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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County

Honorable J. Mark Hayes, Circuit Court Judge

WAYNE MICHAEL SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001169

APPENDIX

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ORDER OF DISMISSAL FILED MAY 7, 2018592

1 experience, or if you conclude that the reasons given in
2 support of the opinion are not sound, the opinion is
3 outweighed by other evidence, you may disregard the opinion
4 entirely. An expert witness' testimony is to be given no
5 greater weight than that of any other witness simply because
6 the witness is an expert. Further, you're not required to
7 accept an expert's opinion even though it's not
8 contradicted.

9 Now, ladies and gentlemen, I instruct you and emphasize
10 that the fact that the Defendant in this case did not
11 testify is not a factor to be considered by you in any way
12 in your deliberation and in consideration on the question of
13 the guilt or innocence of the Defendant. It must not be
14 considered by you in any manner whatsoever. A Defendant has
15 the constitutional right to remain silent and the assertion
16 of this right must not be considered by you in your
17 deliberations. I repeat. Under your oath you are to draw
18 no conclusions whatsoever from the fact that the Defendant
19 in this case did not testify. The fact that Mr. Smith
20 didn't testify shouldn't even be discussed in the jury room.
21 The burden of proof, as I have stated to you, is on the
22 State. The Defendant is not required to prove his
23 innocence. The burden of proof is on the State to prove
24 guilt beyond a reasonable doubt.

25 Now, ladies and gentlemen, in this case, again, the

1 Defendant is charged with murder. The State must prove
2 beyond a reasonable doubt that the Defendant killed another
3 person with malice aforethought. Malice is defined as
4 hatred, ill will or hostility -- or hostility towards
5 another person. It's the intentional doing of a wrongful
6 act without just cause or excuse and with an intent to
7 inflict an injury, or on circumstances that the law will
8 infer an evil intent. Malice aforethought does not require
9 that malice exists for any particular time before the act is
10 committed, but malice must exist in the mind of the
11 Defendant just before and at the time the act is committed.
12 Therefore, there must be a combination of the previous evil
13 intent and the act. Malice aforethought may be expressed or
14 inferred. These terms express and inferred do not mean
15 different kinds of malice but merely the manner in which
16 malice may be shown to exist. That is, either by direct
17 evidence or by inference from the facts and the
18 circumstances which are proven. Expressed malice is shown
19 when a person speaks words which express hatred or ill will
20 for another or when the person prepared beforehand to do the
21 act which was later accomplished. For example, laying in
22 wait for a person or any other acts of preparation going to
23 show that the deed was within the Defendant's mind would be
24 express malice. Malice may be inferred from conduct showing
25 a total disregard for human life.

1 Now, ladies and gentlemen, the law says that if one
2 intentionally kills another during the commission of a
3 felony, the inference of malice may arise. If facts are
4 proven beyond a reasonable doubt sufficient to raise an
5 inference of malice to your satisfaction, this inference
6 would simply be an evidentiary fact to be taken into
7 consideration by you, the jury, along with other evidence in
8 this case, and you may give it such weight that you decide
9 it should receive. I instruct you further that strong-armed
10 robbery is classified in this state as a felony.

11 Now, ladies and gentlemen, if you find that the State
12 has failed to prove beyond a reasonable doubt that the
13 Defendant committed murder, you may consider whether the
14 State has proven beyond a reasonable doubt that the
15 Defendant committed involuntary manslaughter. To prove
16 involuntary manslaughter the State must prove beyond a
17 reasonable doubt that the Defendant unintentionally killed
18 the victim without malice, but while engaged in an unlawful
19 act not naturally tending to cause death or great bodily
20 harm. Unintentional means that the Defendant did not intend
21 for anyone to be killed or seriously injured. The State
22 must also prove beyond a reasonable doubt that the
23 Defendant's act was the proximate cause of death. I
24 instruct you the proximate cause is to find as the direct
25 cause. It's the immediate cause. It is the efficient

1 cause. It's that cause -- it is that cause without which
2 the death of the victim would not have resulted. There must
3 be a chain of causation from the time of the injury
4 inflicted by the Defendant until the time of the victim's
5 death. Proximate cause does not necessarily mean that it
6 occurred immediately prior to death. There may be more than
7 one -- I instruct you that there may be more than one
8 proximate cause. The Defendant's act may be regarded as the
9 proximate cause if it is a contributing cause of the death
10 of the victim. The fact that the other causes also
11 contribute to the death of the victim, such as the victim
12 being in poor health, does not relieve the Defendant from
13 responsibility. The Defendant's act may not be the sole
14 cause of the death, but must be a proximate cause
15 contributing to the death of the victim. It is not a
16 defense to show that the victim might have recovered had he
17 been treated according to the most appropriate, surgical or
18 medical standards, or as reasonably -- as a reasonably
19 prudent doctor would have treated in the case of -- in the
20 case or even by showing that the treatment was negligent.
21 In other words, negligence on the part of someone else would
22 not relieve the Defendant from liability if the injury was a
23 proximate cause of the victim's death.

24 Now, ladies and gentlemen, in this case there are two
25 possible verdicts. And, Mr. Foreman, I've prepared this

1 verdict form to sort of help guide your deliberations.

2 Okay? There's no specificity or no meaning to the order in

3 which I state the corresponding verdicts for each question.

4 It's just that one has to be stated before the other.

5 Now, first, ladies and gentlemen, the first statement

6 here basically says "We the jury in the above-captioned case

7 on the charge of murder unanimously find Wayne Michael

8 Smith" and then there are two options here for you to

9 initial, Mr. Foreman, not guilty or guilty. Okay? If you

10 find that the State has met its burden of proving the

11 Defendant's guilt beyond a reasonable doubt that he's guilty

12 of murder, and all 12 of you agree, then simply initial

13 guilty. And if you find the State has failed to meet that

14 burden then just initial not guilty and proceed down to the

15 second question. Obviously if you find the Defendant guilty

16 on the first one, you don't even go to the second one.

17 Okay? Again, if you find the Defendant not guilty of

18 murder, you would then consider whether the State has proven

19 the Defendant's guilt beyond a reasonable doubt on the

20 charge of involuntary manslaughter. The second statement is

21 pretty much identical to the first. It says, "We the jury

22 in the above-captioned case on the charge of involuntary

23 manslaughter unanimously find Wayne Michael Smith" and then

24 again two options for you choose. Just initial whichever

25 one the jury is unanimous on. Okay? Just like you would

1 for the first.

2 Now, ladies and gentlemen, again, your verdict has to
3 be a unanimous one. That means that all 12 of you must
4 agree. We do not have majority verdicts in South Carolina.
5 I do not think we should ever have majority verdicts in
6 South Carolina. So all 12 of you must agree on the verdict.
7 When the jury has agreed on the verdict, Mr. Foreman, simply
8 knock on the door, let the bailiff know, and we'll receive
9 you back in here as soon as I can get everybody gathered
10 back up. Okay?

11 Ladies and gentlemen, I remind you that you've been
12 chosen as fair and impartial jurors in this case. In other
13 words, you have no friends to reward. You have no enemies
14 to punish. Your job is to render a verdict based solely
15 upon the evidence and the law as I have instructed you.

16 Now, ladies and gentlemen, I'm going to ask in a few
17 moments that you adjourn to the jury room, but don't start
18 your deliberations yet. Okay? I need to give the parties
19 an opportunity to object to anything that I've said to you
20 in these instructions. It shouldn't take long. But long
21 story short, your cue to begin your deliberations will be
22 receipt of the items of evidence, these instructions and the
23 verdict form, and my asking our two alternates to step out.
24 Okay? So when all that happens, that's when you can start
25 talking about the case.

1 Additionally, ladies and gentlemen, I know that we're
2 bumping up against lunch time. Typically we -- we're more
3 than happy to order lunch for you if you feel like the
4 deliberations are going to take a little bit of time.
5 Usually it takes about 45 minutes to an hour to get the food
6 here. We normally order from the Dixie. It isn't fancy,
7 but it's usually pretty good. And your choices would be
8 like Dixie cheese hamburger, hotdog, or like a salad. Okay?
9 If any of you have any specific dietary needs or dietary
10 restrictions though an none of that fits, just let us know
11 and we'll try to accommodate that as best we can. Okay?

12 So one thing you may want to do when you go back there,
13 Mr. Foreman, is go ahead and survey the jury and see if you
14 want to order lunch. And if that's the case, I'll send the
15 clerk in with the exhibits when we're ready to do that. All
16 right?

17 Again, if you need to hear the recordings again, one of
18 them we can probably send to the back. There's another
19 recording that certain parts were not played for you because
20 there was irrelevant material in those parts, and so there
21 was no purpose in playing it. That tape we may have to play
22 out here. But the other ones we can send to the back and
23 perhaps find some mechanism for you to play those.

24 If you would, adjourn back to the jury room one last
25 time, but don't talk about the case yet. You know what your

1 cue to begin deliberations is.

2 (Whereupon, the jury exited the courtroom at 11:58
3 a.m.)

4 THE COURT: No exceptions except for what we've
5 already gone over from the State?

6 MS. WHITE: That's correct, Your Honor.

7 THE COURT: No exceptions from the Defense except for
8 what we've already gone over?

9 MS. NELSON: Yes, Your Honor. That's correct. And I
10 just need to make a very quick record about order of
11 closing.

12 THE COURT: Yes, by all means. Go ahead and do that.

13 MS. NELSON: Yes, sir. If I had -- if the Court had
14 granted my motion about order of closing I could have
15 responded to Ms. White's repeated assertions of Mr. Smith's
16 hands being around Mr. Baer's throat. There wasn't ever any
17 medical testimony of that type of strangulation. There was
18 only testimony of one -- the possibility of the evidence
19 showing that one hand was on the throat. I didn't get to
20 respond to that.

21 The cut on the hand, Dr. Woodard actually testified
22 that that could have happened in a fall. Ms. White
23 represented to the jury that I met with Dr. Woodard and he
24 told me there were signs of strangulation. That's just
25 absolutely not true. When I met with him he told me there

1 were no signs of strangulation, and I didn't have the
2 autopsy photos at that time to go over those. What Dr.
3 Woodard told me was that nothing in the injury section
4 contributed in any way to Mr. Baer's death.

5 And I believe that's it, Your Honor.

6 THE COURT: Very good. I understand your position.
7 The record is made, and clearly I understand that you are
8 taking the position that there was prejudice which resulted
9 from your failure to be able to argue last. I understand
10 that is the Defense position.

11 MS. NELSON: Yes, sir. Thank you, Your Honor.

12 THE COURT: Very good. I don't think I've run the jury
13 verdict form by you guys. Take a quick look at that. I
14 also had a question about the redaction yesterday. We were
15 going to be sure that we redacted the offensive material
16 from the six letters that Mr. Smith sent to the
17 investigator. I'm getting nods that this was, in fact,
18 done.

19 MS. WHITE: We did that. Yes, sir.

20 THE COURT: Very good. You all make sure about the
21 evidence. Let's make sure that everything that's going back
22 should go back and that nothing that's simply sealed or
23 otherwise for exhibit purposes or Court purposes is not
24 going back.

25 THE BAILIFF: Judge, I've got two smokers who would

1 like to smoke before they start deliberations.

2 THE COURT: Sure, that's fine. What we'll do is -- do
3 you know yet if they're wanting lunch?

4 THE BAILIFF: They haven't said yet.

5 THE COURT: Let them get the evidence together. When
6 you take it back there bring the two alternates out, bring
7 the two folks out who want to have a cigarette. Take them
8 out and -- I'm assuming they're going to want lunch. And
9 so, we'll send the clerk in with the menu options.

10 (Whereupon, the jury began deliberations at 12:07 p.m.)

11 (Whereupon, Court's Exhibit No. 4, a jury note, was
12 marked for identification at 1:30 p.m.)

13 (Whereupon, a recess was held from 1:30 p.m. to 2:01
14 p.m.)

15 (Whereupon, Court's Exhibit No. 5 was marked for
16 identification.)

17 THE COURT: We'll go back on the record in *State vs.*
18 *Smith*. The Court has received a communication from the jury
19 which is marked Court's 5. The jury has asked us to provide
20 a further definition of malice. I've reflected on it and
21 quote honestly I don't know that I can come up with a better
22 definition than that which has been provided to the jury
23 already. Obviously I can read that definition again, and
24 they have the jury instructions back there in the jury room.

25 Are there any suggestions or thoughts on how anyone

1 would care for the Court to handle that inquiry?

2 MS. NELSON: Your Honor, I would just suggest that you
3 tell them they've been fully instructed and to refer to
4 their copy of the instructions for the definition.

5 THE COURT: I think we're in agreement.

6 MS. WHITE: Yes, sir.

7 THE COURT: All right. I will tell them that it is
8 located on page 12 of the instructions. And let's have them
9 out, please.

10 THE BAILIFF: All of them, sir?

11 THE COURT: Please.

12 (Whereupon, the jury entered the courtroom at 2:03
13 p.m.)

14 THE COURT: The record should reflect that the jury is
15 back and seated. Mr. Foreman, ladies and gentlemen, I've
16 received a note wherein you are requesting that the Court
17 provide you a further definition of malice. Please
18 understand I would love to be able to do that. The
19 definition that I've already provided you, which is on page
20 12 of those instructions back there, is probably the product
21 of about 200 years of legal thinking collectively resulting
22 in that definition of malice, and in all likelihood the
23 people engaged in that legal thinking are a lot smarter than
24 I could ever hope to be. So I really don't know that I can
25 give you a better instruction of malice than the one that

1 appears on page 12 where the Court defines murder or
2 discusses the murder instruction with you. The second
3 paragraph under the heading of murder. So due to my
4 inability to give you a better instruction, I'm just going
5 to ask that you refer back to that. And obviously if you
6 need any instruction perhaps about what those specific words
7 mean, I think it -- I think it should be understandable the
8 way as written. But if you need any further instructions,
9 or you have something more specific, I'm more than happy to
10 help. But I'm not disposed really to give you a better
11 definition than the one -- I think the one that you've got
12 is the best.

13 So with that, I'll ask that you continue with your
14 deliberations. And if you need anything further, let us
15 know. Okay? Thank you.

16 (Whereupon, the jury returned to deliberations at 2:05
17 p.m.)

18 (Whereupon, a recess was held from 2:05 p.m. to 3:36
19 p.m.)

20 THE BAILIFF: Remain seated. Court come to order.

21 THE COURT: The bailiff has informed me that the jury
22 has reached a verdict. Anything further before we have the
23 jury reenter the courtroom from the State?

24 MS. WHITE: No, sir.

25 THE COURT: From the Defense?

1 MS. NELSON: No, sir. Your Honor.

2 THE COURT: Very good. Lawyers are very familiar with
3 what I'm about to say, but I say this for the benefit of
4 anyone who is here in attendance and just here as a
5 spectator. I understand that this has been a very emotional
6 time for everyone involved. I understand that tensions are
7 running a little bit high. What I need you all to
8 understand is that, of course, this jury has been asked to
9 make a very, very difficult decision, and this is something
10 that none of them asked to do. So I do not intend to allow
11 the jury's decision to be, for lack of a better word,
12 disrespected by any audible outbursts or any shock or cheers
13 or anything like that. Expressions of happiness or
14 disappointment. So if you feel yourself -- you're welcome
15 to stay here. But certainly if anyone feels like after the
16 verdict is read they're unable to contain their emotions or
17 keep their emotions in check, just quietly stand where you
18 are and move towards the exit, and at a later point in time
19 you can come back into the courtroom once you've composed
20 yourself. Okay? I don't know what the verdict is, but
21 obviously the jury has worked hard. And again, we're going
22 to show them and afford them the kind of respect that they
23 deserve. That just goes for everybody here.

24 Let's have the jury in, please.

25 (Whereupon, the jury entered the courtroom at 3:39

1 p.m.)

2 THE COURT: Let the record reflect that the jury is
3 back and seated. Mr. Foreman, I'm told that the jury has
4 reached a verdict. Is that correct?

5 MR. FOREMAN: That is correct.

6 THE COURT: And all 12 of you agree on the verdict?

7 MR. FOREMAN: That's correct.

8 THE COURT: If you would, hand the verdict form,
9 please, to Mr. Willingham.

10 Madam Clerk, you may publish.

11 MADAM CLERK: The State of South Carolina, County of
12 Greenwood, Court of General Sessions, case number 2013-GS-
13 24-1710, the *State of South Carolina vs Wayne Michael Smith*.
14 We the jury in the above-captioned case in the charge of
15 murder unanimously find Wayne Michael Smith not guilty. We
16 the jury in the above-captioned case in the charge of
17 involuntary manslaughter unanimously find Wayne Michael
18 Smith guilty. Signed by the Foreman, David Vickery, on
19 October 22, 2015."

20 THE COURT: All right. Ladies and gentlemen, if this
21 is your verdict, please indicate as much by raising your
22 right hand, please.

23 (Whereupon, jurors raise their right hand.)

24 THE COURT: Let the record reflect that all 12 jurors
25 have raised their right hand. Anything before the jury is

1 discharged from the State?

2 MS. WHITE: No, sir.

3 THE COURT: Anything from the Defense?

4 MS. NELSON: No, sir, Your Honor.

5 THE COURT: Very good. Ladies and gentlemen, I want to
6 thank you for your service here this week. And I know,
7 again, that none of you asked to come in here. None of you
8 volunteered to come in here. But again -- and certainly we
9 probably exposed you to some information and some testimony
10 that you otherwise might not have wanted to hear. Okay? I
11 do not like having to drag people in off the street and
12 expose folks to this kind of thing. If you see this sort of
13 thing day in and day out it's possible that people like me,
14 or some of the lawyers, you can become a little bit
15 desensitized to it and you don't fully appreciate how hard
16 it can be for folks who don't see this kind of thing every
17 day to work through this. I will tell you that I firmly
18 believe that any result that 12 people are able to reach, 12
19 people are able to agree upon, is a good result. And I
20 think that's one of the reasons that our country insists, or
21 our state at least insists on a unanimous 12 person verdict
22 before any result in any case, be it civil or criminal, has
23 had. All right?

24 I will tell you that you will receive a check as -- I'm
25 not going to call it payment because obviously it's not

1 going to be sufficient to compensate you for what you have
2 done these last four days for your inconvenience, but I'm
3 going to consider it -- please consider it a gratuity. An
4 express of our gratitude. It should be probably about \$40.
5 Okay? You'll get that sometime, in all likelihood, next
6 week. You will also receive from me a letter thanking you
7 for your jury service. Okay? The letter's purpose is
8 really twofold. As I've said, it's to thank you. But
9 perhaps more importantly, it's to solicit any feedback. So
10 if there's anything that you did like, anything that you did
11 not like, anything that you didn't understand, anything you
12 want to ask me about, please let me know. Specifically if
13 there's anything that you thought we could do to make jury
14 service more pleasurable for you or better for you, also let
15 us know that, too. And don't be shy about being honest in
16 that regard. One of the bailiffs have already mentioned
17 that they thought -- one of you thinks a window in there
18 would be great. The only problem is obviously it doesn't
19 look outside. So it would simply look into the hallway.
20 But maybe we can do something to spruce that room up a
21 little bit in the future.

22 I'm not going to keep you any further. But again, I
23 will thank you again for your service. You are free to
24 speak to anyone about this case at this point in time.
25 General rule is what happens in the jury room stays in the

1 jury room. But certainly if you want to discuss this case
2 with anyone you are free to do that. Sometimes lawyers will
3 contact jurors just to get feedback on how they did, how
4 their presentation went. And I know that that was very
5 helpful for me when I was trying cases. So you might get a
6 call. If you don't want to talk to the lawyer just say,
7 hey, I've heard you for three days straight. I really don't
8 want to speak any more to you. Okay? And they'll not
9 insist on talking to you.

10 With that, I'm not going to keep you any further. I
11 will ask the Foreperson to just stick around for two
12 seconds. I need you to sign the actual indictment. The
13 rest of you are free to go. And I will need those buttons
14 back, but you can keep my thanks. Okay?

15 You all have a great week. Take care. And I hope to
16 see you all around under less formal circumstances. You all
17 take care.

18 (Whereupon, the jury was released.)

19 THE COURT: We'll be at ease for a few moments.
20 Solicitor, we'll need a sentencing sheet, of course, on this
21 charge. The clerk kept the sentencing sheet from the plea
22 on Monday. So if you all could just figure out who's going
23 to speak in aggravation and mitigation I'm more than happy
24 to entertain that in about five or 10 minutes. Whenever you
25 tell me you have a sentencing sheet. Okay?

1 MS. WHITE: We'll be at ease.

2 (Whereupon, a recess was held until 4:02 p.m.)

3 THE COURT: Just in the way of housekeeping mattes.
4 We'll go back on the record. Ms. Nelson, any motions at
5 this particular point in time?

6 MS. NELSON: Your Honor, I'll be making written -- if
7 any, I'll be making it in writing after the -- after the
8 trial.

9 THE COURT: Very good.

10 MS. NELSON: I don't know whether there will be any or
11 not.

12 THE COURT: I understand then, I think. Solicitor, if
13 you would, I'm more than happy to hear about --

14 MS. WHITE: Your Honor, I'm sorry. One of the people
15 who wanted to speak had stepped out.

16 THE COURT: Oh, certainly.

17 MS. WHITE: I'm just waiting on them.

18 THE COURT: I'm more than happy to wait on them. While
19 they're coming back in, Ms. White, you had indicated to me
20 on Monday that Mr. Hurly did not have a -- not Mr. Hurly,
21 but Mr. Smith did not have a criminal history. He has no
22 convictions apparently? I'm looking at what you --

23 MS. SMITH: He does have -- he has two violations of
24 city ordinance convictions, Your Honor, from 2010, and I
25 believe he has some -- it's an out-of-state record so it's

1 hard to tell what the charge is. It says domestic
2 vandalism, malicious injury to property. He received a
3 probationary sentence on that.

4 MS. NELSON: I believe it's classified as a
5 misdemeanor, if I'm not mistaken, Your Honor.

6 MS. WHITE: And I believe that's the extent of his
7 criminal history. There are several family members who
8 would like to address the Court. Also, I would also have a
9 few comments for the Court.

10 THE COURT: Happy to entertain anything that you may
11 want to say, Solicitor, or that the Baer family might want
12 to say. I know this is very difficult for you all. This
13 whole weeks has been difficult. These whole two years have,
14 but I'm all ears.

15 MS. WHITE: Your Honor, you heard the recording, the
16 CI, when Mr. Smith was -- did not have his guard up. Was
17 not speaking with law enforcement. It was very callous. It
18 definitely showed a complete disregard for Mr. Baer's life.
19 And, Your Honor, I believe that shows his true feelings in
20 this case. Once he was caught he was very, very sorry, that
21 he'd been caught, but the recording in which he was laughing
22 said things like good riddance. I think that shows just how
23 little he cared that he robbed this family of a very loved
24 family member.

25 THE COURT: Thank you, Ms. White.

1 THE COURT: And it's Ms. Rinaldi, correct, ma'am?

2 MS. RINALDI: Yes.

3 THE COURT: Yes, ma'am.

4 MS. RINALDI: I don't know what the maximum is, but I
5 ask you to give him the maximum that you can give. We're a
6 very close family. I don't know him. I've never met him.
7 And I respect the jury's decision. I know it was very hard.
8 I've been on juries before. But I'm asking you to give
9 whatever maximum sentence that you can give him for our
10 sake. Because Phillip can never come back. He was color
11 blind. What I mean to say, that I'm not talking about the
12 color of his skin. He was the type of person that he liked
13 everybody, and that came out even with some of the people
14 that spoke that had criminal charges. I love my brother
15 very much. But this is one of the things that him and I
16 went round and round on. And he would -- and he would
17 actually argue with me over it, because I would say,
18 Phillip, that's not a very nice person. And he would say,
19 but he was my friend. You have to understand how my brother
20 was to understand that he was helping this boy. On the
21 table in his livingroom he had a piece of paper with
22 different churches that he was going to give to Wayne to
23 give to his wife where he could get food and diapers for
24 free for his children. This is the kind of person that's no
25 longer with us. Yes, he was a smoker, and he may have died

1 a year later. He may have died 20 years later. But that
2 was for God to decide, not for Wayne. And I do feel that if
3 the jury had of heard the first part where he actually said
4 he went in and took the money and took these things that the
5 jury -- the verdict would have been different. That part, I
6 don't understand, because they should have heard all the
7 evidence. Not just the part that they did hear. He had two
8 and a half years to come up with a reason of why. And I
9 know the only thing, because I've gone over this a hundred
10 times in my mind, especially last night, was the time
11 period. He had two and a half years to come up, and all the
12 different statements that he made, it was very smart on his
13 part. But he wasn't acquitted. And I'm asking you -- I do
14 not know what the sentencing is. We've never had this
15 happen to our family before. I don't know. Please keep us
16 in mind when you do sentencing. Thank you.

17 THE COURT: Thank you, Ms. Rinaldi. Mr. Baer.

18 MR. BAER: Your Honor, like my sister said, this is
19 something our family's never, never gone through. We've
20 always been a very close knit family. For us to endure for
21 two and a half years, finally there is closure to this
22 matter. We do respect the decision that the jury made. I
23 know it was not an easy decision. But at the same time
24 there's one person in the room that really knows what
25 happened that evening. I've prayed for this man, and I hope

1 somewhere in his heart that he finds true peace, if that's
2 possible. I personally, from what I know, and I know what
3 got my brother in a lot of trouble. He never saw color. He
4 never saw good or bad. He just saw people as people. And
5 as many times as I'd warned him about who he hung around
6 with, who he hired to do jobs, I knew one day there would be
7 one person that would take advantage of him, and that person
8 is in this courtroom today. And my brother's not here to
9 defend. If my brother was here, he was just the type of
10 person that he would forgive. He always had a forgiving
11 heart. Even his son, Frankie. Frankie felt like two months
12 before this situation happened he could have stepped in. He
13 could have done something. Because Mr. Smith had been over
14 his apartment prior to that and had demanded some things
15 from my brother. He knew about it. He didn't call the
16 police. His dad said, don't worry about it. I'll take care
17 of it. And because it was not acted on at that particular
18 time, and Frankie will always have to live with that, this
19 is the outcome of that. And, of course, you never know what
20 lies down the road. So, Your Honor, all I can say is, you
21 know, I just don't think this man needs to be out on the
22 street any time soon. I think whatever the maximum is. And
23 you've heard the testimony. And the State did an excellent
24 job of what they had to present. I have no qualms about
25 anything. I thought they did an outstanding job. But

1 again, whatever the maximum sentence is for this gentleman,
2 I think it needs to be exercised.

3 THE COURT: Thank you, Mr. Baer.

4 VICTIM ADVOCATE: Frankie has something he wishes to
5 pass up to The Court. It's too much for him to speak today.

6 THE COURT: Sure. Thank you. Did you want to take a
7 look at this beforehand. I'll be happy to let Ms. Nelson
8 take a look at it. Thank you. I understand completely.
9 Anything further from the State?

10 MS. WHITE: No, sir.

11 THE COURT: Ms. Nelson.

12 MS. NELSON: Thank you very much, Your Honor. I don't
13 know if it will mean anything coming from me, but I do -- I
14 am very sorry for the Baer family's loss, and it's always a
15 terrible situation to come in court on cases like these when
16 there have been losses on both sides. Certainly theirs is
17 irrecoverable.

18 We certainly respect what the jury has decided, Your
19 Honor. And I believe Your Honor already knows that this is
20 exactly the resolution we offered to try to avoid having to
21 bring this case to trial, have people called to the stand.
22 I would ask, Your Honor, to keep that in mind. I know Your
23 Honor's familiar with the trial tax phrase and that people
24 are sometimes rewarded for -- the opposite of that is people
25 are rewarded for pleading guilty. And I would just ask you

1 to consider that Wayne did make an offer through me to
2 acknowledge his guilt for exactly what the jury has
3 convicted him for and to take that into consideration in
4 your sentence.

5 Wayne has been incarcerated since he was arrested on
6 July 25th of 2013. So over two years now. And, of course,
7 we would ask that you give him credit for that time he has
8 served. He, as Your Honor as heard, does not have any
9 substantial criminal record. Has never been in general
10 sessions court before. He met Dana when they were about
11 16-years-old and they got married when they were 18 in 2007.
12 And until this happened were happily married. Had a happy
13 family. Three young children together. He, as Dana told
14 you, did his best to provide for them. At the time that
15 this happened he was working through a local staffing agency
16 temping out for Fuji Film and had been there for about a
17 year and has worked at various other places in the community
18 supporting his family. I truly believe, Your Honor, and
19 have all along that Wayne never intended the result that
20 happened that night. And I know what Ms. White has said
21 about the recording, but also there were times, when Wayne
22 talked to Kenneth Clark, for example, when there was no law
23 enforcement around and Wayne did not have his guard up when
24 he expressed his remorse, and Kenneth Clark could tell that
25 Wayne was torn up about what had happened. He's not a

1 heartless monster, Your Honor. He made a very bad decision
2 when he picked up Mr. Baer's computer and a result happened
3 that he did not ever intend but certainly understands that
4 he is responsible for. And understands that -- understands
5 the consequences.

6 Your Honor, I'm just asking you to -- I think it's
7 clear why Wayne chose to take this case to trial. This is
8 not a case where someone is clearly guilty of murder with
9 absolutely no defense, absolutely no explanation who just
10 refuses to work a case out. There's also been some comment
11 made about how he didn't come in and plead to the strong-arm
12 until Monday. But, Judge, I think I may have explained to
13 you in chambers there were no plea negotiations started in
14 this case at all until about a month, month and a half ago.
15 And I really did not ever even entertain the possibility of
16 Wayne pleading to one of the charges and not the other until
17 shortly before trial, because that's just not how we
18 typically handle these kids of things. But I think he also
19 at least deserves some amount of credit for coming in here
20 and removing that from the -- from the need for the jury to
21 decide it, completely accepting responsibility for it. And
22 it was -- that idea actually came from Wayne is what Ms.
23 Bolen is telling me. We didn't suggest that to him. He
24 said, well, hey, I mean, I know obviously I'm guilty of the
25 strong-arm robbery. Can I just go ahead and plea to that.

1 So it was not something that Ms. Bolen and I thought of
2 independently and had been trying to get him to do for a
3 long time to get him to do. I believe that he deserves some
4 credit for acknowledging that, Your Honor. And given his --
5 he's 26-years-old. He was 24 at the time this happened.
6 And given his youth, his stability before this happened, his
7 lack of any significant criminal history, we're asking that
8 you be as lenient as possible under all the circumstances of
9 this case, Your Honor.

10 THE COURT: All right. Thank you. Mr. Smith, anything
11 that you would care to say, sir?

12 THE DEFENDANT: Yes, sir. Your Honor, for the family I
13 would say I'm sorry. I really didn't mean to hurt nobody.
14 What they're saying about Phillip Baer is honestly true. He
15 was a good guy. I'm not going to take nothing from him. I
16 told them from the beginning I was wrong. I was wrong. And
17 I told them I deserved time and I'll do it. I'm not
18 debating that at all, Your Honor. But I was a loving
19 father. A good husband. I did try to provide the best
20 where I can coming from nothing. I tried. I have no mom.
21 I have no dad. I tried the hardest I can and I make a
22 mistake. And I do -- I apologize. I am sorry for what I
23 did. I'm just hoping you give me the best chance possible.
24 Whatever you give me, I deserve it. I mean -- but I don't
25 want to be another -- I don't want to be -- I don't want to

1 have to go in there and come up to nothing. My kids have to
2 suffer. I'm sorry. I don't know if I really deserve that
3 type of sympathy, but I'm asking for it. I'm sorry to the
4 family. I am sorry. I can't give Phillip back. I can't say
5 I understand. But -- it's just difficult. Like I said, I
6 offered this from the beginning. I told them what I did was
7 wrong. I honestly did. That's all I've got.

8 THE COURT: Thank you, Mr. Smith. Anything, Ms. Bolen,
9 from you?

10 MS. BOLEN: No, sir.

11 THE COURT: This goes without saying that we are in
12 agreement that involuntary manslaughter carries five years
13 as the maximum. Is that correct, Solicitor?

14 MS. WHITE: Yes.

15 THE COURT: Mr. Smith, in the for what it's worth
16 category, and just so you are aware, sir. I agree with Ms.
17 Nelson's statement that this case is different from a lot of
18 the homicides that I try, a lot of the murder cases that I
19 try in the sense that clearly you didn't go in there with a
20 weapon. I don't think that your intention when you got
21 there was to kill Mr. Baer. And I've presided over a number
22 of trials, and I always, always, always respect the decision
23 of 12 people who have reached a decision. And something
24 that you may be unaware of, but on the sentencing sheet that
25 was handed up to me by the Foreperson, one thing that was

1 written on there -- it was not solicited obviously by the
2 Court. But one thing that was written on there above the
3 Foreman's name was the phrase "max sentence". And I know
4 that the jury struggled with the proper result in this case.
5 And clearly they saw Phillip as truly an innocent victim and
6 someone who definitely did not deserve what happened to him.
7 I do understand, Mr. Smith, that you were willing to come in
8 here, and you have been willing to come in here and
9 basically plead guilty to what it was that you were
10 convicted of, and I do give you credit for that. I do give
11 you credit for accepting responsibility. And I do
12 understand fully that whatever recommendation, unsolicited
13 though it be that the jury made, clearly I'm not bound by
14 that. But the problem that I've had throughout this case,
15 Mr. Smith, is something that's just sort of been in the back
16 of my mind. And I'm just being honest with you. Okay, sir?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Candidly, I believe that the State proved
19 that you did put your hands about Phillip's throat. And you
20 may not have intended to kill him, but I do believe that you
21 strangled him. Okay? And that's just where I am coming
22 from, Mr. Smith. I feel that they did prove that. I
23 understand that you have an issue with that.

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: I understand that you have an issue with

1 that. But I'm satisfied in my own mind that's what
2 happened.

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And it occurs to me, because I'm forced to
5 concluded that in all likelihood that is what happened, I
6 have to ask myself whether after you did this spur of the
7 moment thing it would have been possible for Phillip to have
8 survived this if, instead of grabbing the laptop and
9 stealing the car, you had taken a few moments to dial 911
10 and at least let them know there's someone who is having a
11 heart attack at address X, Y, Z. An ambulance needs to get
12 here. And then grab the laptop and run away. So I have --
13 I have a problem with that, Mr. Smith. I understand and I
14 believe that you did not go over there that evening with the
15 intention to kill him.

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: But having done what you did, and having
18 placed a higher value on your liberty and your freedom than
19 you did the life of a 68-year-old man, I find that quite
20 shocking.

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: I've said it before. I'll say it again. I
23 believe that no one is ever permanently defined by the worst
24 thing that they have done in this world, by the worst thing
25 that they have done in their life, Mr. Smith. I don't

1 believe that that permanently defines us. If it does, then
2 that means we're all in a lot of trouble. All right? So I
3 believe that you do have many, many very positive
4 attributes. And even with this sentence, Mr. Smith, you
5 will one day see the light of day again. You will be able
6 to walk free again, and that's something that Mr. Baer
7 obviously will never be able to do --

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: -- because of your actions, sir.

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: So I have taken all of that into account.
12 I'm more shocked, Mr. Smith, at your reaction after the
13 assault took place perhaps than the fact that the assault
14 happened in the first place. I know that you may not have
15 intended the result. But quite honestly, sometimes it's
16 just better to hear a case, and it gives the Court a better
17 feeling for what an appropriate punishment is.

18 So I've taken all that into account. Mr. Smith, what
19 I've done is on indictment 1485, that's the strong-armed
20 charge --

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: -- I've given you 15 years on that. And
23 I've given you credit for the time that you have served
24 since July the 25th of 2013.

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: On the charge of involuntary manslaughter,
2 the sentence is five years. The sentence will be
3 consecutive, so you have 20 years to serve.

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: But you do get credit for the time that you
6 have served since July the 25th, 2013.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Smith, you took a life. Twenty years
9 is the price you're going to have to pay. Good luck to you,
10 sir.

11 MS. NELSON: Thank you, Your Honor.

12 MS. WHITE: Thank you, Your Honor.

13 THE COURT: We are adjourned on this case.

14 (Whereupon, the proceeding was concluded.)

15 - - - END OF TRANSCRIPT OF RECORD - - -

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1 Certificate of Reporter

2

3 I, the undersigned, Tara T. Scott, Official Court
4 Reporter for the Eighth Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing is a
6 true, accurate, and complete transcript of record of all the
7 proceedings had and evidence introduced in the trial/hearing
8 of the captioned case, relative to appeal, in the Circuit
9 Court for Greenwood County, South Carolina, on the 19th-22nd
10 day of October, 2015.

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

13

14

15

Tara T. Scott

16

Tara T. Scott, CVR

17

Circuit Court Reporter

18

October 21, 2016

19

20

21

22

23

24

25

WITNESSES

E W Brooks
Greenwood County Sheriff

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

November Term, 2013

Indictment # 13GS24- 1710

WARRANT NUMBER

2013A2410200967

THE STATE

vs.

Wayne Michael Smith

Jay Hill

Foreman of the Grand Jury

Date: 11/8/13

INDICTMENT FOR

MURDER
16-03-0010

VERDICT

Guilty B.11

CDR: 0116

Guilty of Involuntary Manslaughter.

Foreman

[Signature]

Oct. 22, 2013

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

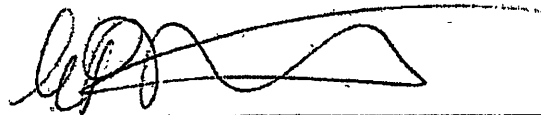
INDICTMENT FOR

MURDER
16-03-0010

At a Court of General Sessions, convened on the 8th day of November, 2013, the Grand Jurors of Greenwood County present upon their oath:

That Wayne Michael Smith, in Greenwood County, on or about July 12, 2013 willfully, feloniously, and with malice aforethought kill one Phillip Baer by means of a heart attack caused by strangulation and stress from said assault and that the said Phillip Baer did die in Greenwood County as a proximate result thereof on or about July 12, 2013, in violation of Section 16-3-10 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 cases made and provided.



Assistant Solicitor

WITNESSES

E W Brooks
Greenwood County Sheriff

WARRANT NUMBER

DIRECT INDICTMENT
2015D2400100121

Tim Bill

[Signature]

Foreman of the Grand Jury

Date: 10/16/15

VERDICT

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

October Term, 2015
Indictment # 15GS24- 1485

THE STATE

vs.

Wayne Michael Smith

INDICTMENT FOR

ROBBERY
§ 16-11-0325

CDR: 0137

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

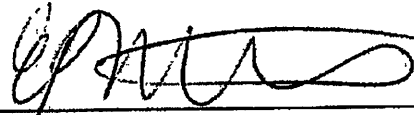
INDICTMENT FOR

ROBBERY
§ 16-11-0325

At a Court of General Sessions, convened on the 16th day of October, 2015, the Grand Jurors of Greenwood County present upon their oath:

That Wayne Michael Smith, on or about July 12, 2013, in Greenwood County, willfully, unlawfully and feloniously take, or attempt to take, by means of force or intimidation goods and/or monies from the person or presence of Phillip Baer, said goods and/or monies being described: one (1) laptop computer, one (1) television, one (1) 1998 Ford Ranger pickup truck, and United States currency, said goods and/or monies being owned by the said Phillip Baer, in violation of the South Carolina Code of Laws.

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



Assistant Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Greenwood
STATE VS.

INDICTMENT/CASE#: 13GS24-1710
A/W#: 2013A2410200967
Date of Offense: 7/12/2013
S.C. Code § : 16-03-0010
CDR Code #: 0116

Wayne Michael Smith

AKA:
Race: AFRICAN AME Sex: M Age: 26
DOB: -1988 SS#:
Address: Washington Street
City, State, Zip: Greenwood, SC
DL#: SID#:

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Involuntary manslaughter (up to 5 years)

CONVICTED OF or PLEADS

in violation of § 16-03-0060 of the S.C. Code of Laws, bearing CDR Code # 0218
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45
w/minor 1st or Lawd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's Initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: *[Signature]* 71182
White, Elizabeth SC Bar# Defendant

Attorney for Defendant

FILED GENERAL SESSIONS
CLERK OF COURT
2015 OCT 22 9:09 AM
COURT HOUSE
GREENWOOD, SC

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center
for a determinate term of 5 (five) days/months/years or under the Youthful Offender Act not to exceed
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 15-65-24-1485
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Credit for time served since July 25, 2013.
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP
Total: \$ plus 20% fee: \$
Payment Terms:
 Set by SCDPPPS

days/hours Public Service Employment

Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Recipient:

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk *[Signature]*
Court Reporter: *[Signature]*
SCCA/217 (03/2011)

Presiding Judge *[Signature]*
Judge Code: 2157
Sentence Date: October 22, 2015

STATE OF SOUTH CAROLINA

COUNTY OF Greenwood
STATE VS.
Wayne Michael Smith
AKA:
Race: AFRICAN AME Sex: M Age: 26
DOB: -1988 SS#:
Address: Washington Street
City, State, Zip: Greenwood, SC
DL#: SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 15GS24-1485
A/W#: 2015D2400100121
Date of Offense: 7/12/2013
S.C. Code §: 16-11-0325
CDR Code #: 0137

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Stong Arm Robbery (up to 15 years)

CONVICED OF or PLEADS

in violation of § 16-11-0325 of the S.C. Code of Laws, bearing CDR Code # 0137
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45 w/minor 1st or Lowd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Elizabeth White, SC Bar# 7182 Defendant; Janna White, Attorney for Defendant, SC Bar# 70306

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 15 (fifteen) days/months/years or under the Youthful Offender Act not to exceed
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payments
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Credit for time served since July 25, 2013.
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waiver Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Recipient:

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 9% to County (if paid in installments) \$3.90. Total: \$133.90

days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other: This accepted on 10-19-15. Interview
delayed until the Murder Charge is
resolved.

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk. during probation.

Clerk of Court/ Deputy Clerk: Angela Woodhurst
Court Reporter: Tara Scott
SCCA/217 (03/2011)

Presiding Judge: [Signature]
Judge Code: 2187
Sentence Date: Oct. 22, 2015

FILED GENERAL SESSIONS
CLERK OF COURT
GREENWOOD, SC
OCT 22 2015

COUNTY OF Greenwood

* Wayne Smith 365770
Plaintiff(s)

CIVIL ACTION COVERSHEET

vs.
State of South Carolina
Defendant(s)

~~2016-CP-24~~ ⁰¹⁰⁸⁹
2016 JUN -3 AM 9:15
FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

Submitted By: _____
Address: _____

SC Bar #: _____
Telephone #: _____
Fax #: _____
Other: _____
E-mail: _____

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Constructions (100) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Fraud/Bad Faith (150) <input type="checkbox"/> Failure to Deliver/Warranty (160) <input type="checkbox"/> Employment Discrim (170) <input type="checkbox"/> Employment (180) <input type="checkbox"/> Other (199) _____ | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (220) Previous Notice of Intent Case #
20 <u>-NI-</u> <input type="checkbox"/> Notice/ File Med Mal (230) <input type="checkbox"/> Other (299) _____ | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input type="checkbox"/> Assault/Battery (370) <input type="checkbox"/> Slander/Label (380) <input type="checkbox"/> Other (399) _____ | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (499) _____ |
| <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> PCR (500) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) _____ | <p>Administrative Law/Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstate Drv. License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture-Petition (840) <input type="checkbox"/> Forfeiture-Consent Order (850) <input type="checkbox"/> Other (899) _____ | <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) <input type="checkbox"/> Confession of Judgment (770) <input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780) <input type="checkbox"/> Other (799) _____ | <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Public Service Comm. (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) _____ |
| <p>Special/Complex/Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobile Arb. (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) _____ <input type="checkbox"/> Sexual Predator (510) <input type="checkbox"/> Permanent Restraining Order (680) | <ul style="list-style-type: none"> <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of-State Depositions (650) <input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660) <input type="checkbox"/> Pre-Suit Discovery (670) | | |

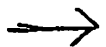
ATTEST A TRUE COPY
Angela Woolfhusen
ANGELA WOOLFHUSEN
CCCP AND GS
GREENWOOD COUNTY
S.C.

Submitting Party Signature: _____

Date: 5/27/16

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

I am writing in regards to the case number 15GS25. (Strong arm Robbery) I feel as though my rights have been violated with conflict of interest. The reason being that my lawyer was representing one of the informants on my case while she was representing me. It clearly states under the 6th amendment U.S.C.A that defense attorneys are obligated to inform the court of conflict of interest. She did not do that. Also where attorney is actively engaged in legal representation, which requires him/her to account to two masters. With this being said, I feel that she told him my case to free him and lock me up. She told me not to take this to trial because I would lose. My lawyer also stated that she did not represent me to the best of her ability. That she was inadequate. I have



S.C. code: (16-3-600) and (16-3-0600)
for ineffective assistance of counsel.

FORM 5

STATE OF SOUTH CAROLINA)

County of Greenwood)

Wayne Smith 865770)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2016-CP-24 01089

APPLICATION FOR

POST-CONVICTION RELIEF

2016 JUN -3 AM 9:05

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Greenwood County Detention Center
2. Name and location of Court which imposed sentence 8th circuit court Greenwood, SC
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 156824-1485

BEST A TRUE COPY
Angela Woodhuff
ANGELA WOODHUFF
CCCP AND GS
GREENWOOD COUNTY
S. C.

- (b) _____
- (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) 10/22/15
- (b) 5 years 65% Non-violent ran consecutive with
- (c) 15 years 65% Non-violent

6. Check whether a finding of guilty was made:

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

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

No

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

- (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
- (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
- (c) the date of each such result:
 - i. _____
 - ii. _____
 - iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____

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

- (a) My lawyer told me it would not help.

- (b) Also I was not sure how everything worked
- (c) _____

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

- (a) Conflict of interest
- (b) Ineffective assistance of counsel. S.C code (16-3-650)(16-3-0600)
- (c) I Pleds ~~guilt~~ guilty and the judge mark out my sentence
- (d) This was not strong arm robbery. I was not adequately represented

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

- (a) A man that wrote statements on me also ~~had~~ ^{was} represented
- (b) by the same lawyer as me. My lawyer told me
- (c) going to trial would hurt me and I would not win.

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

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

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

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

- (a) I have not filed anything else, except P.G.R.
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (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? _____

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

- (a) the name and address of each attorney who represented you:
 - i. Janna Nelson
600 Monument St P.O. Box-133 Greenwood SC 29646
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Plea, Trial, sentencing
 - ii. _____
 - iii. _____

Grounds: Counsel's performance fell below an objective standard of reasonableness
or if the Counsel would not have erred. There is a reasonable probability
the trial would have been different.
(Counsel performance prejudiced the defense.)

ineffective assistance of trial counsel

PCR - Counsel's prejudice was unprofessional

Pauling v. State (S.C. 2002) 350 S.C. 278, 565 S.E.2d 769

Gailman v. State (S.C. 1992) 307 S.C. 273, 413 S.E.2d 780

Grier v. State (S.C. 1989) 299 S.C. 321, 384 S.E.2d 722

6th Amendment Right was
violated as a result of
unprofessional errors.

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

To have a new trial and, or lesser sentencing on my strong arm robbery charge

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

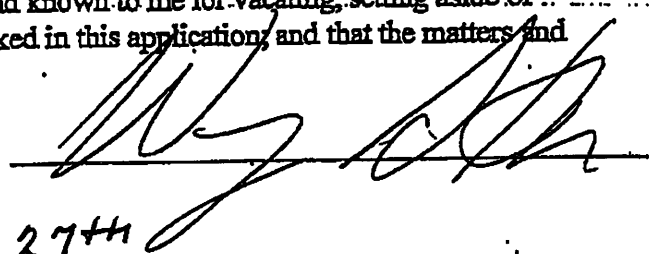
No

Revised 3/2003

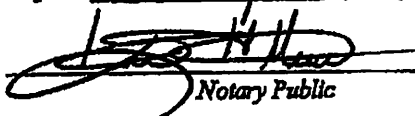
STATE OF SOUTH CAROLINA)
County of Greenwood)

VERIFICATION

I, Wayne Smith 365710, 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.



SWORN to and subscribed before me this 27th day of May, 2016.

 (L.S.)
Notary Public

My Commission Expires: October 7, 2024

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

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

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

Wayne Smith 365770
Applicant

SWORN or affirmed to and subscribed before me this
27th day of May, 2016.

[Signature]
Notary Public

My Commission Expires: October 7, 2024

WITNESSES

E W Brooks
Greenwood County Sheriff

WARRANT NUMBER

DIRECT INDICTMENT

2015D2400100121

Tim Bill

[Signature]

Foreman of the Grand Jury

Date: *10/16/15*

VERDICT

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

October Term, 2015

Indictment # 15GS24- *1485*

THE STATE

vs.

Wayne Michael Smith

INDICTMENT FOR

**ROBBERY
§ 16-11-0325**

CDR: 0137

THE STATE OF SOUTH CAROLINA**INDICTMENT FOR**

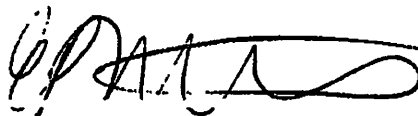
COUNTY OF GREENWOOD

**ROBBERY
§ 16-11-0325**

At a Court of General Sessions, convened on the 16th day of October, 2015, the Grand Jurors of Greenwood County present upon their oath:

That Wayne Michael Smith, on or about July 12, 2013, in Greenwood County, willfully, unlawfully and feloniously take, or attempt to take, by means of force or intimidation goods and/or monies from the person or presence of Phillip Baer, said goods and/or monies being described: one (1) laptop computer, one (1) television, one (1) 1998 Ford Ranger pickup truck, and United States currency, said goods and/or monies being owned by the said Phillip Baer, in violation of the South Carolina Code of Laws.

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



Assistant Solicitor

992 COUNTY OF Greenwood
 STATE VS.
Wayne Michael Smith
 AKA: _____
 Race: AFRICAN AME Sex: M Age: 26
 DOB: -1988 SS#: _____
 Address: Washington Street
 City, State, Zip: Greenwood, SC
 DL#: _____ SID#: _____

INDICTMENT/CASE#: 15GS24-1485
 A/W#: 2015D2400100121
 Date of Offense: 7/12/2013
 S.C. Code § : 16-11-0325
 CDR Code #: 0137

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was
 TO: Stong Arm Robbery (up to 15 years) CONVICTED OF or PLEADS

in violation of § 16-11-0325 of the S.C. Code of Laws, bearing CDR Code # 0137
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.
 ATTEST: [Signature] 7182 [Signature] Janna [Signature] 70306
 White, Elizabeth SC Bar# Defendant Attorney for Defendant PD SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, **FILED GENERAL SESSIONS**
 for a determinate term of 15 (fifteen) days/months/years or under the Youthful Offender Act not to exceed 15 years **GREENWOOD, SC**
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
 CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Credit for time served since July 25, 2013.
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SCDPPPS _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$-10/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

_____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund
 Other: Plea accepted on 10-19-15. Sentence deferred until the Murder charge is resolved.
 ANGELA WOODHURST
 CCCP AND GS
 GREENWOOD COUNTY
 S. C.

Appointed PD or appointed other counsel. § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Angela Woodhurst
 Court Reporter: Tara Scott
 SCCA/217 (03/2011)

Presiding Judge [Signature]
 Judge Code: 2189
 Sentence Date: Oct. 22, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENWOOD)
)
 Wayne Michael Smith,)
 S.C.D.C. No. 365770,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 OF THE EIGHTH JUDICIAL CIRCUIT

2016-CP-24-1089

RETURN

Respondent, making its Return to the application for post-conviction relief (PCR) filed June 3, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment by the Greenwood County Clerk of Court. Applicant was indicted at the October 2015 term of the Greenwood County Grand Jury for strong arm robbery (2015-GS-24-1485). He was represented by Janna Nelson. On October 19, 2015, he pled guilty as indicted before the Honorable Frank R. Addy, Jr., and on October 22, 2015 he was sentenced to imprisonment for fifteen years. Applicant did not file a notice of appeal.

II.

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

1. Ineffective Assistance of Counsel
2. Conflict of Interest
 - a. "A man that wrote statements on me also was represented by the same lawyer as me. My lawyer told me going to trial would hurt me and I would not win."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRCP(a).

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

III.

Respondent submits plea counsel rendered effective assistance of counsel. 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, 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 334 S.E.2d 813.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under

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

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

[Signature block on following page]

IV.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

V.

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

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

DON ZELENKA
Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

February 16, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENWOOD)
)
)
 WAYNE SMITH, #365770,)
)
) Applicant,)
)
) vs)
)
 STATE OF SOUTH CAROLINA,)
)
) Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS


2016-CP-24-1089

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:

Ashley A. McMahan, Esquire
 Mac | Vance Attorneys, LLC
 PO Box 5501
 West Columbia, SC 29171-5501

DATED this 16th day of February, 2017.



 Jocelyn Baker, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

WAYNE MICHAEL SMITH,)
)
 PLAINTIFF,)
)
 -VS-)
)
 STATE OF SOUTH CAROLINA,)
)
 DEFENDANT.)
 _____)

CASE NO.: 2016-CP-24-1089

TRANSCRIPT OF RECORD

FEBRUARY 27, 2018
LAURENS, SOUTH CAROLINA

BEFORE:

THE HONORABLE J. MARK HAYES, JUDGE

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

ASHLEY MCMAHON, ESQUIRE

ATTORNEY FOR DEFENDANT:

JUSTIN J. HUNTER, ASSISTANT ATTORNEY GENERAL

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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Cross-Examination by Mr. Hunter.....17

Janna Nelson,

Direct Examination by Mr. Hunter.....20

Cross-Examination by Ms. McMahon.....29

Certificate of Reporter.....32

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
	Plaintiff's 1 Letter		10

Wayne Michael Smith-Direct Examination

3

1 MR. HUNTER: May it please the Court, Your Honor. The
2 next case today is *Wayne Michael Smith vs. The State of*
3 *South Carolina*, 2016-CP-24-1089. Your Honor, he was
4 indicted October 2015 in Greenwood County for strong armed
5 robbery. And, Your Honor, just to clarify some background,
6 and I'm sure Ms. McMahon will correct me if I'm wrong. Mr.
7 Smith was indicted for murder and strong armed robbery. He
8 pled guilty to the strong robbery charge prior to the murder
9 trial. Sentencing was deferred until the end of the murder
10 trial. And just by way of reference, he was just found
11 guilty involuntary manslaughter as a result of that murder
12 trial. He was represented by Ms. Janna Nelson. October 19,
13 2015 he pled guilty. At the culmination of the trial he was
14 sentenced to 15 years for strong armed robbery.

15 Your Honor, he did not file a direct appeal. He filed
16 this current action June 3, 2016. He's present today
17 represented by Ms. Ashley McMahon.

18 MS. MCMAHON: Yes, Your Honor, and just as Mr. Hunter
19 did clarify, Mr. Smith is only challenging the strong armed
20 robbery plea. And at this time, we'll call Mr. Smith to the
21 stand.

22 WAYNE MICHAEL SMITH, having first
23 been duly sworn to tell the truth, testified as follows:

24 DIRECT EXAMINATION

25 BY MS. MCMAHON:

1 Q Mr. Smith, did you file this application?

2 A Yes, ma'am.

3 Q And you have several allegations in here, mostly which
4 is ineffective assistance of counsel. But who was your
5 attorney that represented you?

6 A Ms. Janna Nelson.

7 Q And she represented you on the strong armed robbery and
8 the other charge?

9 A Yes, ma'am.

10 Q How many times would you say you guys met?

11 A One time before trial -- like, maybe a week before
12 trial I seen her two times. But before that I seen her one
13 time. She -- a motion discovery in Court.

14 Q So were you in the detention center waiting this whole
15 time?

16 A Yes, ma'am.

17 Q So you were not out on bond?

18 A No, ma'am.

19 Q Was a bond set at all --

20 A No, ma'am.

21 Q -- and you just couldn't make it? You just -- no bond?

22 A There was no bond.

23 Q Did you ever ask to try to go back and get a bond set
24 or --

25 A We went for a bond reduction, but I was told pretty

Wayne Michael Smith-Direct Examination

5

1 much like I'm not going to get one because I'm not from this
2 state and my charge. I'm a flight risk, so it was
3 pointless.

4 Q And that's because you're from Rhode Island?

5 A Rhode Island.

6 Q So did you ever had that hearing?

7 A We had one bond hearing.

8 Q And was that when they ruled you were a flight risk?

9 A (Nonverbal response).

10 Q Okay. And so, you are alleging that you -- it was
11 ineffective. So let's go over what you felt she was
12 ineffective on doing. So one of your issues had to do with
13 a conflict of interest that you felt Ms. Nelson had. Could
14 you explain to the Court what that was?

15 A I had a person write a statement when I was in the
16 county jail supposedly saying I said something about my
17 case, but at that same time he had Janna Nelson as a lawyer,
18 too, the same time that he wrote a statement against me.
19 Now, she wasn't there. I don't know. But she was my lawyer
20 as well as his lawyer, so...

21 Q Do you remember who that guy was?

22 A Josh Ritter. Joshua Ritter.

23 Q So he was also represented by Ms. Nelson at the time
24 that he wrote the statement against you?

25 A Yeah.

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6

1 Q And what did that statement say, do you know?

2 A He said that I told him that I went to a house to
3 blatantly rob and kill a man.

4 Q So this was a guy that was in the detention center with
5 you --

6 A Yeah.

7 Q -- and he says that you were telling him all this when
8 you guys were together in the detention center?

9 A Yeah. He wrote it and they gave him a PR bond.

10 Q So he got out on bond?

11 A Yeah. The case came up. They said the case -- they
12 ain't have no more case against him after he wrote it.
13 After he wrote the statement, they said they had no more
14 case against him. I don't know if they dismissed it or
15 what, but he got out.

16 Q So your understanding that whatever charges were
17 pending against him were dismissed?

18 A Yeah.

19 Q Do you know how long Ms. Nelson represented Mr. Ritter
20 --

21 A No, ma'am.

22 Q -- or what she was representing him on?

23 A It was some type of manufacturing drugs.

24 Q How did you find out that she represented him?

25 A (Non-verbal response)

Wayne Michael Smith-Direct Examination

7

1 Q You just don't remember how you found out?

2 A No.

3 Q Did you bring that up with her?

4 A I believe I did. I believe I did.

5 Q Okay. But, I guess, if you believe you did, it doesn't

6 -- it wasn't a conversation that --

7 A No.

8 Q -- you really -- made any impact on you?

9 A No, it didn't. Pretty much, like, went over my head.

10 Q And so, you said you wanted to plead guilty to strong

11 armed robbery, so let's talk about that. Tell the Court

12 what happened with that.

13 A I was trying to get in touch with my lawyer for a very

14 long time. We went for a bond reduction about six months

15 into my bid. After that I didn't see her. I stayed in

16 county jail for over 28 months. I wanted to plead out the

17 strong armed robbery, and go down the road and come back.

18 Well, I couldn't -- every time I wrote her a letter I

19 wouldn't get no response back. It was very difficult to get

20 in touch with her. She wouldn't come to see me.

21 Q So when you saw her it was the few times she came to

22 see you in the detention center?

23 A Yeah, but all -- but this was right before trial.

24 Q Okay. That was --

25 A This was right before trial.

1 Q So the other, you said, two years or so it was pending.

2 So that amount of time you had written her how many times?

3 A Many.

4 Q And how often would you get a response to that?

5 A I don't -- I don't know if I ever got one back.

6 Q So you don't recall getting a response?

7 A No, ma'am.

8 Q And you were in the Greenwood Detention Center, right?

9 A Uh-huh.

10 Q And so, you -- you had indicated to her that you wanted

11 to go ahead and plead to this strong armed robbery straight

12 away?

13 A I wanted to.

14 Q Had somebody given you an offer on it or anything like

15 that?

16 A No. I wanted to plead to it, because when I had seen

17 her one time she had told me pretty much let's not worry

18 about the strong armed robbery. I was trying to figure

19 whether I could beat the strong armed robbery as well as the

20 murder. She told me don't worry about it, because it's not

21 our biggest problem. Our biggest problem is murder. So

22 that's pretty much it.

23 Q So did you feel if you went ahead and pled to it and

24 you were in SCDC that maybe the murder charge would kind of

25 be put to the side for a while?

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1 A No. I thought that if I pled to strong armed robbery
2 early on and it -- earlier on, then I wouldn't get 15 years
3 because I've never been in trouble a day in my life. I've
4 never been in trouble ever. So I thought I was getting a
5 reasonable sentencing. But instead, since I waited to the
6 murder trial and I beat murder -- be honest with you, I beat
7 murder charge. So it was -- they had to find a way to get
8 me for something, so they maxed me out on everything.

9 Q So did you feel like the Judge was then punishing you
10 through the strong armed sentence because of what had
11 happened in the murder trial?

12 A Yeah, because he had them wait -- they had me wait
13 until the sentencing was resolved. It said it right there
14 on my sentencing sheet.

15 Q So had you pled earlier and gotten sentenced on the
16 strong armed earlier, you don't feel like it would have been
17 impacted as much by the ultimate verdict in the murder?

18 A No. It was pretty much sure that I was going to lose
19 the murder, so.

20 Q And did Ms. -- did Ms. Nelson ever write you a letter
21 about that?

22 A Yeah. She told me -- I asked her about -- well, right
23 before -- after the sentencing the Judge ruled, she -- the
24 Judge said something about appeals and a couple other extra
25 things that I could do, and I asked her about it and she was

1 like, you know, let him finish talking to you and she'll
2 explain to me after. Well, in the midst of time it was like
3 I beat a real big charge and I'm not going to go to jail for
4 life. So I really -- it wasn't really a top priority to
5 fight an appeal or anything like that. So I didn't know
6 what the 10 day motion for reconsideration was until I
7 got to SCDC. When I got here -- at the time she told me, it
8 was like -- she said don't worry about it, you know what I
9 mean. So....

10 Q And is this the letter she ended up writing you about
11 your question?

12 A Yes. Yes, ma'am.

13 Q Is that a copy of that letter?

14 A Yes, ma'am.

15 Q Is that a true and exact copy of that letter?

16 A Yes, ma'am.

17 MS. MCMAHON: And I've given Mr. Hunter a copy of it.

18 At this time we would ask to move this in as Applicant's 1.

19 MR. HUNTER: No objection.

20 (Whereupon, Plaintiff's Exhibit number 1, Letter, was
21 marked for identification and admitted.)

22 Q And in that letter what did Ms. Nelson tell you about
23 how she felt?

24 A She told me that even if I moved for a motion for
25 reconsideration, she told me the judge would highly most

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1 likely not do it, because he was mad at me for multiple
2 reasons, and also because the jury told him to max my
3 sentence out regardless of what he was going to do
4 regardless, so...

5 Q So at the end of the murder trial where you ended up --
6 I believe you got involuntary manslaughter, right?

7 A Yes, ma'am.

8 Q He pointed out the jury verdict form and the jury had
9 written max sentence?

10 A Yes, ma'am.

11 Q But that was for that charge, right?

12 A As he said, max sentence. And he maxed my sentence
13 regardless of --

14 Q On the strong arm --

15 A The strong armed robbery, he maxed it. Everything he
16 maxed it.

17 Q What was the issue with Mr. Hurley in sending a letter?

18 A I had sent the letter to Mr. Hurley, which was a friend
19 of mine during trial, and that was all. They intercepted
20 the letter while I sent it to him. Actually I gave it to
21 him. The Judge had told me give it to him. I had give it
22 to him. The Judge retaped it and said there was nothing
23 wrong with it, so...

24 Q Who's Mr. Hurley?

25 A Zanquirous Hurley. I met him a couple years before I

1 went to trial.

2 Q Was he in the detention center at the time you were
3 trying --

4 A No.

5 Q -- to send this letter to him, or he was --

6 A No. He was actually a free man.

7 Q Was he watching the trial?

8 A Yeah, he was there for my trial.

9 Q And you sent a letter to him?

10 A Yeah.

11 Q So you had only -- talk about your plea offers that you
12 had gotten from Ms. Nelson. What were those?

13 A I believe one was life and the next one was 25. Maybe
14 if I plea out right now he might give me 20, or something
15 like that. It was crazy talk.

16 Q And was that for both of the charges combined?

17 A I believe so.

18 Q When did you get that offer for the 25 years?

19 A Right before trial.

20 Q About two days or so?

21 A If that.

22 Q There was never any discussion of plea offers prior to
23 that?

24 A No.

25 Q Other than your request that you wanted to go ahead and

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1 plead and get sentenced on the strong arm there was no other
2 suggestion of what -- any offers from the Solicitor pleading
3 to the murder or anything like that?

4 A No. At the time -- right before the trial I tried to,
5 what you say, fire Ms. Nelson, because she was not answering
6 me or nothing and I'd been there almost three years and I
7 don't know nothing yet. I don't know.

8 Q But that -- that didn't work?

9 A No.

10 Q And so, back to the letter. What was her response when
11 you asked why she didn't move to reconsider the sentence?

12 A Because she said the Judge was mad at me. Aggravated.
13 I'm sorry. He was aggravated, because the jury told him to
14 max me out.

15 Q Yeah, on the -- in the involuntary manslaughter charge,
16 because that strong armed never was before the jury,
17 correct, because you'd already pled to it?

18 A Yeah.

19 Q What else did you feel like Ms. Nelson should have done
20 to assist you?

21 A I believe she should have asked me what I wanted to do
22 beforehand, maybe six months into my bid, eight months into
23 bid get me a good -- counsel me. She's a counselor. She's
24 supposed to advise me of different things that I can and
25 can't do. Ways to go about situations. I didn't know

1 nothing.

2 Q So she didn't advise you of any possible different
3 routes you could have taken throughout --

4 A No.

5 Q -- your representation?

6 A No.

7 Q Did she talk about what you were facing? What kind of
8 time you were facing?

9 A Yeah.

10 Q Did she go over the evidence with you?

11 A Yeah, a couple -- a couple times before trial she did
12 go over all the evidence, statements from other people.

13 Q And what was your defense? What was the biggest thing
14 that you were trying to get out, getting a verdict from
15 this?

16 A On the strong armed robbery?

17 Q Yeah.

18 A The fact that I didn't intimidate the man or --

19 Q And that sort of came out in the plea a little bit?

20 A Yeah. I told him we got into an altercation, but I
21 didn't -- I didn't try to take nothing from him. The
22 statute says I have to intimidate or physically take
23 something from him. I didn't intimidate or physically take
24 nothing. Even in my plea I didn't tell him I physically or
25 intimidating or --

Wayne Michael Smith-Direct Examination

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1 Q You said intimidated or physically what?

2 A Just put your hands on him. Take something physically.

3 Q So in the two plus years that it was pending, when was
4 the first time you met Ms. Nelson?

5 A I got arrested June -- I mean, July 24. I probably
6 seen her December, November or -- I mean, January. I'm not
7 really sure. It was within that three month range that I
8 did go to Court for my bond hearing.

9 Q That was the first time you met her?

10 A No, no. I'm sorry. I met her at the preliminary
11 hearing for like two seconds.

12 Q So the first time you met her when you saw her was at
13 the prelim?

14 A Yeah.

15 Q Had anybody else from the Public Defender's Office come
16 and seen you at the detention center?

17 A No.

18 Q Sort of like an intake person or anything like that?
19 So you saw her at the prelim, and then how long after that
20 did you see her again?

21 A My bond hearing.

22 Q And were you writing her at this time or --

23 A Yeah.

24 Q And then how far after that last bond hearing you were
25 finally tried?

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1 A After the bond hearing?

2 Q Yeah.

3 A Twenty-two months later.

4 Q So the 22 months you saw her, what, five, six times?

5 A No, I didn't see her in the 22 months except for like
6 two weeks before my trial. A week or two before my trial.

7 And I seen her, I want to say, two or three times within two
8 weeks I seen her two times. And I seen her with another
9 lawyer at the same time.

10 Q So once your case was getting prepared for trial is
11 when you --

12 A Yeah.

13 Q -- started seeing Ms. Nelson? Okay. Is there anything
14 else you want the Court to know today about Ms. Nelson and
15 how you feel she should have done -- handled things
16 differently?

17 A I think that Ms. Nelson -- the only thing is she should
18 have -- I was new to the situation. I've never been in
19 trouble, like I say, so I didn't know different things that
20 I could do to help my situation. I just laid down and put
21 my faith in her and --

22 Q So you weren't aware of the whole court process?

23 A No, not at all.

24 Q Had you ever been in trouble in Rhode Island?

25 A I been in trouble, but I never went to -- I never been

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1 convicted or anything.

2 Q So you definitely weren't aware of the court process?

3 A No.

4 Q And you just felt like she should have explained
5 everything a little bit better to you, like the step by
6 steps and all that kind of stuff?

7 A Yeah, she should have advised me I could plead out, or
8 we could've fought for a -- I really didn't want to plead
9 out I wanted to fight for a lesser included offense, because
10 that's what I was actually guilty for. But, I mean, I was
11 never advised of that until it was too late, and she told
12 me, well, plead out to this for 15 years, because if not, if
13 we go to trial right now and if you lose you're going to get
14 something called Felony Murder Rule and they're going to
15 give you the biggest number they can give you.

16 MS. MCMAHON: Answer any questions Mr. Hunter has.

17 CROSS-EXAMINATION

18 BY MR. HUNTER:

19 Q So on your strong armed robbery charge, did you ever
20 want a trial on that charge?

21 A Yes, I did.

22 Q You did want a trial on the strong armed robbery?

23 A Yes, I did.

24 Q Why did you -- I mean, did you when you were being
25 represented by Ms. Nelson?

1 A Yeah, I wanted to go to trial on both.

2 Q You told her you wanted a trial for strong arm? Why
3 did you --

4 A I'm sorry. I'm sorry. I'm sorry. Let me rephrase
5 that. I wanted to plead out. I didn't -- to a non-violent
6 sentence. I wanted to plead out. They wouldn't accept it.
7 So they forced me to trial, she said.

8 Q I'm talking about this strong armed charge that you
9 pled guilty to.

10 A That's what I'm talking about.

11 Q So why did you plead guilty?

12 A Because, like I said, she told me maybe a couple days
13 before I went to trial that if I was found guilty during
14 trial for strong armed robbery on murder, while I went for
15 murder at the same time, they would give me something called
16 the Felony Murder Rule. So even if I lost the involuntary
17 manslaughter, they were still going to hit me with a Felony
18 Murder Rule which would still be in these big numbers, or
19 life, or whatever.

20 Q So again, during that plea hearing, did you ever say
21 anything to the Judge about not wanting to plead guilty?

22 A No. Why would I? I understood what she told me.

23 Q Okay. So, but I'm just trying to understand. Are you
24 saying she coerced you into pleading guilty?

25 A No. I was told that if I didn't, then even if I won

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1 against involuntary manslaughter I was still going to get a
2 big number. So the only way that I was getting involuntary
3 manslaughter and keep involuntary manslaughter is if I plead
4 out now, take whatever plea they want to give me for this,
5 and then just fight this by itself.

6 Q So are you saying that's wrong advice?

7 A Yeah, it was a sort of -- it's sort of like a coercion,
8 because by the time I knew that it was a Felony Murder Rule
9 it was the date of my trial. It was -- I had no choice but
10 to plead out because, like I said, like I lost involuntary
11 manslaughter -- if I took the murder charge and I took the
12 strong armed robbery at the same time, if I lost involuntary
13 manslaughter, I'd have a big number, maybe life.

14 Q So you were coerced by her explaining the law to you?

15 A Not coercion, but just made understood -- just I
16 understood too late, or understood when there was no time
17 left. You had 28 months.

18 Q I mean, you could have told the Judge -- do you think
19 you could have told the Judge you didn't want to plead?

20 A If I'd told the Judge I didn't want to plead I'd had to
21 go to trial for it, and if I lost -- like I did on the
22 involuntary manslaughter, I would have caught life in
23 prison.

24 Q So as far as a plea or a trial, is there another option
25 you were looking for?

1 A Trial or plead. There's nothing else. Oh, yeah --
2 Yeah, I was looking for a lesser included offense. Like I
3 said a couple minutes ago, yes, I was looking for grand
4 larceny, or somewhere around there. Grand larceny, I
5 believe.

6 Q But the State wouldn't do that, right?

7 A No, the State would not do it for a lesser included
8 offense.

9 MR. HUNTER: That's all I have.

10 THE COURT: Any redirect limited to what he went into?

11 MS. MCMAHON: No, Your Honor.

12 THE COURT: Thank you, sir, you may step down. Watch
13 your step.

14 (Whereupon, the witness stepped down from the witness
15 stand.)

16 MS. MCMAHON: Your Honor, the Applicant rests.

17 MR. HUNTER: Your Honor, the State would call Ms. Janna
18 Nelson.

19 JANNA NELSON, having been duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. HUNTER:

23 Q Would you please state your name for the record.

24 A Janna Nelson.

25 Q What's your current title?

Janna Nelson-Direct Examination

21

1 A Circuit Defender, Eighth Judicial Circuit.

2 Q Is that where you were working back in 2015?

3 A Yes.

4 Q Can you just go over, I guess, the commencement of your
5 representation of Mr. Smith?

6 A We'd gotten an application, and since it was -- and we
7 got an application for Public Defender services, and since
8 it was a murder case it was something that I took rather
9 than assign out to someone else in my office. And then we
10 -- when we open the file we do a Rule 5, we send a letter to
11 the client, either in jail or, if they're out on bond, at
12 the address we have. And then, you know, you advise people
13 to the best of your ability. You try to work out a plea if
14 that's what they want. You prepare for trial if that's what
15 they want, like any other case.

16 Q So, do you recall when you first met with Mr. Smith?

17 A I don't. I know that I saw him at his prelim, which
18 was early on, but I don't have the dates of my visits with
19 him documented.

20 Q And roughly how long was it from your -- I guess the
21 beginning to the trial? The begin of your representation to
22 the trial date?

23 A I don't know. I think Wayne's testimony was accurate
24 on that. It took a long time to go to trial.

25 Q And you were the only one to represent him from your

1 office, correct?

2 A When we started prepping for trial Patrial Bolen from
3 -- who's no longer at our office, but she was there at the
4 time, she tried the case with me and worked on it with me in
5 trial prep.

6 Q Now, did you receive all the discovery from the State?

7 A I believe so. I mean, I didn't get -- there were
8 things that we didn't get until the very eve of trial that
9 -- which happens a lot in my circuit and other circuits, as
10 far as I know. And Wayne had made some statements that the
11 State actually didn't turn over to me until right before the
12 trial. But as far as I know -- I don't know of anything
13 that was missing, because how do you know if something's
14 missing. You don't know about it.

15 Q And did you share all the discovery with him?

16 A Yes.

17 Q Did you talk to him about what the State was planning
18 on presenting and what that meant as far as his defenses go?

19 A Yes.

20 Q Did he ever give you alibi witnesses or any -- anything
21 for you to investigate?

22 A Yeah. And we talked a lot about his movements on the
23 date of the incident, what he did. There was -- there was
24 like a little children's fair in town and he had gone home
25 to his wife and kids and they had gone over to -- to this

1 little amusement park kind of thing that was set up, I
2 think, near the library. And I went to whoever the person
3 was that was in charge of organizing that. We subpoenaed
4 the report. Got information about when the fair was
5 running. My investigator looked at some things about the
6 truck of Mr. Baer's that was found parked, as to when --
7 there was some kind of tag put on the truck by law
8 enforcement, and we looked into the time for that because we
9 were -- you know, we were trying to come up with a timeline
10 of what Wayne had been doing that day, because the goals in
11 the case were either to try and get an acquittal altogether
12 on murder, or to try to get it to involuntary manslaughter,
13 which we were successful at doing in the trial. So yes,
14 there was -- we did some investigation.

15 Q And let's just go to the plea offers. Do you recall --
16 well, first off, was this plea offer to strong armed
17 robbery, was that something that you guys thought all along
18 or just came up at the end right before trial?

19 A The State actually never offered the plea to strong
20 arm. I mean, that's what he was charged with. They -- and
21 I don't have this documented like I should either. But my
22 recollection was that the only offer that Wayne ever got was
23 to plead to voluntary manslaughter for some amount of years.
24 I don't -- I don't remember them offering life on murder,
25 because that's not an offer. But my best recollection is

1 that the only offer he ever got was to plead to voluntary
2 for a large amount of time and I don't -- I don't dispute
3 what he said about really that was in the 20, 25 range. It
4 was a high number. The strong arm came about because -- it
5 was actually -- my recollection is that it was actually
6 Wayne's idea. What we had been looking for to try to work
7 out a plea was to get him non-violent time. Sixty-five
8 percent time is what we were trying to do, which is
9 ultimately how it worked out. And if I remember right, I
10 made that offer numerous times to the prosecutor, can we --
11 to the effect of can we resolve this for something that gets
12 it out of 85 percent time. And I think we even -- I think
13 we even offered what the result was to try to just get it
14 out of voluntary manslaughter, and the State would never --
15 Ms. White, who was the Assistant Solicitor on the case,
16 wasn't ever amiable to any of those offers. I don't think
17 the -- Mr. Baers' family, the decedent's family, was
18 interested in resolving the case for that, and that
19 influenced Ms. White's position on it. But my recollection
20 is that when we met with Wayne he -- that pleading to the
21 strong arm was his idea is what I remember. And when he
22 brought it up I talked to Ms. Bolen about it and we actually
23 thought it was a pretty good strategic decision to be able
24 to go in to the jury at -- for the trial on murder and say,
25 look, this guy's already admitted to what he did wrong. We

1 felt like, it gave us a lot of credibility in front of the
2 jury to say, look, he went into this man's apartment, stole
3 his computer and drove off with his car, and he has accepted
4 responsibility for that. He's pled guilty. He's going to
5 be punished. But all -- you know, all you have to decide is
6 whether he had an intent to kill this man or if it was -- if
7 he didn't do anything wrong at all, or if it was something
8 less. And so, I thought it was a really good idea. And at
9 first Ms. White, the prosecutor, was not even -- she wasn't
10 interested in even have him plead to strong arm before
11 trial. She first told me I don't really want to do that,
12 but I don't know if I can stop you. I don't know if I can
13 stop him from doing that. And I said, yeah, I don't think
14 you can either. And so, that was what we ultimately did.
15 He pled to that before the trial, and he just wasn't
16 sentenced on it until after the trial.

17 Q So this plea to strong arm, did he ever indicate to you
18 well before that plea date, hey, I want to go ahead and
19 plead and get this out of the way?

20 A We -- I don't remember there ever being until close to
21 trial, I want to just plead to the strong arm. That may
22 have happened. What I remember is us talking about
23 primarily trying to get a plea offer that would get him into
24 65 percent time, and whether that involved -- generally I
25 remember those discussions as pleading to two charges,

1 whatever those were going to be, and getting him out of 85
2 percent time.

3 Q Now, I want to go over -- I believe his name is Josh
4 Ritter. He testified for the State. Did you represent him
5 at any point?

6 A I honestly don't know, and I don't -- I don't dispute
7 it. I didn't look that up before this hearing, because I
8 thought we were just going to be talking about the strong
9 arm plea, and so, I didn't double check what was going on
10 with Mr. Ritter. I can't imagine that I would not have --
11 once I -- once I figured that out, that I would not have
12 conflicted Mr. Ritter's case out of the office. But I don't
13 have -- I didn't look at that beforehand and I don't know
14 the answers.

15 Q And I believe you alluded to it. Was Mr. Ritter at all
16 involved in the strong arm robbery plea?

17 A Not that I know of.

18 Q So --

19 A You mean, did I work a deal with Mr. Ritter to get a
20 sentencing against Wayne that --

21 Q No, no, no. As far as his strong arm robbery plea is
22 concerned, just from the beginning of that plea hearing to
23 the end, did Mr. Ritter's name ever come up?

24 A I mean, in the context of us talking about discovery
25 and the fact that somebody had put him at the apartment,

1 yes.

2 Q So if you'd just explain what Mr. Ritter testified to.

3 A Right.

4 Q Would you explain to the Court what his involvement
5 was, what he said?

6 A He wrote a statement, as I recall -- and I didn't look
7 at this before the hearing either. But as I recall, he
8 wrote a statement putting Wayne at the apartment. Like
9 saying that Wayne had said some stuff to him in the jail.
10 And I was not involved with law enforcement getting that
11 statement from him.

12 MR. HUNTER: May I approach?

13 Q This is Applicant's Exhibit 1. Do you recognize that?

14 A Yes.

15 Q Can you just explain the circumstances that caused you
16 to write that letter?

17 A It would have been because I got a letter from Wayne,
18 and I assume, based on what I say in this letter, that he
19 must have asked me if there was anything that could have
20 been done about his sentence. And, like I told him in the
21 letter, the time for filing for a reconsideration motion was
22 passed. And I did tell him that I did not feel that filing
23 one would have changed anything at all. That I felt that
24 Judge Addy would have stood by his sentence, given the --
25 given the verdict and the jury's request for a maximum

1 sentence on the verdict form.

2 Q So you believe those two things affected, I guess, his
3 strong arm sentence?

4 A The jury writing that on the --

5 Q Yeah.

6 A Oh, I absolutely believe that affected the strong armed
7 sentence.

8 Q And can you just clarify the passing the note issue
9 that happened during trial?

10 A It was -- I don't know what day of trial it was, and I
11 didn't see it happened. I don't know if it was one of the
12 bailiffs or one of the Solicitors. But Zan Hurley, who
13 Wayne talked about, was sitting in the first row of the
14 Court -- in one of the front benches in the courtroom. And
15 I guess -- I didn't see it, but I guess Wayne handed him a
16 little piece of paper. And when somebody brought up that
17 may have seen this passing of the note, Wayne managed to get
18 it torn up, I guess while it was still in his pocket, or he
19 took it out and tore it up and put it back in his pocket.
20 So the note was torn up. And the Judge did demand to see it
21 and decided there wasn't anything wrong with it. It was --
22 he was asking -- if I remember right, he was asking --
23 saying a question about one of the jurors. Like, do you
24 know this juror. But it wasn't anything like can you tell
25 this juror to vote not guilty or can you contact this juror.

Janna Nelson-Cross Examination

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1 It was just something like do you know person X on the jury,
2 if I remember right.

3 MR. HUNTER: Beg the Court's indulgence one second.
4 That's all I have. I appreciate it.

5 THE WITNESS: Yes, sir.

6 CROSS-EXAMINATION

7 BY MS. MCMAHON:

8 Q So you sort of eluded to this earlier. The verdict
9 form, the involuntary manslaughter that said max sentence?

10 A I believe that's what it said.

11 Q And you believe that also would have affected the
12 sentence on the strong armed robbery?

13 A Absolutely. I don't disagree with -- with Wayne's
14 statement up here that if we had done -- if we had been able
15 to do just a plea to strong armed robbery earlier, that his
16 sentence might not have been 15 years. However, I also
17 don't remember us ever talking about just pleading to that
18 charge earlier on as an option. What I remember is that we
19 were always talking about some kind of resolution of one or
20 more charges that would get him out of 85 percent time. But
21 I absolutely think if we had gone that route, if I had
22 thought of that or if Wayne had suggested that to me
23 earlier, that that could have been a lower sentence on that
24 charge, yes.

25 Q If he had pled to strong arm --

1 A Earlier.

2 Q -- much earlier?

3 A Uh-huh.

4 Q Did you ever discuss the Felony Murder Rule with him?

5 A Yes.

6 Q And what exactly did you advise him on that?

7 A I mean, the Federal Murder Rule is going to apply
8 whether he -- whether he pled to the strong arm or was
9 convicted of it, and I did tell him that I thought that
10 while we might be able to do something about not getting a
11 guilty verdict on murder, that -- that the jury could --
12 that based on the facts that I knew were going to be
13 presented, that the jury could pretty easily find him guilty
14 of strong arm. And either way, whether they had found him
15 guilty or he pled to it earlier, the Felony Murder Rule was
16 going to apply. And it certainly was raised based on his
17 plea. So it wasn't -- it wasn't a situation where pleading
18 to the strong arm would negate the Felony Murder Rule.

19 Q Did Mr. Ritter's statement, would it have counted
20 towards the strong armed robbery as well as it would have
21 towards the involuntary? Would it have affected both?

22 A It would have -- I mean, they all happened at the same
23 time, so -- so yes.

24 Q Did you feel like Judge Addy was sort of mad at the
25 whole situation at the end of that trial because he got

Janna Nelson-Cross Examination

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1 involuntary?

2 A Because he got involuntary?

3 Q Because he got the lesser --

4 A I don't think Judge Addy was mad about the verdict
5 coming back involuntary, no. Judge Addy gave us that charge
6 over the State's vociferous objection, and he insisted that
7 that charge should apply, and that the facts supported it,
8 and so I don't think that Judge Addy was angry about the
9 jury coming back involuntary.

10 MS. MCMAHON: Okay. Nothing further, Your Honor.

11 MR. HUNT: Nothing from us.

12 THE COURT: Thank you, ma'am. You may step down.

13 THE WITNESS: Thank you.

14 (Whereupon, the witness stepped down from the witness
15 stand.)

16 MR. HUNT: Nothing else from the State, Your Honor.

17 THE COURT: Any reply?

18 MS. MCMAHON: No reply, Your Honor.

19 THE COURT: Thank you very much. I'll let you know.

20 - - - END OF REQUESTED TRANSCRIPT OF RECORD - - -

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Certificate of Reporter

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I, the undersigned, Tara T. Scott, Official Court Reporter for the Eighth 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 trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenwood County, South Carolina, on the 27th day of February, 2018.

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

Tara T. Scott

Tara T. Scott, CVR
Circuit Court Reporter
September 16, 2018

PUBLIC DEFENDER

Circuit Defender for the Eighth Judicial Circuit
 Abbeville, Greenwood, Laurens, and Newberry Counties
 Suite 208, Park Plaza
 600 Monument Street
 Greenwood, South Carolina 29646
 Phone: (864)229-9505 Fax: (864)227-1104

Janna A. Nelson
 Circuit Defender

April 07, 2016

Mr. Wayne Michael Smith, #365770
 Trenton Correctional Institution
 84 Greenhouse Rd.
 Trenton, SC 29847

Re: State v. Wayne Michael Smith
 Our File Number: 24A13-00000417

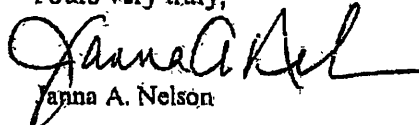
Dear Wayne:

It's good to hear from you and I hope you're doing as well as possible under the circumstances. We are way past the time limit for filing a motion for reconsideration of your sentence. It would have to have been filed within 10 days of your sentencing. Even if we had moved for reconsideration within that time frame, I really do think it would have been highly unlikely that Judge Addy would have changed his mind about the consecutive time. Based on my conversation with him after the trial, he made that decision in part because of the note on the jury's verdict form, and in part because he was aggravated with you about passing the note to Mr. Hurley during the trial.

As far as filing a PCR, you can certainly do that. You have a year from the date of sentencing to file it, and if you do, an attorney will be appointed to represent you. However, it won't be possible for you to get your time reduced with a PCR. If it is granted, you would essentially be put back in the same position you were in before trial, facing the same original charges. You would have a new attorney appointed to represent you for plea negotiations and/or a new trial.

I know these aren't the answers you were hoping to hear, but I hope this information is helpful. It was a pleasure to represent you, and I wish you nothing but the best for your future.

Yours very truly,


 Janna A. Nelson



STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)

Wayne Michael Smith,)
S.C.D.C. No. 365770,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE EIGHTH JUDICIAL CIRCUIT

2016-CP-24-1089

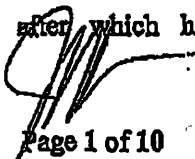
ORDER OF DISMISSAL

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2018 MAY -7 AM 9:53

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 3, 2016. Respondent made its Return on or about February 16, 2017. An evidentiary hearing into the matter was convened on February 27, 2018, at the Laurens County Courthouse in Laurens County, South Carolina. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Eighth Circuit Public Defender Janna Nelson, Esquire, testified. This Court had before it a copy of Applicant's records from the Greenwood County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial and plea transcript, Applicant's PCR Application, and Respondent's Return.

I. PROCEDURAL HISTORY

Applicant was indicted at the October 2015 term of the Greenwood County Grand Jury for strong arm robbery (2015-GS-24-1485). He was represented by Janna Nelson. On October 19, 2015, he pled guilty before the Honorable Frank R. Addy, Jr., to strong arm robbery and sentencing was deferred until after a related trial. After the plea, Applicant proceeded to a jury trial for murder (2015-GS-24-1485), after which he was found guilty of involuntary



manslaughter, and on October 22, 2015, he was sentenced to imprisonment for fifteen years for strong arm robbery and five years for involuntary manslaughter. Both sentences were set to run consecutively. Applicant did not file a notice of appeal. In his current PCR application, Applicant only challenges the guilty plea to strong arm robbery.

PCR Application

In his application for post-conviction relief, Applicant alleged the following grounds of relief:

1. Conflict of interest
 - a. "A man that wrote statements on me also was represented by the same lawyer as me. My lawyer told me going to trial would hurt me and I would not win."
2. Ineffective Assistance of Counsel

Applicant filed an Amended PCR Application, dated September 27, 2017, adding the following allegations:

1. Ineffective Assistance of Counsel as to Circuit Public Defender Janna A. Nelson:
 - a. "Conflict of interest - Ms. Nelson represented the individual that wrote a statement against the Applicant. The charges against that individual were ultimately dismissed."
 - b. "Applicant wanted to plead guilty straight away to the strong armed robbery charge but trial counsel would not let him do so."
 - c. "Applicant only received one offer for 25 years and that was 2 days before the guilty plea and trial. No other plea offers were ever communicated to the Applicant."
 - d. "Counsel did not move to request a reconsideration of the sentence. Judge punished the Applicant in sentencing because the Applicant exercised his right to a trial. See Castro v. State, 417 SC 77, 789 SE2d 44 (2016)."

II. APPLICABLE LAW

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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must

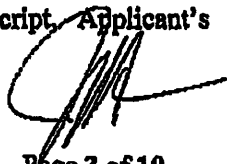
prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial and plea transcript, Applicant's records from the South Carolina



Department of Corrections, the application for post-conviction relief and amendment, the exhibits received at the PCR hearing, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Conflict of interest – Ms. Nelson represented the individual that wrote a statement against the Applicant.

Applicant alleged Counsel was ineffective because a conflict of interest existed due to Counsel representing Josh Ritter, an individual who wrote a statement against Applicant. Applicant alleged pending charges against Mr. Ritter were ultimately dismissed. Applicant testified Mr. Ritter wrote a statement saying Applicant told Mr. Ritter that Applicant committed the crimes. Applicant testified Counsel represented Mr. Ritter on drug charges.

Counsel testified she did not remember representing Mr. Ritter. She testified if she had represented Mr. Ritter, she would have said something. She testified Mr. Ritter's testimony put Applicant at the scene of the crime.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364

S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). A defendant need not demonstrate prejudices if there is an actual conflict of interest." Id., 364 S.C. at 153, 612 S.E.2d at 450.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to raise the issue of a conflict of interest. This Court finds Applicant has failed to show an actual conflict of interest existed as he has failed to show that Counsel did in fact represent Mr. Ritter, the case on which she represented him, and how Counsel represented conflicting interests. This Court finds Counsel's testimony credible that if a conflict was present she would have been aware and said something about it. As Applicant has failed to meet his burden of proving an actual conflict existed, he has failed to prove Counsel's performance was deficient. Furthermore, Applicant has failed to show he was prejudiced by Counsel's actions and this allegation must be dismissed.

Applicant wanted to plead guilty straight away to the strong armed robbery charge but trial counsel would not let him do so

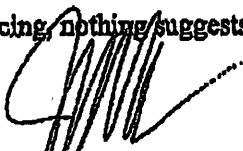
Applicant alleged Counsel was ineffective for failing to let him plead guilty to strong arm robbery sooner than his eventual plea. Applicant testified he wanted to plead guilty to strong arm robbery and wrote letters to Counsel but did not hear a response. He testified Counsel told him not to worry about the strong arm robbery charge because his murder charge would be a bigger problem. Applicant testified he thought if he had pled guilty earlier, he would have received a lower sentence than he eventually received because he believed the trial judge punished him for exercising his right to trial on his murder charge.

Counsel testified she did not receive any plea offers from the State on the strong arm robbery charge. She testified pleading to strong arm robbery was Applicant's idea. She testified she did not remember Applicant wanted to plead guilty until right before his trial started. Counsel testified she did not recall talking to Applicant about pleading guilty to only the strong

arm robbery charge. Counsel testified if she had thought about the possibility of Applicant pleading earlier to strong arm robbery or if Applicant had mentioned doing this, then they would have done so.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to allow Applicant to plead guilty. This Court finds there is no evidence that Counsel prevented Applicant from pleading guilty at an earlier date or that her performance affected his ability to plead guilty. Counsel appeared very credible at the PCR hearing. Counsel acknowledged at the PCR hearing that Applicant helped develop the plan for handling his cases. The plan was to have Applicant plead to the strong arm robbery charge (not violent or serious) and then proceed to trial on the murder charge and argue to the jury Applicant had already pled to crime which he is guilty of committing. The record reflects the strategy was successful and rejected the murder charge in favor of the lesser-included offense of involuntary manslaughter. Although Applicant's combined twenty-year sentence is significant, the sentences are not violent or serious, and applicant avoided the eighty-five percent mandatory time imposed on violent and serious crimes. Applicant has failed to meet his burden of proving Counsel's actions were deficient in this regard.

Furthermore, Applicant has failed to meet his burden of proving he was prejudiced by Counsel's actions. This Court finds there is no evidence the length of Applicant's sentence was a direct result of Counsel's conduct or that the timing of Applicant's plea affected his sentence. The trial judge's remarks at the time of sentencing indicate the reason for the sentence. The reasons do not suggest, in any way, that the twenty year sentence was due to his trial attorney's action or conduct. The judge's remarks relate solely to the facts underlying the case. If the trial judge was "mad" at the time of sentencing, nothing suggests it was Counsel who made him mad.



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Accordingly, this allegation must be dismissed.

Applicant only received one offer for 25 years and that was 2 days before the guilty plea and trial. No other plea offers were ever communicated to the Applicant.

Applicant alleged Counsel was ineffective for failing to work out a plea offer with the State. He alleges he only received one plea offer that was given two days before the plea and trial. Applicant testified his first plea offer was for twenty-five years combined for both charges. Counsel testified she received no offers to strong armed robbery charge. She testified she made an offer for Applicant to plead guilty to voluntary manslaughter as a lesser included offense of murder, but the solicitor would not take it. She testified it was ultimately his idea to plead guilty to strong arm robbery so they could argue to the jury that he had already pled guilty to the crime of which he was guilty.

This Court finds Applicant has failed to meet his burden of proving Counsel's actions were ineffective. This court finds there is no evidence Counsel failed to relay plea offers. This Court finds the State would not make offers for the strong arm robbery charge and Counsel attempted to work out a plea offer on the murder charge. This Court finds Applicant has failed to prove Counsel was deficient in her plea negotiations or that she caused any plea offers to lapse, or that she failed to relay plea offers. Applicant has failed to show there were offers not relayed to him or that he did not accept an offer due to Counsel's performance. Accordingly, Applicant has failed to prove Counsel was ineffective in this regard, and this allegation must be dismissed.

Counsel did not move to request a reconsideration of the sentence

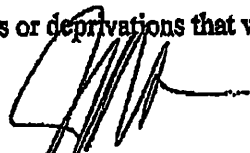
Applicant alleged Counsel was ineffective for failing to request a reconsideration of his sentence. He testified he believed the trial judge punished him for exercising his jury trial rights. Applicant testified he did not know about a motion to reconsider until he got to SCDC. Counsel testified Applicant sent her a letter asking her to file a motion to reconsider the sentence. Counsel

sent a letter back informing Applicant the time to file a motion to reconsider had passed and she believed it was highly unlikely the trial judge would change his sentence. In the letter, Counsel also informed Applicant she believed the judge's sentencing was a result of the jury writing "max sentence" on the verdict form and because the judge was aggravated with Applicant passing a note to someone during trial. Counsel testified she did not think the trial judge was mad that Applicant was convicted of involuntary manslaughter because the trial judge allowed the charge over the State's objection.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to file a motion to reconsider the sentence. This Court finds Applicant has failed to meet his burden of proving he timely requested this motion be filed and Counsel failed to do so. This Court finds there is no evidence the length of Applicant's sentence was a direct result of Counsel's conduct. Applicant has failed to meet his burden of proving he was prejudiced by Counsel's actions. This Court finds there is no evidence the trial judge punished Applicant for exercising his right to trial. As stated above, the trial judge indicated reasons for his sentence. The comments from the deceased's family to the judge prior to sentencing were powerful and clearly had an influence in the judge. In fact, the transcript reflects that the judge, too, was very articulate as to the reasons behind the sentence he imposed when he addressed Applicant. Nothing in the judge's remark can be seen by this Court as a reflection of deficient representation by trial counsel. As Applicant has failed to meet his burden of proving Counsel's actions were deficient or that he was prejudiced, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his



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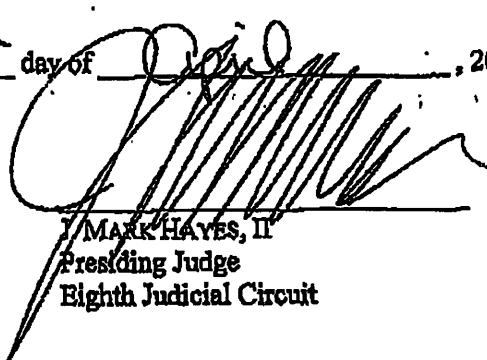
application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) 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), SCRCF, 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 shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20th day of June, 2018.


 MARK HAYES, II
 Presiding Judge
 Eighth Judicial Circuit

Greenwood, South Carolina