff,)
)
 Vs.) Transcript of Record
)
 Darnell Khan,)
)
 Defendant.)
)
)
)

February 10, 2015
 Columbia, South Carolina

B e f o r e:

The Honorable Allison R. Lee, Judge

A p p e a r a n c e s:

Dan Goldberg, Esquire
 Attorney for the Plaintiff

William Hodge, Esquire
 Attorney for the Defendant

Bonnie H. Kelly, CVR
 Circuit Court Reporter

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NO.	DESCRIPTION	I.D.	EV.
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-- NO EXHIBITS ENTERED --

1 THE COURT: Yes, sir.

2 MR. GOLDBERG: Thank you, Your Honor. If it pleases
3 the Court. Dan Goldberg for the State.

4 Before you is Darnell Khan with his attorney, William
5 Hodge, of the private bar. Mr. Khan's before you to be
6 sentenced on one count of voluntary manslaughter, one count
7 burglary first degree, and one count attempted armed
8 robbery.

9 Mr. Khan appeared on May 22, 2014, in front of Joel --
10 Judge Goldsmith, and entered a guilty plea to those three
11 charges. Judge Goldsmith advised him of his rights and
12 accepted the guilty plea at that time; however, sentencing
13 was deferred until a later date.

14 The State and the Defense have entered into
15 negotiations. The negotiated sentence was a range of 20 to
16 30 years in this matter.

17 One reason for the deferred sentence, at the time of
18 the guilty plea, Mr. Khan was represented by Mark Sawyer of
19 the Public Defender's Office. Mr. Sawyer actually was
20 leaving the Public Defender's Office. The guilty plea was
21 entered and sentencing was deferred so some additional
22 information could be gathered prior to sentencing.

23 Upon his departure, Mr. Hodge was subsequently
24 appointed to represent Mr. Khan for the duration -- for the
25 sentencing.

DIRECT EXAMINATION BY THE COURT - DARNELL KHAN

5

1 There was a factual basis put on the record at the
2 time in front of Judge Goldsmith; however, since he did not
3 retain jurisdiction on the matter, the State is here to
4 have him sentenced today and is prepared to offer you some
5 factual background so that you may be fully informed prior
6 to handing down your sentence.

7 THE COURT: So the negotiations came after the -- as
8 to the sentence, came after the plea was accepted?

9 MR. GOLDBERG: No, ma'am. The -- the negotiations at
10 the plea, that were accepted, were set per a negotiated
11 range of 20 to 30 years. I believe there was some
12 additional information that needed to be gathered in terms
13 of mitigation. And with Mr. Sawyer departing, that could
14 not be done at that time.

15 DIRECT EXAMINATION BY THE COURT:

16 Q Darnell Khan?

17 A Yes, ma'am.

18 Q How old are you, sir?

19 A 32.

20 Q How far did you go in school?

21 A Got my GED.

22 Q Before you were arrested, were you employed?

23 A Yes, ma'am.

24 Q Where did you work?

25 A McDonald's.

1 Q How long did you work there?

2 A Since 2007.

3 Q And you're currently represented by Mr. Hodge; is that
4 correct?

5 A Yes, ma'am.

6 Q Mr. Khan, I understand that back in May of last year,
7 that you appeared in the court before Judge Goldsmith, and
8 you entered a plea at that time; is that correct?

9 A Yes, ma'am.

10 Q And you were represented by Mr. Sawyer then?

11 A Yes, ma'am.

12 Q And I believe at that time you were aware of your
13 constitutional rights; is that correct?

14 A Yes, ma'am.

15 Q And you entered a plea at that time to attempted arm
16 robbery, with a negotiated sentence of 20 years; is that
17 correct?

18 A Yes, ma'am.

19 Q You entered a plea to burglary first degree with a
20 negotiated sentence between 20 and 30 years; is that
21 correct?

22 A Yes, ma'am.

23 Q And you also entered a plea to voluntary manslaughter,
24 a reduction from murder charge, with a negotiated sentence
25 between 20 and 30 years; is that correct?

1 A Yes, ma'am.

2 Q And Mr. Khan, were you advised that each one of these
3 charges, to which you pled back in May of 2014 -- each one
4 is considered to be a violent offense, and that each one's
5 considered to be a most serious offense, which constitutes
6 a strike?

7 A Yes, ma'am.

8 Q Were you advised that if you were subsequently
9 convicted of other charges that carry a strike, that at
10 some point, the State could seek to serve you with notice
11 that they would intent -- intend to seek life without the
12 possibility of parole; you understand that?

13 A Yes, ma'am.

14 Q And do you understand that -- I think with the
15 exception of the attempted arm robbery, the other charges
16 are -- are no parole offenses. Do you understand that?

17 A Yes, ma'am.

18 Q Since the plea was entered into, you are now
19 represented by Mr. Hodge; is that correct?

20 A Yes, ma'am.

21 Q Have you had an opportunity to discuss the -- the case
22 with him and all the charges with him?

23 A Yes, ma'am.

24 Q And have you discussed with him the evidence that the
25 State had -- has against you on the charges?

1 A Yes, ma'am.

2 Q Did he also discuss with you in additional detail,
3 although you've already pled, your constitutional rights?

4 A Yes, ma'am.

5 Q And did he discuss with you any issues relating to
6 sentencing and mitigation?

7 A Yes, ma'am.

8 THE COURT: Mr. Hodge, you've heard your client
9 indicate that you had those conversations with him; is that
10 correct?

11 MR. HODGE: Yes, Your Honor.

12 THE COURT: Can you tell me a little bit more about
13 when you came to represent Mr. -- Mr. Khan?

14 MR. HODGE: Your Honor, it was -- I believe it was
15 around September of last year. I don't have my appointment
16 letter on me, Your Honor. But it was almost immediately --
17 Mark Sawyer left, I believe, during the summer, and I was
18 appointed immediately following, either August or September
19 of last year; and I've been working with Mr. Khan since
20 then.

21 THE COURT: And have you had enough time to discuss
22 this matter with him as it relates to sentencing?

23 MR. HODGE: Yes, ma'am, I have.

24 THE COURT: And you're aware of all the negotiations
25 that were entered into that -- that yielded the -- the

1 negotiated sentence?

2 MR. HODGE: Yes, Your Honor.

3 THE COURT: Were you also able to review all the
4 discovery and get up to speed relating to the facts in this
5 case?

6 MR. HODGE: I was, Your Honor.

7 THE COURT: All right. And you had discussions with
8 Mr. Khan about the negotiations, as well as the charges and
9 the evidence?

10 MR. HODGE: Yes, ma'am.

11 THE COURT: And you explained to him his
12 constitutional rights, so you're aware that he was aware of
13 his constitutional rights?

14 MR. HODGE: Yes, ma'am.

15 THE COURT: Well, since the plea has been accepted by
16 Judge Goldsmith, before I hear any additional information,
17 I would need to hear factual background relating to the
18 charges. Yes, sir, Mr. Goldberg.

19 MR. GOLDBERG: Thank you, Your Honor. If it pleases
20 the Court. This incident took place on January the 27th of
21 2009, at approximately 1:15 a.m., at ■■■ Morningside Drive,
22 here in Richland County. That was the residence of a
23 Jeremy Jamal Scott. Also present at -- present in the
24 residence that night was the victim in the case of the
25 shooting, James Willie Smith, Jr.

1 A home invasion took place, an attempted robbery took
2 place, when suspects kicked a hole in the rear door of the
3 residence. Shots were fired, and James Willie Smith was
4 actually struck with a single gunshot wound to the upper
5 torso, and died as a result of that gunshot.

6 The case was worked by investigators from the
7 Sheriff's Department. They were unable to reach a closure
8 at that time. The case went cold.

9 In 2010, I believe, the case was picked up by the Cold
10 Case Unit. Investigator Dowl Thompson, with the Sheriff's
11 Department -- who is present in the courtroom here today --
12 was the lead investigator on that matter. He, along with
13 other members of the department, began to work the case.
14 They received information from a witness, who was in the
15 Lexington County Detention Center, that led them to focus
16 upon Mr. Khan.

17 That witness, by the name of Naquan Foul [phonetic,]
18 alleged that Khan had previously indicated a desire to rob
19 the Scott twins and others to -- and sought others to go
20 with him to commit this robbery.

21 Another witness sent word from Lexington County, an
22 individual by the name of Craig Starkey [phonetic,] who was
23 later charged in connection with this incident, that he
24 wanted to talk about the homicide as well.

25 He was interviewed. He provided the name of Demetrius

1 Carlos, also a co-defendant in this matter, and indicated
2 that he, Starkey, gave Carlos a ride to the general area of
3 where the incident took place, shortly before the incident
4 happened.

5 Carlos was then interviewed. He actually made
6 admissions of his involvement to a former co-defendant of
7 his on another case, admitting his involvement in this
8 incident; and he did so in front of the presence of two
9 other witnesses.

10 Those two female witnesses were interviewed. They
11 indicated, yes, Mr. Carlos did admit his involvement in it,
12 and that he indicated that Darnell Khan was responsible for
13 the incident along with him.

14 As a result, warrants were obtained for Mr. Khan.
15 While investigators were searching for him, Mr. Starkey was
16 re-interviewed, and at this time he was more specific and
17 indicated that he knew that the Scotts had marijuana and
18 money at the location, that he was interested in committing
19 a robbery with them; and that he would go over and purchase
20 some weed prior to, and then later on he would take Khan
21 and Carlos back over there and drop them off for them to
22 commit the robbery, which is in fact what happened.

23 Mr. Khan was eventually detained. He was interviewed,
24 after advice of his rights and waiver of those rights; and
25 he subsequently confessed to participating in this home

1 invasion at Morningside Drive.

2 He was re-interviewed a second time, in May of 2011,
3 and in this statement, he admitted that he had a 9-
4 millimeter pistol during the home invasion. He said that
5 he and Mr. Carlos had tried unsuccessfully to kick in the
6 back door of the residence and -- subsequently damaging it
7 during the process. Mr. Carlos then ran around to the
8 front of the house, while Mr. Khan stuck his pistol into
9 the house through a hole that had been created by virtue of
10 trying to kick the door in.

11 He indicated that he saw people in the house, told
12 them not to move, and then shots were fired. He indicated
13 shots were fired in both directions; however, there was a
14 shell casing that matched up with the 9-millimeter that he
15 fired. He said he fired a shot.

16 He then ran away, met up with Mr. Carlos, they dropped
17 the pistol, and they hopped in the car -- or eventually met
18 up with Starkey and fled the area.

19 As I indicated, Mr. Smith was struck with one bullet
20 and died as a result thereof.

21 And that is the factual basis for the plea, Your
22 Honor.

23 THE COURT: Prior record?

24 MR. GOLDBERG: Yes, ma'am. He has prior convictions
25 for burglary second degree, in 2001, in which he received

1 probation; simple assault and battery in 2001; simple
2 possession of marijuana, also in 2001.

3 In 2003, convictions for simple possession of
4 marijuana second, driving under suspension, CDVHAN, and
5 unlawful carrying of a pistol. He received a probationary
6 sentence for the CDVHAN.

7 2004, in the State of New York, criminal possession of
8 a weapon. He received 40 months of active time. Looks
9 like there was a probation violation that came from that in
10 2008.

11 Another simple possession of marijuana -- I'm sorry --
12 that dated back to '03. And then, in 2004 as well, ABHAN
13 and strong arm robbery convictions here in South Carolina,
14 for which he got 40 months. And then in 2008, another
15 strong arm robbery, in which he was sentenced to 9 months.

16 And at the appropriate time, I do have some brief
17 comments on behalf of the victims.

18 THE COURT: I'll hear those at this time.

19 MR. GOLDBERG: Thank you, Your Honor. I don't believe
20 Mr. Smith is in the courtroom, the father of the victim
21 James Willie Smith. I've spoken to him numerous times. He
22 actually appeared at the guilty plea back in May of 2014,
23 and was present at that time.

24 He indicated to our victim's advocate that he may not
25 be able to make it today as he works nights and isn't

1 always able to -- isn't always able to wake up, actually,
2 after working all night. So he asked that we proceed
3 without him if he was not able to be here.

4 He did indicate, however, that, obviously, this was a
5 tremendous loss to him and his family. He is very
6 grateful, as am I, too, to the work done by Investigator
7 Thompson. Want to thank him on behalf of the Smith family
8 and the Solicitor's Office for the work that they did in
9 reviving this case, if you will, after it had gone cold.
10 They did an outstanding job to bring it to this point, and
11 Mr. Smith was very grateful on that.

12 And he supports this plea negotiation, and he asked
13 that I relay to the Court -- and I agree with him as well -
14 - that you sentence Mr. Khan to the maximum sentence under
15 the negotiations of 30 years.

16 THE COURT: Thank you.

17 MR. GOLDBERG: Yes, ma'am.

18 THE COURT: Mr. Hodge?

19 MR. HODGE: Thank you, Your Honor. May it please the
20 Court. As you have well known and has been covered, I -- I
21 was not appointed to represent Mr. Khan til after he had
22 already accepted the negotiated plea. Since then I met
23 with him on a number of occasions, and we've talked about
24 the charges and -- and discussed today's proceedings.
25 We've sort of been planning it for months, I guess you

1 could say.

2 He's been anticipating this ---

3 THE COURT REPORTER: Mr. Hodge, could you speak up a
4 little (clears throat) -- could you speak up a little bit.

5 MR. HODGE: Certainly.

6 THE COURT REPORTER: Thank you.

7 MR. HODGE: He's been -- he's been anticipating this
8 for some time now, Judge. I believe he's been in for 45
9 months. As you heard, he is 32 years old. He's lived here
10 in Columbia since 1996. He was born and raised in New
11 York. He does have family here in South Carolina. His
12 grandmother is from Columbia. His mom is here in the
13 courtroom today, who is Ms. Denice Smith; and I believe she
14 would like to address the Court at the appropriate time.

15 Your Honor, we've gone over -- obviously I came in
16 after the plea had already been accepted. We -- but we
17 have gone over the case that was against him. We talked
18 about that. We talked about the possible sentence that
19 he's facing today, and he understands the gravity of what's
20 going on and the proceedings that he's -- that he's going
21 through right now, Judge.

22 Twenty to 30 is -- is a long time. He's -- he's 32.
23 He's got a lot of life ahead of him, and he clearly made a
24 poor decision that night, a lot of poor decisions over the
25 course of his life, this being the largest one. And I

1 believe he would like to address the Court at the
2 appropriate time as well.

3 And I'll go ahead and let Mom speak, and then I'll
4 wrap it.

5 THE COURT: Yes, ma'am. If you'd step forward to the
6 microphone right there, please, and state your name.

7 MS. SMITH: Denise Smith.

8 THE COURT: You need to speak up just a little bit
9 more, please, Ms. Smith.

10 MS. SMITH: Denise Smith.

11 THE COURT: Yes, ma'am.

12 MS. SMITH: I'm here because I -- I -- I truly am
13 sorry about the whole situation. And my son is sorry and
14 very remorseful. It was a very ---

15 THE COURT REPORTER: Ma'am, I cannot hear you. I'm
16 sorry.

17 MS. SMITH: Can you hear me now?

18 THE COURT: Yes, ma'am.

19 MS. SMITH: It was a very unfortunate situation, and
20 I'm -- me and my family and my son, we're so sorry that
21 this happened.

22 Darnell's not a -- he's not a bad person. He just
23 made a lot of bad decisions. And I'm just asking the Court
24 to please have mercy in your sentencing because I know -- I
25 know -- I know that he's not a bad person. And I'm really

1 sorry for the Smith family.

2 I -- I -- I have another son, and I understand -- I
3 feel like we all lost all way round. It was really a bad
4 situation. I'm just asking the Court to have mercy on my
5 son in this instance.

6 He's not trying to evade what was done. He's not
7 trying to evade that, but he knows that that was a bad
8 mistake and that is something that he's going to have to
9 live with. The rest of his life he's going to have to
10 carry that burden. I'm just asking the Court to have mercy
11 on him and his family and me, please. Thank you.

12 THE COURT: Thank you, ma'am.

13 MR. HODGE: Your Honor, at this time I think my client
14 would like to address the Court.

15 THE COURT: Yes, sir, Mr. Khan.

16 THE DEFENDANT: Well, you know, it wasn't intentional.
17 It wasn't even supposed to happen like that. It's a little
18 -- when Mr. -- Investigator Thompson come up, he -- he
19 explained it -- I wasn't trying to aim at nobody at all.

20 Actually, the bullet went through two walls before it
21 struck Mr. Smith. I -- I mean, I didn't even know he was
22 hit. I was pretty much trying to not get hit myself.

23 I know what I did was wrong. I -- I accept
24 responsibility for what I did. I ain't never tried to run
25 from the police. I ain't trying to take the State through

1 no trial. I admitted to what I did from the beginning.

2 I feel sorry for that to happen to Mr. Smith son. I
3 mean, I got a son myself, so I -- I'm -- I just feel bad
4 about it. I know I got to pay the piper. I already know.

5 I just ask you -- for you -- I'm gonna ask you for 20
6 years. I mean, I know that sound crazy, but I'm asking you
7 for 20 years, just so I have a chance to get out and maybe
8 help somebody else that's in the position I'm in, so they
9 don't have to go down the road I went down.

10 I made a lot of mistakes. I paid for them. I'm
11 accept my responsibility. No matter what time you give me,
12 I'm gonna have to do it regardless. So I'm just hoping
13 that you be lenient and give me 20 years so I can see
14 daylight. Because there ain't no guarantee I'm gonna make
15 it through the penitentiary. Everybody know how life is
16 back there. Ain't no guarantee I'm gonna make it out. I'm
17 just hoping I can just maintain and -- to make it out.
18 Thank you.

19 THE COURT: Thank you. Yes, sir, Mr. Hodge.

20 MR. HODGE: Thank you, Your Honor. Just briefly,
21 Judge. The one thing that -- that we've talked about is
22 sort of what he touched on, that -- that this was not -- it
23 wasn't an intentional act of murder. And I've explained to
24 him, obviously, he's accepted the guilty plea because he
25 knows that the consequences, whether expected or

1 unexpected, are still the same.

2 He's told me on more than one occasion that -- that
3 that's not how it was supposed to happen, that he -- he's
4 sorry that that's how it happened. And -- and I get a
5 sense today that there is some remorse there, Judge.

6 It's a terrible tragedy, and -- and nothing can
7 reverse that. I just -- I wanted to reiterate, and I think
8 he did, Your Honor, that was not his intentions, that he
9 didn't go there to kill someone or to shoot someone. It
10 happened, he made the wrong choice of firing a gun. And we
11 all know what can happen when that occurs, especially into
12 a residence with people in it.

13 Judge, we would ask for the 20 years. We would ask
14 you to consider the 20 years, just based on -- I believe --
15 the co-defendant in this case, I believe, received 17 with
16 some probation to follow, Your Honor.

17 My client, at the time, in his statement, says that he
18 believed that he was being fired upon. There were other
19 shots fired he said, and so he fired one shot. And that
20 one shot turned out to -- to be the deciding factor in the
21 rest of his life, Judge.

22 And we're asking that you consider a 20-year sentence
23 so that he may have the opportunity to get out and make a
24 difference. Thank you.

25 THE COURT: Have all the co-defendants been sentenced,

1 Mr. ---

2 MR. GOLDBERG: Yes, ma'am, Your Honor. And if I may
3 just add a couple of brief things. Mr. Carlos, as Mr.
4 Hodge alluded to, did plead guilty to the same charges. He
5 got 17 years active; and then he got a 10-year sentence,
6 suspended on 5 years probation, to run consecutive to that.

7 And I think the distinction that can be made in this
8 case as to that sentence, as opposed to this one, is that
9 the evidence corroborates that Mr. Khan's the one
10 responsible for the death of Mr. Smith.

11 I understand under the "hand of one/hand of all"
12 they're both responsible; however, the evidence supports
13 that it was the shot fired by Mr. Khan that took Mr.
14 Smith's life. And that would be the difference in the
15 State's eyes.

16 Additionally, one -- one fact that I wanted to make
17 sure that the Court was aware of that I think I failed to
18 be clear about, Mr. Smith did not live at that residence.
19 He was a guest of that residence.

20 The Scott twins lived at that residence. They were
21 the ones engaged in the sale of narcotics that the robbery
22 was intended to hit. Mr. Smith was merely a guest there
23 and had no involvement.

24 Oh. And the other co-defendant, Mr. Starkey, who was
25 the driver, who basically helped break the investigation

1 wide open to lead to Mr. Carlos and Mr. Khan, was allowed
2 to plead guilty to accessory; and he was sentenced to 3
3 years.

4 (Brief pause.)

5 THE COURT: Mr. Carlos received 17 years on the
6 voluntary?

7 MR. GOLDBERG: 17 on the voluntary and the attempted
8 arm robbery; and then on the -- he actually pled to
9 burglary second and got 10 years, suspended on 5 years
10 probation, to run consecutive to the 17 years on the other
11 charges. He also had a different prior record.

12 (Brief pause.)

13 THE COURT: Mr. Khan, on the -- the attempted armed
14 robbery charge, you agreed to a negotiated 20-year
15 sentence. So I will sentence you to the Department of
16 Corrections for a period of 20 years.

17 On the burglary first degree charge, you have agreed
18 to a negotiated sentence between 20 and 30 years. And I
19 will sentence you to the Department of Corrections for a
20 period of 20 years on that sentence.

21 On the murder charge, which you pled guilty to
22 voluntary manslaughter, which carries a maximum term of
23 imprisonment between 2 and 30 years, and to which you
24 agreed to a negotiated sentence between 20 and 30 years, I
25 will sentence you to the Department of Corrections for a

1 period of 25 years.

2 All to run concurrent. Good luck to you.

3 MR. HODGE: Thank you, Your Honor.

4 MR. GOLDBERG: Thank you, Your Honor.

5

6 -- END OF TRANSCRIPT RECORD --

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CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fifth Circuit Court for Richland County, South Carolina, on the 10th day of February, 2015.

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

Bonnie H. Kelly, CVR
 Official Court Reporter

Columbia, South Carolina

February 22, 2016

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2015CP406211

STATE OF SOUTH CAROLINA

County of Richland

In the Court of Common Pleas

2015 OCT 14 PM 2:06
ANETTE W. MOSELEY
C.C.P. & G.S.
RICHLAND COUNTY
FILED

Darnell Khan, 330148

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

vs.

State of South Carolina

Name of Respondent.

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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Lee Correctional Institution
990 Wisacky Highway, Bishopville, SC, 29010
2. Name and location of Court which imposed sentence Court of General Sessions
Columbia, South Carolina, 29201
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2011-GS-4003251 (Attempted Armed Robbery) 1
 - (b) 2011-GS-4003252 (Burglary 1st)
 - (c) 2011-GS-4003253 (Manslaughter/Voluntary manslaughter)
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) February 10, 2015 20 years
 - (b) February 10, 2015 20 years
 - (c) February 10, 2015 25 years

5. Check whether a finding of guilty was made

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

6. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. N/A
- ii. N/A
- iii. N/A

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

- i. N/A
- ii. N/A
- iii. N/A

(c) the date of each such result:

- i. N/A
- ii. N/A
- iii. N/A

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

- i. N/A
- ii. N/A
- iii. N/A

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) Had to wait until I got to SCDC
- (b) Get the application for the PDR
- (c) _____

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

- (a) Plea was not voluntary
- (b) Motion to relieve counsel was denied
- (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) Ineffective assistance of counsel, counsel's performance
- (b) was deficient to the extent that there exist a
- (c) probability that deficient, perjurial of applicant unduly

11. 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 petitions in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petitions in the United States Supreme Court for certiorari other than petitions; if any, already specified in (7)? No

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

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

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

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

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

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

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

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

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

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

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

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

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

17. If you answered "yes" to one or more parts of (16), list:

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

- i. Douglas Steven Strickler P.O. Box 192, Columbia, SC 29208
- ii. Mark Anthony Sawyer Jr.
P.O. Box 192, Columbia, SC 29202
- iii. William A. Hodge
P.O. Box 8753, Columbia, SC 29202

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

- i. Apperance & Bond hearing
- ii. Plea hearing
- iii. Sentence hearing

18. State clearly the relief you seek in filing this application.

A reduce Sentences

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

NO

STATE OF SOUTH CAROLINA

County of Richland

VERIFICATION

I, Darnell Khan, 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.

X Darnell Khan
Darnell Khan

SWORN to and subscribed before me this 1ST day of October, 2015

Jane J. Duggers (s.)
Notary Public

My Commission Expires: 11-05-2019

2015 OCT 11 PM 2:06
JEANETTE W. MOORE
D.C.P. & G.V. RIDGE
RICHLAND COUNTY
FILED

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

I, Darnell Khan, 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 therefor.

X Darnell Khan
Applicant
Darnell Khan

SWORN or affirmed to and subscribed before me this 1ST day of October, 2015

Jane J. Duggers
Notary Public

My Commission Expires 11-05-2019

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Darnell Khan, #330148,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2015-CP-40-06211

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief filed October 14, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In June 2011, the Richland County Grand Jury indicted Applicant for attempted armed robbery (2011-GS-40-03251), first-degree burglary (2011-GS-40-03252), and murder (2011-GS-40-03253). Mark Anthony Sawyer Jr., Esquire represented Applicant. On May 22, 2014, Applicant pled guilty to a lesser included offense of voluntary manslaughter, first-degree burglary, and attempted armed robbery. Sentencing was deferred until February 10, 2015 where the Honorable Brooks P. Goldsmith sentenced Applicant to twenty-five (25) years imprisonment for voluntary manslaughter twenty (20) years imprisonment for first-degree burglary, and twenty (20) years for attempted armed robbery, to be served concurrently. Applicant was represented by William Hodge at sentencing.

II.

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

1. Ineffective Assistance Counsel
 - a. "Counsel performance was deficient to the extent that there exist a probability that deficient, prejudicial applicant unduly"
2. Involuntary Guilty Plea
 - a. "Plea was not voluntary"

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this return and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at

687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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

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

IV.

Respondent submits Applicant's second allegation that his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C.

354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Respondent submits the record fully supports the knowing and voluntary nature of Applicant's plea. However, allegations regarding the voluntariness of the plea may raise questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper, 279 S.C. 264, 305 S.E.2d 247.

V.

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

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

[SIGNATURE PAGE TO FOLLOW]

VII.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held on the claims of ineffective assistance of counsel and involuntary plea.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

April 25, 2016

STATE OF SOUTH CAROLINA)
COUNT OF RICHLAND)
))
))
DARNELL KHAN, #330148)
))
Applicant,)
))
vs)
))
STATE OF SOUTH CAROLINA,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT


2015-CP-40-06211

AFFIDAVIT OF SERVICE BY MAIL

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

Jonathan D. Waller
Giese Law Firm
1315 Blanding Street
Columbia, SC 29201

DATED this 25th day of April, 2016.


Jenna C. Brown, Legal Assistant
For Respondent

State of South Carolina
County of Richland

Court of Common Pleas

Darnell Kahn)
)
 Applicant,)
 v.)
)
 State of South Carolina)
)
 Respondent.)

Transcript of Record
2015-CP-40-6211

July 21, 2017
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Judge.

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

Jonathan Waller, Esquire
Attorney for the Applicant

Jessica Kinard, Esquire
Attorney for the Respondent

Bethanie K. Creppon
Circuit Court Reporter

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E X H I B I T S

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NO.

DESCRIPTION

ID.

EVD.

(No Exhibits.)

1 P R O C E E D I N G S

2 * * *

3 THE COURT: Ms. Kinard, you may proceed.

4 MS. KINARD: Thank you, Your Honor. May it
5 please the Court. This is the matter of Darnell
6 Kahn vs. The State of South Carolina. It's
7 Case No. 2015-CP-40-6211. We're before the Court on
8 an application for postconviction relief that was
9 filed October 14th, 2015. Mr. Kahn is presently
10 confined in the South Carolina Department of
11 Corrections pursuant to orders of commitment from
12 the Richland County Clerk of Court.

13 In June 2011, the Richland County Grand Jury
14 indicted him for attempted armed robbery, first
15 degree burglary, and murder. Mark Sawyer
16 represented him on May 22nd, 2014, when he pled
17 guilty to the lesser included offense of voluntary
18 manslaughter as well as first degree burglary and
19 attempted armed robbery.

20 Sentencing was deferred until February 10th,
21 2015, where the Honorable Brooks P. Goldsmith
22 sentenced him to 25 years' imprisonment for
23 voluntary manslaughter, 20 years for first degree
24 burglary, and 20 years for attempted armed robbery
25 to be served concurrently. He was represented by

1 William Hodge at sentencing. He did not appeal his
2 plea or conviction.

3 The State is present and ready to proceed.
4 Mr. Kahn is present and represented by Jonathan
5 Waller.

6 MR. WALLER: Your Honor, it was actually Judge
7 Lee that did the sentencing.

8 THE COURT: I'm sorry?

9 MR. WALLER: It was actually Judge Lee that did
10 the sentencing. He pled in front of Judge Goldsmith
11 and then it was deferred sentencing in front of
12 Judge Lee.

13 THE COURT: Okay.

14 MR. WALLER: Your Honor, we've amended his
15 application. We're going forward on the very
16 limited issue of ineffective assistance of counsel
17 for not objecting to the solicitor breaching a plea
18 agreement.

19 THE COURT: I got your amendment.

20 MR. WALLER: Thank you, Your Honor. I would
21 call Darnell Kahn.

22 THE CLERK: State your full name, please.

23 THE WITNESS: Darnell Kahn.

24 DARNELL KAHN

25 being first duly sworn, testified as follows:

1 THE WITNESS: I do, yes, ma'am.

2 THE CLERK: Thank you. You can have a seat.

3 DIRECT EXAMINATION

4 BY MR. WALLER:

5 Q. Good afternoon, Mr. Kahn. How are you doing
6 this afternoon?

7 A. I'm fine.

8 Q. Mr. Kahn, if I can get you to speak up just a
9 little bit so the court reporter and the Judge can
10 hear you. Just make sure everybody can hear.

11 Mr. Kahn, you were arrested and, ultimately,
12 indicted for murder; is that right?

13 A. Right.

14 Q. You pled guilty to voluntary manslaughter?

15 A. Correct.

16 Q. Who was your first attorney?

17 A. Jim May.

18 Q. Okay. Who was your attorney when you pled
19 guilty?

20 A. Mark Sawyer.

21 Q. Okay. And you and Mr. Sawyer negotiated a
22 20-to-30-year sentence; is that correct?

23 A. Negotiated, correct.

24 Q. Negotiated range of 20 to 30?

25 A. Correct.

1 Q. What was your understanding -- was that your
2 understanding --

3 THE COURT: What was the negotiation?

4 MR. WALLER: 20 to 30, Your Honor.

5 Q. Was that your understanding of the complete
6 plea agreement?

7 A. Yeah, 20 to 30 with a cap of 30.

8 THE COURT: Sir, can you pull up closer to that
9 microphone? I don't want to have to try to hear
10 you, I need to hear you.

11 THE WITNESS: Yes, sir. 20 to 30 with a cap of
12 30.

13 Q. So that's all you thought it was?

14 A. That's all it was supposed to be.

15 Q. Okay. Mr. Sawyer represented you when you pled
16 guilty; is that right?

17 A. Correct.

18 Q. And he was not your attorney when you were
19 sentenced?

20 A. Correct.

21 Q. When you went to the sentencing, the offer was
22 still the same?

23 A. Correct.

24 Q. And the agreement was still the same?

25 A. Correct.

1 Q. Did the solicitor go away from that when you
2 were at the plea?

3 A. Yes. He recommended I get the maximum
4 sentence.

5 Q. He recommended 30?

6 A. Yeah.

7 Q. And that wasn't part of the original agreement?

8 A. The negotiated plea was 20 to 30.

9 Q. Okay. Are you asking the Court here today just
10 that you be resentenced under the parameters that
11 you had agreed on -- you and the Solicitor's Office
12 had agreed on?

13 A. Correct.

14 Q. I have nothing further. Please answer any
15 questions Ms. Kinard has.

16 CROSS-EXAMINATION

17 BY MS. KINARD:

18 Q. Mr. Kahn, do you remember the Judge pronouncing
19 your sentence?

20 A. Pronouncing it?

21 Q. Yes, when he actually stated what you received
22 on each charge.

23 A. What she said?

24 Q. I'm sorry. Yeah, she.

25 A. Yeah. It was Judge Lee. Yes.

1 Q. Do you remember her saying that she sentenced
2 you pursuant to a recommended sentence or a
3 negotiated sentence?

4 A. In the transcript, she sentenced me to the
5 negotiated sentence.

6 Q. So --

7 A. But the question of the matter here is the fact
8 that he recommended a number, which he wasn't
9 supposed to do.

10 Q. Do you dispute that that number is still within
11 the recommended range that you agreed to?

12 A. No, I'm not disputing that. It's in the range.
13 But what I am disputing is the simple fact that one
14 co-defendant went home, one got 17, and then I get
15 25 when he recommended the max. I went through four
16 lawyers through this whole process.

17 Q. All right. Now, you worked with Mr. Sawyer to
18 get to that negotiated range; is that correct?

19 A. No. Actually, I tried to fire him.

20 Q. You tried to fire him?

21 A. Yeah. I went in front of Judge Newman.

22 Q. Okay. When he represented you to enter your
23 plea, you understood the negotiated range was 20 to
24 30?

25 A. Yes, I understood that.

1 Q. And which attorney helped you get to that 20 to
2 30?

3 A. Rephrase your question.

4 Q. You said you had four attorneys.

5 A. Yeah.

6 Q. Which one negotiated with the solicitors --

7 A. Mark Sawyer.

8 Q. Okay. And between entering your plea and being
9 sentenced, you ended up being represented by
10 Mr. Hodge?

11 A. That's correct.

12 Q. Did he ask the Solicitor's Office to try and
13 change that?

14 A. Me and Mr. Hodge tried to get the plea
15 withdrawn. And, basically, Dan Goldberg basically
16 said withdraw that plea and you're going to get a
17 life sentence.

18 Q. So both of these attorneys did help you
19 negotiate --

20 A. No, no, no, no, no.

21 Q. I'm sorry?

22 A. My dispute is not with Mr. Hodge; he did his
23 part. My dispute is with Mark Sawyer because it
24 ain't no way -- I went in front of Judge Newman and
25 tried to fire the man and they refused to let me

1 fire him, then a week later, I go for the plea. And
2 then two weeks after the plea, he don't work for the
3 Public Defender's Office no more. I went through
4 four lawyers through my whole case: Jim May, then I
5 went to -- Jim May, then I went to Newman, yeah,
6 Clark Newman, then I went from Newman to Mark
7 Sawyer, and then from Mark Sawyer to Mr. Hodge. So,
8 yeah.

9 Q. So your ultimate dispute is with --

10 A. Mr. Sawyer, not with Mr. Hodge.

11 Q. Okay. No further questions. Thank you.

12 REDIRECT EXAMINATION

13 BY MR. WALLER:

14 Q. Mr. Kahn, Mr. Hodge represented you at the
15 sentencing?

16 A. Correct.

17 Q. And was it the sentencing when the solicitor
18 recommended that you receive the maximum?

19 A. Correct.

20 Q. So your dispute is with Mr. Hodge; is that
21 right?

22 A. Not technically, because he tried to withdraw
23 the plea for me and the solicitor wouldn't allow him
24 to withdraw it.

25 Q. Okay. Did he -- I'm not talking about the

1 plea -- I'm not talking about the plea where you
2 pled guilty and were not sentenced. Did he inform
3 the Court that when the solicitor recommended that
4 you get 30 that that wasn't the plea agreement?

5 A. No.

6 Q. So he didn't tell the Court that?

7 A. No.

8 Q. He didn't object?

9 A. No.

10 Q. Nothing further.

11 MS. KINARD: Nothing further, Your Honor.

12 THE COURT: All right. You can come down, sir.

13 MR. WALLER: That's the Applicant's case, Your
14 Honor.

15 THE COURT: All right. Anything on behalf of
16 the State?

17 MS. KINARD: Very briefly, Your Honor. The
18 State would call William Hodge.

19 THE CLERK: State your full name, please.

20 THE WITNESS: William Arthur Hodge.

21 WILLIAM ARTHUR HODGE

22 being first duly sworn, testified as follows:

23 THE WITNESS: I do.

24 THE CLERK: Thank you. You may have a seat.

25

1 DIRECT EXAMINATION

2 BY MS. KINARD:

3 Q. Thank you for your patience and for being here,
4 Mr. Hodge.

5 A. No problem.

6 Q. You were at the public defender's office when
7 you represented Mr. Kahn?8 A. No, ma'am, I was in private practice. I've
9 never worked for the Public Defender's Office, but I
10 was on the conflict list, so it was a conflict case.
11 Once Mr. Sawyer left the office, it was conflicted
12 out to me.13 Q. My apologies. Thank you for clarifying that.
14 You represented him solely at his sentencing, not at
15 the entry of his plea?

16 A. That's correct.

17 Q. And when you received this case, he had already
18 pled to a negotiated range of 20 to 30?

19 A. That's correct.

20 Q. After the sentencing and when you got this
21 case, can you tell me what efforts you made to
22 change that, if anything?23 A. Certainly. Me and Mr. Kahn had numerous
24 conversations about the plea negotiations and
25 agreement between him and the Solicitor's Office. I

1 went to Dan -- after having those conversations, I
2 went to, sorry, Assistant Solicitor, Deputy
3 Solicitor Goldberg now; went to him to request a
4 possible renegotiation of trying to reduce that
5 range or, in the alternative, allow Mr. Kahn to
6 withdraw his plea and start from scratch with me as
7 counsel negotiating that plea.

8 Goldberg was not inclined to agree with either
9 of those. I felt because I was not privy to the
10 negotiation conversations, a motion to withdraw the
11 plea would have been completely ignored and would
12 have been denied, so I did not file one.

13 Based on that decision and after talking to
14 Darnell, we felt we would go forward with the
15 negotiations once we realized that we weren't going
16 to be able to withdraw his plea.

17 Q. Now, when you went forward at the sentencing,
18 do you believe Mr. Kahn understood the 20-to-30
19 range was still there?

20 A. Oh, absolutely. That was the whole point of
21 our conversations was what he said earlier about
22 co-defendant getting less, everyone seemed to get
23 less, and then he had a range that was higher than
24 what they had received. So we were both well aware
25 of what the range was at the time.

1 Q. During the plea, do you recall the solicitor
2 asking for the maximum sentence?

3 A. I honestly didn't recall. I have reviewed the
4 transcript and see where he did ask for the maximum
5 sentence. My understanding at the time of the plea
6 and at the time of talking to Mr. Kahn -- and I
7 can't tell you for sure we even had this specific
8 conversation, but it was that the Solicitor's Office
9 had always intended to ask for 30 and that we were
10 going to argue for 20, that they allow the
11 negotiated range to give more time for us to
12 mitigate things, and to, hopefully, reduce his
13 exposure on my end. I did not understand the
14 Solicitor's Office to reduce it at all.

15 Q. So just to make sure I understood, it was
16 always your understanding that they were going to go
17 high and you believe you conveyed that to Mr. Kahn?

18 A. Well, I don't remember if I conveyed those
19 specific words to Mr. Khan. He knew that we were
20 looking at 20 to 30. The conversations that I had
21 with Deputy Solicitor Goldberg certainly were he was
22 going to ask for 30, I was going to argue for 20.
23 And that was kind of how we went into it.

24 Q. Do you believe that his requesting 30 in any
25 way breaches the plea agreement?

1 A. I mean, I didn't think about that until today.
2 It is an interesting argument. I was not a party to
3 the actual negotiations. There was no written plea
4 agreement. I have not seen anything that lays out
5 the exact terms or terminology of how it should have
6 been handled.

7 My reasoning at the time was, no, he was not
8 outside of the negotiations because the negotiations
9 were for a range of 20 to 30. Any time I've ever
10 had a solicitor make a negotiated range or a cap,
11 they're always going to argue for the cap or for the
12 top end of that negotiated range. And I'm always
13 going to argue for the bottom of that range. So
14 that is how I interpreted it.

15 Now, like I said, I don't know what was
16 discussed or negotiated between Mr. Sawyer and
17 Goldberg, but I would imagine that's probably how
18 those negotiations went.

19 Q. So you saw nothing unusual about the way this
20 sentencing hearing progressed?

21 A. No. Like I said, at the time, that thought did
22 not cross my mind.

23 Q. I have no further questions. Thank you.

24 MR. WALLER: Just briefly, Your Honor.

25

CROSS-EXAMINATION

1

2 BY MR. WALLER:

3 Q. Mr. Hodge, in your experience when a plea
4 agreement is placed on the record, if something is
5 left out of that, it's gone; is that right? If you
6 don't place all the terms of the agreement on the
7 record, then what was on the record can't be
8 enforced?

9 A. Correct. I think that's the whole point of
10 putting it on the record, so everyone knows what
11 you're agreeing to. That's right.

12 Q. So if the record doesn't indicate that the
13 solicitor was going to recommend 30, that's not part
14 of the plea agreement; is that right?

15 A. It certainly was not spelled out that he was
16 going to recommend 30. I guess the way I read the
17 plea agreement, or now that I've seen the
18 transcript, understood the plea agreement at the
19 time as Mr. Kahn's attorney was the negotiated range
20 was for the purpose of allowing arguments on both
21 sides. Allowing arguments for 30 and allowing
22 arguments for 20 is how I interpreted it.

23 Q. Okay. But the agreement in the record was for
24 a negotiated range of 20 to 30?

25 A. Correct.

1 Q. Not a negotiated range of 20 to 30 with a
2 recommendation of 30?

3 A. That's correct. That's not in the record.
4 That's right.

5 Q. So your testimony is you didn't object to it or
6 bring it to the Court's attention because you first
7 didn't notice it and then didn't think anything of
8 it?

9 A. Yes, sir, it's general practice. Like I said,
10 I've had plenty of negotiated ranges and caps and
11 it's understood that the Solicitor's Office, that
12 that's all negotiations. They're going to recommend
13 the max.

14 MR. WALLER: I beg the Court's indulgence,
15 please.

16 Nothing further. Thank you, Mr. Hodge.

17 MS. KINARD: Nothing further, Your Honor. We'd
18 ask that he be excused.

19 MR. WALLER: No objection.

20 THE COURT: You may come down.

21 MS. KINARD: The State would call Mark Sawyer.

22 THE CLERK: State your name.

23 THE WITNESS: Mark Anthony Sawyer, Jr.

24 MARK ANTHONY SAWYER, JR.

25 being first duly sworn, testified as follows:

1 THE WITNESS: I do.

2 DIRECT EXAMINATION

3 BY MS. KINARD:

4 Q. Thank you for being here, Mr. Sawyer. Do you
5 agree with Mr. Kahn's statement that you were the
6 third attorney that he had?

7 A. I was.

8 Q. Now, in getting to this plea agreement, did you
9 discuss with him all the elements of the charges
10 that he faced?

11 A. I did.

12 Q. And you discussed with him the maximum
13 penalties he faced?

14 A. I did.

15 Q. As well as all the collateral consequences?

16 A. I did.

17 Q. Do you think he understood all of that?

18 A. I do. I believe I have spoken with you earlier
19 as well. I normally do an advisement of rights
20 sheet, which I included in the packet with the Clerk
21 of Court.

22 Q. And you executed that as normal and you believe
23 he understood all of it?

24 A. Yes, ma'am.

25 Q. Do you believe you received all necessary

1 discovery in this matter?

2 A. Yes.

3 Q. Did you review that with him?

4 A. I did.

5 Q. Do you believe that it was ultimately his
6 choice to plead guilty?

7 A. It was.

8 Q. How did you get to the range of 20 to 30 years?

9 A. Well, he was originally charged with murder
10 and, obviously, that was the minimum sentence at the
11 time. So we negotiated getting down to the
12 manslaughter range. Twenty -- I can't remember off
13 the top of my head how we got to that number, other
14 than that's probably what Deputy Solicitor Goldberg
15 was comfortable with at the time. I think the least
16 that he could offer was 20.

17 I believe for the robbery charge he was looking
18 at a minimum of 10, the burglary first a minimum of
19 15, so I imagine that's where he got the 20 from.
20 And then 30 just for a cast off everything, make
21 sure he can't have any consecutive sentences or
22 anything like that.

23 Q. How did you feel about this range? Did you
24 feel it was a good offer for him?

25 A. I did.

1 Q. Do you recall your analysis of his chances at
2 trial?

3 A. I did. We had -- he had confessed to the crime
4 to Richland County. In addition, there was some
5 question about whether he was the actual shooter or
6 not. I don't necessarily think it would have
7 mattered. It was a prearranged robbery.

8 I did hire Bob Trexler, who is a crime scene
9 analyst, to look at everything. Based on his
10 analysis, he would have testified that the shot came
11 from where Darnell said he was outside the house.

12 Q. Would it have been a hand of one, hand of all
13 situation otherwise?

14 A. It certainly would have.

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

16 A. We did.

17 Q. Did you begin to prepare for trial or was this
18 always planned to be a plea?

19 A. Darnell never wanted to go to trial. He just
20 wanted to know the range. He was willing to sit
21 down in the county jail as long as it took to try to
22 get some sort of reasonable sentence.

23 Q. And he was comfortable with 20 to 30?

24 A. Yes, ma'am.

25 Q. Do you recall any conversation about a

1 recommendation of a max of 30?

2 A. Again, I'm right where Mr. Hodge was a minute
3 ago. When we had negotiated, the understanding
4 between us would have certainly been that he ask for
5 the most and I ask for the least. And Darnell
6 understood he could be sentenced anywhere between
7 those two extremes. There was never any explicit
8 talk about whether or not Dan would be able to make
9 a recommendation. I assume I would have told him
10 that Dan gets to ask for what he gets to ask for, I
11 get to ask for what I get to ask for, and the Judge
12 decides.

13 Q. Do you think him using the word recommendation
14 in the sentencing, in your experience, even though
15 you weren't there, would be a breach of the plea
16 agreement?

17 A. No.

18 Q. Have you reviewed the plea transcript?

19 A. I have.

20 Q. Did it seem like an average sentence entry?

21 A. Yeah.

22 Q. I have no further questions. Thank you very
23 much.

24 MR. WALLER: Just briefly.

25

1 CROSS-EXAMINATION

2 BY MR. WALLER:

3 Q. Mr. Sawyer, I'm going to ask you the same
4 question I asked Mr. Hodge: When a plea agreement
5 is placed on the record, you have to put all the
6 terms for it to be enforced; is that correct?

7 A. Correct.

8 Q. So if something is not in there, it can't be
9 enforced.

10 A. Correct.

11 Q. I'm on Page 3 of the plea transcript, the guilt
12 portion.

13 A. Is this mine or yours?

14 Q. That's yours.

15 THE COURT: I've got it. I've read it.

16 Q. And, Mr. Sawyer, if the solicitor said, the
17 State and the Defense have entered into negotiations
18 whereby the Defendant is to be sentenced to a range
19 of 20 to 30 years with the actual number to be left
20 in the discretion of the Court, where does that
21 mention anything about they're going to recommend 30
22 years?

23 A. Again, I don't look at it necessarily as a
24 recommendation. I didn't know what he was going to
25 ask for. My understanding and what I told Mr. Kahn

1 was that this is the range you could be sentenced
2 in. Both of us can ask for whatever we want to ask
3 for. It would be up -- Dan Goldberg asked for 29
4 years, 28 years. He could have asked for whatever
5 he wanted to. So I didn't necessarily see that
6 there was any point where he was going to recommend
7 30 years. At the time of the plea, it was just
8 going to be, essentially, an open plea within that
9 range.

10 Q. Okay. But you, obviously, weren't there for
11 the actual sentencing?

12 A. Correct.

13 Q. Nothing further.

14 MS. KINARD: Nothing further, Your Honor. We'd
15 ask that he be excused.

16 MR. WALLER: No objection.

17 THE COURT: You can come down, sir.

18 MS. KINARD: That's the State's case, Your
19 Honor.

20 THE COURT: Let me make sure I understand this:
21 At the plea negotiations -- I mean, the plea, your
22 client -- the State says on the record,
23 Mr. Goldberg: The State and Defense have entered
24 into negotiations whereby the Defendant is to be
25 sentenced to a range of 20 to 30 years with the

1 actual number left to the discretion of the Court.
2 That's first.

3 Then we go over to the actual sentencing in
4 front of Judge Lee. And Mr. Goldberg says, once
5 again, negotiated -- on Page 4 of the sentencing
6 transcript: Negotiated sentence was a range of 20
7 to 30 years in this matter. Then again, on Page 5
8 of the sentencing transcript, he tells Judge Lee the
9 negotiations of the plea that were accepted were set
10 per a negotiated range of 20 to 30 years.

11 So she was certainly aware of the negotiation
12 because she asked your client, Mr. Kahn, when she
13 spoke to him, said, you entered into a plea at that
14 time on the attempted armed robbery of 20 years; is
15 that correct? Yes. You entered a plea for burglary
16 first degree with a negotiated sentence between 20
17 and 30; is that correct? And you entered into a
18 voluntary manslaughter reduction from the murder
19 charge with a negotiated sentence of 20 to 30 years;
20 is that correct? So she clearly understood, at
21 least from that colloquy, what the negotiation was.

22 Then we turn to Page 14 of the sentencing
23 transcript. Mr. Goldberg is presenting the case for
24 the State. And he goes through his discussions with
25 Mr. Smith, I believe it is, who is the father of the

1 deceased -- yeah, Mr. Smith, father of the victim,
2 James Willy Smith. And he says, we want to thank
3 the Smith family and the Solicitor's Office for the
4 work they did in reviving this case, if you will,
5 after it had gone cold. They did an outstanding job
6 of bringing it to this point, and Mr. Smith was
7 grateful of that and he supports the plea
8 negotiation. And he asked that I relay to the Court
9 that I agree with him as well that the sentence
10 Mr. Kahn -- that you sentence Mr. Kahn to the
11 maximum sentence under negotiations of 30 years.

12 So it's clear that Mr. Goldberg didn't use the
13 word recommend. He just says, I agree with the
14 victim of the father, that you sentence Mr. Kahn to
15 the maximum sentence of 30 years. Then finally she
16 sentenced him to 25 years. That's within the range?

17 MR. WALLER: Yes, sir.

18 THE COURT: Right? Have I got the facts
19 straight?

20 MR. WALLER: Yes, sir, you do.

21 THE COURT: All right. What's the -- the
22 Applicant's position is that he should not have said
23 that?

24 MR. WALLER: Particularly. And I agree with
25 him as well, Your Honor.

1 THE COURT: Right. That's the whole case?

2 MR. WALLER: Yes, sir.

3 THE COURT: Okay. Thank you very much.

4 MR. WALLER: Thank you, Your Honor.

5 THE COURT: Thirty days.

6 MS. KINARD: Thank you, Your Honor.

7 MR. WALLER: Thank you, Your Honor.

8 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Richland County, South Carolina, on the 21st of July, 2017.

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

May 30, 2018

s/Bethanie K. Creppon

Bethanie K. Creppon
Circuit Court Reporter

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Darnell Khan, SCDC #330148,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2015-CP-40-6211

ORDER OF DISMISSAL

RICHLAND COUNTY
 2018 JUN -8 PM 12:38
 JESSICA E. KINARD

This matter comes before the Court by way of an application for post-conviction relief filed on October 14, 2015 by Darnell Khan (Applicant), and amended on July 10, 2017, by his counsel Jonathan D. Waller, Esquire. The State (Respondent) made its return on April 25, 2016, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on July 21, 2017, at the Richland County Courthouse. Applicant was present at the hearing and represented by counsel Waller. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant, his plea counsel Mark A. Sawyer, Jr., and sentencing counsel William A. Hodge testified at the evidentiary hearing. The Court had before it a copy of the plea transcript, the sentencing transcript, the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this action. After reviewing the record and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof as to any constitutional deprivation and denies this application with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant

to orders of commitment of the Richland County Clerk of Court. During its June 2011 term, the Richland County Grand Jury indicted Applicant for attempted armed robbery (2011-GS-40-03251), first-degree burglary (2011-GS-40-03252), and murder (2011-GS-40-03253). These charges stemmed from an incident on January 27, 2009, when Applicant and two co-defendants went to a residence in Richland County armed with firearms with the intention of robbing the residents. During the incident, an occupant of the home, James Willie Smith, was struck with a single gunshot wound to the upper torso and died as a result of the wound. Witnesses eventually implicated Applicant and his co-defendants, who all gave statements implicating themselves.

Assistant Public Defender Mark A. Sawyer, Jr., of the Richland County Public Defender's Office was appointed to represent Applicant. Deputy Solicitor Dan Goldberg of the Fifth Circuit Solicitor's Office prosecuted the case. On May 22, 2014, Applicant appeared in the Richland County Court of General Sessions before the Honorable Brooks P. Goldsmith, circuit court judge, and pled guilty as indicted to attempted armed robbery and first-degree burglary and the lesser-included offense of voluntary manslaughter. By agreement of the parties, sentencing was deferred to allow additional time for victim input and mitigation.

On February 10, 2015, all parties reconvened for a sentencing hearing before the Honorable Alison R. Lee, circuit court judge. Applicant was represented by William A. Hodge, Esquire, who was appointed to represent Applicant shortly after plea counsel Sawyer left the public defender's office. Pursuant to plea negotiations between Applicant and the State for an aggregate sentence between twenty to thirty years imprisonment, Judge Lee sentenced Applicant to twenty years imprisonment for attempted armed robbery, twenty years imprisonment for first-degree burglary, and twenty-five years imprisonment for voluntary manslaughter, with all sentences to be served concurrently. Applicant did not appeal his guilty plea or sentences.



II. ALLEGATIONS RAISED

In his *pro se* application for post-conviction relief, Applicant alleged he is being held in custody unlawfully based on allegations that his plea was involuntary, his motion to relieve counsel was denied, and counsel was ineffective.

The amendment filed by Applicant's counsel alleged "Counsel was ineffective for failing to object to the Deputy Solicitor breaching the terms of the plea agreement" and seeks "the alternative relief of re-sentencing, with the instruction that the terms of the plea agreement be enforced." Applicant proceeded forward solely on this amended ground at the evidentiary hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe the witnesses who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process



that [it] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 389. "It is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." Bell v. Cone, 535 U.S. 685, 702 (2002) (citing Strickland).

Applicant has alleged the State breached its plea agreement when the Deputy Solicitor recommended the court sentence Applicant to thirty years, which he asserts was in violation of the negotiations for a recommendation of twenty to thirty years imprisonment, and that his counsel was ineffective for failing to object when the Deputy Solicitor made this recommendation for a thirty year sentence. ("And [the victim's father] supports this plea negotiation, and he asked that I relay to the Court – and I agree with him as well – that you sentence Mr. Khan to the maximum sentence under the negotiations of 30 years.").

During the plea proceeding, Applicant informed the court he understood the plea agreement was for a sentence between twenty to thirty years imprisonment. Similarly during the sentencing proceeding, Applicant informed the court the plea negotiations were for a sentence between twenty to thirty years imprisonment. Applicant was sentenced to an aggregate twenty-five years imprisonment—within the negotiated range that Applicant stated numerous times he had agreed to when deciding to enter his guilty plea.

At the evidentiary hearing, Applicant testified he understood the plea agreement with the State was for a sentence within the range of twenty to thirty years imprisonment. He testified this was the negotiation at both his plea proceeding and sentencing proceeding. He testified the Deputy Solicitor departed from this negotiation when he asked the sentencing court to sentence Applicant to the maximum sentence of thirty years. Applicant testified he was sentenced within



the negotiated range which he agreed to in exchange for his guilty plea. However, he testified, "what I am disputing is the simple fact that one co-defendant went home, one got 17, and then I get 25 when he recommended the max." Applicant further clarified that he was not raising any allegations against his sentencing counsel, William A. Hodge, and that his allegations pertained to plea counsel Mark A. Sawyer, Jr.

Sentencing counsel William A. Hodge testified he was appointed to represent Applicant after Applicant had already entered into a negotiation with the State for a sentence within the range of twenty to thirty years imprisonment. He testified he attempted to re-negotiate the plea for a lesser sentence, but the State would not agree to a reduced sentence range or to allow Applicant to withdraw his plea. He testified he and Applicant were both well aware that the negotiated sentence range was between twenty to thirty years when Applicant appeared for his sentencing hearing. He testified he was aware the State intended to ask for the court to impose the maximum sentence of thirty years and that he would ask for the minimum of twenty years, with both being at the outer ranges of the negotiated sentencing range. He testified he did not object when the Deputy Solicitor requested a sentence of thirty years because he believed it was within the terms of the plea agreement for the State to ask for a thirty year sentence.

Plea counsel Mark A. Sawyer, Jr., testified he negotiated the plea agreement with the State on behalf of Applicant and was able to secure a plea to the lesser-included offense of voluntary manslaughter from murder and for a sentencing range of twenty to thirty years. He testified Applicant never wanted to proceed to trial and was always interested in securing the most favorable plea negotiation possible. He testified he understood the plea agreement would allow the State to ask for the maximum sentence of thirty years imprisonment and he would



allow Applicant to request a sentence of twenty years imprisonment, which he conveyed to Applicant.

After a review of the entire record, including the testimony presented at the evidentiary hearing and the transcripts from Applicant's plea and sentencing hearings, this Court finds Applicant has failed to meet his requisite burden of proof and that counsel's performance was in accordance with reasonable professional standards as required under the United States and South Carolina Constitutions. As an initial matter, this Court disagrees with Applicant's assertion that the State breached its plea agreement and finds the Deputy Solicitor's comment to the sentencing court requesting a sentence at the top of the negotiated range did not breach or otherwise violate the plea agreement entered into by Applicant and the State. Moreover, this Court finds counsel's performance was not constitutionally ineffective, as sentencing counsel likewise requested a sentence at the bottom of the negotiated range. Applicant was sentenced to twenty-five years in accordance with the negotiations he entered into with the State, and therefore, received the benefit of his bargain—a sentence within the range of twenty to thirty years imprisonment. Additionally, this Court notes Applicant did not testify he would not have pled guilty but for counsel's alleged failure to object to the State's request for a thirty year sentence. Rather, Applicant testified at the hearing that he was merely upset that his two cooperating co-defendants received more lenient sentences—both which were outside the negotiated range to which Applicant agreed before he entered his guilty plea. This Court finds Applicant has failed to establish any constitutional deprivations entitling him to relief and finds this application must be denied and dismissed with prejudice.

IV. CONCLUSION

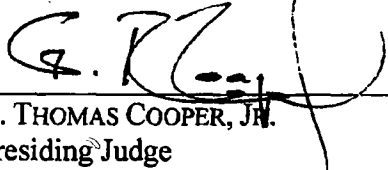
Based on the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 5 day of JUNE, 2018.


 G. THOMAS COOPER, JR.
 Presiding Judge
 Fifth Judicial Circuit

CAUDER, South Carolina

WITNESSES

✓
(S) William D Thompson – Richland County Sheriff

ARREST WARRANT NUMBER

1901833

SECTION OF GRAND JURY
TRUE BILL

Mena H Gardiner
Foreperson of Grand Jury JUN 16 2011
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011-GS40-03251

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JUNE TERM 2011

74

**THE STATE
vs.**

Darnell Khan

**Indictment for
ATTEMPTED ARMED ROBBERY**

SC Code: 16-11-0330(B)
CDR Code: 0026

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

**CERTIFIED TRUE COPY
OF ORIGINAL FILED**
Jeanette W McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on June 15, 2011, the Grand Jurors of Richland County present upon their oath:

ATTEMPTED ARMED ROBBERY

That Darnell Khan did in Richland County on or about January 27, 2009, attempt to commit robbery by feloniously taking from the person or presence of James Willie Smith and/or Jeremy Scott and/or Jamel Scott, by means of force or intimidation, goods or monies of the victims, with the intent to deprive the owners permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, all in violation of Section 16-11-325 of the South Carolina Code of Laws.

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



 DAN JOHNSON, SOLICITOR

WITNESSES

(S) William D Thompson – Richland County Sheriff

ARREST WARRANT NUMBER

1901834

ACTION OF GRAND JURY

TRUE BILL

Mena H. Gardner
Foreperson of Grand Jury
Date: JUN 16 2011

VERDICT

DOCKET NO. 2011-GS40-03252

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JUNE TERM 2011

74

THE STATE

vs.

Darnell Khan

**Indictment for
BURGLARY 1ST DEGREE**

SC Code: 16-11-0311

CDR Code: 0079

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I *Darnell Khan*
hereby appear in my own proper person and plead guilty to the within indictment or to

Darnell Khan
Defendant

Witness:
[Signature]
C.C.C. PLS. AND G.S.

**CERTIFIED TRUE COPY
OF ORIGINAL FILED**
Jeannette Williams
C.C.C.P.&G.S.
**RICHLAND COUNTY
SOUTH CAROLINA**

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

INDICTMENT

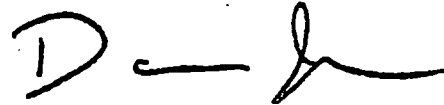
At a Court of General Sessions, convened on June 15, 2011, the Grand Jurors of Richland County present upon their oath:

BURGLARY, 1ST DEGREE

CDR: 0079 16-11-0311

That Darnell Khan did in Richland County on or about January 27, 2009 willfully and unlawfully enter the dwelling at ■■■ Morningside Drive, without consent and with the intent to commit a crime therein and the defendant entered during the hours of darkness and/or was armed with a deadly weapon while therein and/or caused physical injury to the victim, and/or used or threatened to use a dangerous instrument, all in violation of Section 16-11-311 of the South Carolina 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.



DAN JOHNSON, SOLICITOR

WITNESSES

(S) William D Thompson – Richland County
Sheriff

ARREST WARRANT NUMBER

1901835

ACTION OF GRAND JURY

TRUE BILL

Mewa H Gardner
Foreperson of Grand Jury
Date: JUN 16 2011

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011-GS40-03253

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JUNE TERM 2011

74

THE STATE
vs.

Darnell Khan

Indictment for
MURDER

SC Code: 16-03-0010
CDR Code: 0116

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I *Darnell Khan*
hereby appear in my own proper person and plead
guilty to the within indictment or to

Voluntary Manslaughter

Darnell Khan
Defendant

Witness: *Mewa H Gardner*
C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeannette W McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

