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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Clarendon County

Honorable Brian M. Gibbons, Circuit Court Judge

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MARCO ANDRE CLARK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001475

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APPENDIX

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State of South Carolina )  
 )  
County of Clarendon )  
 )

The State of South Carolina,  
Plaintiffs

vs.

Transcript of Guilty Plea  
09-GS-14-69

Marco Clark,  
Defendant

July 7, 2009  
Manning, S.C.

Before The Honorable Howard P. King, Judge.

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

Ms. Amy A. Land,  
Attorney for the State

Mr. Harry L. Devoe, Jr.,  
Attorney for the Defendant

Margaret T. Sullivan,  
Court Reporter

1 THE COURT: Anything we need to take up at  
2 this time, Ms. Land?

3 MS. LAND: No, sir.

4 THE COURT: Mr. Devoe?

5 MR. DEVOE: No, sir. Except the fact that  
6 my client wishes to change his plea from not  
7 guilty to guilty.

8 THE COURT: All right. So he wishes to  
9 change his plea from not guilty to guilty?

10 MR. DEVOE: That's correct, Your Honor.

11 THE COURT: All right, and come up please.  
12 Ms. Land, do you have the sentencing sheet?

13 MS. LAND: Yes, sir.

14 THE COURT: I have got the indictment.

15 (Whereupon, the defendant is sworn.)

16 THE COURT: Mr. Devoe, you are advised now  
17 that your client wishes to enter a plea of guilty.  
18 I am sure you have explained to him the two  
19 charges contained in this indictment, the possible  
20 punishment, and his constitutional rights.  
21 Including his right to a jury trial. As we have  
22 already drawn a jury. Is that correct?

23 MR. DEVOE: I have. I am sure, I told him  
24 about the sentencing range of the armed robbery.  
25 And I also mentioned the 5-year situation for the

1 possession of a weapon during a violent crime.

2 THE COURT: You are Marco Clark, is that  
3 right?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Mr. Clark, before I can accept  
6 your plea in this case, I have got to make sure  
7 that it is freely and voluntarily given. I am  
8 going to ask you some questions. If you don't  
9 understand that questions or the words that I use,  
10 you tell me. I will be glad to explain them to  
11 you. Or you may talk with your lawyer at any time  
12 as we go through this process, do you understand?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Speak loud and clearly so I  
15 can hear you and so the Court Reporter down here  
16 can hear you because we have to get all this on  
17 the record. How old are you, Mr. Clark?

18 THE DEFENDANT: I'm 27 years old.

19 THE COURT: And how far did you go in  
20 school?

21 THE DEFENDANT: Graduated.

22 THE COURT: So you have a high school  
23 diploma?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: What kind of work do you

1 usually do?

2 THE DEFENDANT: Carpentry work.

3 THE COURT: Are you today under the  
4 influence of any kind of drugs or alcohol?

5 THE DEFENDANT: No, sir.

6 THE COURT: Have you ever been treated for  
7 the use of alcohol or drugs?

8 THE DEFENDANT: No, sir.

9 THE COURT: Have you ever been treated---

10 THE DEFENDANT: I mean, hold it. What did  
11 you say, sir?

12 THE COURT: Have you ever been treated for  
13 the abuse of alcohol or drugs?

14 THE DEFENDANT: Oh, yes, sir, I have.

15 THE COURT: Tell me about that.

16 THE DEFENDANT: Well I've been to alcohol  
17 and drug abuse centers.

18 THE COURT: Were you treated inpatient or  
19 outpatient?

20 THE DEFENDANT: Inpatient.

21 THE COURT: Did you successfully complete  
22 those programs?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Does your alcohol or drug  
25 abuse affect your ability to know and understand

1 what you are doing here today?

2 THE DEFENDANT: I think it does.

3 THE COURT: You think it does?

4 THE DEFENDANT: I am not sure.

5 THE COURT: Do you understand what is  
6 going on today?

7 THE DEFENDANT: I know what is going on  
8 today.

9 THE COURT: That's what I mean.

10 THE DEFENDANT: Okay, yes, sir.

11 THE COURT: So in your opinion, it does  
12 not affect your ability to know and understand  
13 what is going on here today. Is that right?

14 THE DEFENDANT: I know what is going on.

15 THE COURT: And have you also ever been  
16 treated for mental illness?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Tell me about that.

19 THE DEFENDANT: Well since the age of  
20 about 15, 16, I have been going in and out of  
21 mental health. Or I have been in mental health  
22 for schizophrenia. And---

23 THE COURT: Do you remember being  
24 evaluated by the state doctor's in connection with  
25 this case?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay. And do you recall what  
3 you told them, what you told them at the time  
4 about this matter?

5 THE DEFENDANT: I don't recall everything.

6 THE COURT: You don't?

7 THE DEFENDANT: Some parts.

8 THE COURT: Okay. Let me make sure you do  
9 understand the charges and you understand what  
10 your legal rights are. The charges in this  
11 indictment, and it is just a charge at this point.  
12 But the indictment charges that on or about  
13 December 4th 2008, of last year, that you along  
14 with Alvin Washington and Leo Lamont Zene, did in  
15 Clarendon County while armed with a handgun,  
16 feloniously take from the Easy Shop convenience  
17 store by means of force or intimidation, certain  
18 monies from the Easy Shop convenience store. Do  
19 you understand what the charge is against you?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: The second charge against you  
22 in Count 2, charges that you did in Clarendon  
23 County on or about December 4th, while you were in  
24 possession of and did visibly display a handgun.  
25 And you were charged also with possession of a

1        weapon during the commission of a violent crime.

2        Do you understand that charge?

3                THE DEFENDANT:  Yes, sir.

4                THE COURT:  Now with regard to the armed  
5        robbery, I want to make sure that you understand  
6        what the possible punishment is.  Do you  
7        understand that the punishment for armed robbery  
8        is from 10 to 30 years in prison, and that there  
9        is a 10-year minimum.  Do you understand that?

10               THE DEFENDANT:  Yes, sir.

11               THE COURT:  You also understand that it is  
12        considered a violent crime pursuant to 16-1-60.  
13        And I am sure Mr. Devoe has explained to you what  
14        is meant by a violent crime, is that correct?

15               THE DEFENDANT:  Yes, sir.

16               THE COURT:  You also understand that under  
17        our two strikes or three strikes law, it is  
18        considered a most serious crime.  That means that  
19        after you get out of prison if you were to commit  
20        another most serious crime the state would have to  
21        seek the mandatory life without parole if you were  
22        to be convicted of another most serious crime.  Do  
23        you understand that?

24               THE DEFENDANT:  Yes, sir.

25               THE COURT:  Also do you also understand I

1 cannot give you a suspended sentence. In other  
2 words, as I say, the minimum sentence is 10 years.  
3 But whatever sentence I impose, I cannot suspend  
4 it and place you on probation. Do you understand  
5 that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And do you understand that  
8 this is a no parole offense. Which means that you  
9 would have to serve 85 percent of whatever I  
10 sentence you to before you could be released to  
11 any kind of community supervision. Do you  
12 understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You also understand that you  
15 will be required to give a sample of body fluids  
16 to register your DNA in the State DNA data base.  
17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And on the charge of  
20 possession of a weapon during the commission of a  
21 violent crime, that carries from 0 to 5 years in  
22 prison. Do you understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Now, Mr. Clark, when you plead  
25 guilty, you give up important constitutional

1 rights. First of all, you give up your right to  
2 have a jury trial. Now in your case, we have  
3 already drawn the jury. The jury is sitting in  
4 the jury room and is prepared to go forward with  
5 the trial of this case. If you should decide that  
6 you want a jury trial. However, if I accept your  
7 plea, the jury in this case would be discharged  
8 and will have nothing to do with making a decision  
9 in this case. Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: You also understand that in a  
12 jury trial, you would not have to testify. And  
13 you cannot be required to provide testimony or  
14 evidence against yourself. This is your privilege  
15 against self incrimination. And I would instruct  
16 the jury that they are not to presume anything  
17 from the fact that you elected not to testify in  
18 this case; that you have that constitutional  
19 right, but that you give that right up when you  
20 plead guilty. Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And third, you give up the  
23 right to confront the witnesses against you; that  
24 is the right the require the witnesses against you  
25 to come in to court and testify. Have your lawyer

1 cross examine those witnesses. And you have the  
2 right to subpoena and call witnesses on your own  
3 behalf. You give up those constitutional rights  
4 when you plead guilty. Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right, for the record, and  
7 again we had earlier today had a hearing with  
8 regard to the request of the defense to seek  
9 further evaluation of this defendant for both  
10 competency to stand trial and criminal  
11 responsibility. I overruled those motions for the  
12 reasons that I put on the record at that time.  
13 However, I would want the record to reflect at  
14 this time and to be a part of record in this  
15 guilty plea, the report from the South Carolina  
16 Department of Mental Health on the Competency  
17 Evaluation whereby the South Carolina Department  
18 of Mental Health did find that he would be  
19 competent. Or is competent.

20 Also under the State vs. Blair, the court  
21 would make a finding based upon that report, as  
22 well as my own observations of the defendant, and  
23 his responses to my questions. And I would find  
24 him to be competent to stand trial as well.

25 Mr. Clark, knowing full well your

1 constitutional rights and the fact that the jury  
2 is here prepared to try your case if you wish to  
3 have it tried. But I understand you wish to  
4 change your plea. I would ask you now, how do you  
5 wish to plea to the charges of armed robbery and  
6 possession of a weapon during the commission of a  
7 violent crime? Guilty or not guilty?

8 THE DEFENDANT: Guilty, sir.

9 THE COURT: You understand that when you  
10 plead guilty, you are admitting that the charges  
11 against you are true?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And you are pleading guilty  
14 because you are guilty?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Plea negotiations, Ms. Land?

17 MS. LAND: Your Honor, there is a  
18 recommendation, but it was not accepted. So we  
19 are going forward without any recommendations or  
20 negotiations.

21 THE COURT: Has anyone promised you  
22 anything or held out any hope of reward to get you  
23 to plead guilty?

24 THE DEFENDANT: No, sir.

25 THE COURT: Has anyone threatened you to

1 cause you to plead guilty?

2 THE DEFENDANT: No, sir.

3 THE COURT: Are you pleading guilty of  
4 your own free will and accord?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: You are represented in this  
7 case by Mr. Harry Devoe. Are you satisfied with  
8 the manner in which he has advised you and  
9 represented you?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Has he done everything for you  
12 that you feel he could have or should have done on  
13 your behalf?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Has he done anything you feel  
16 he should not have done?

17 THE DEFENDANT: No, sir.

18 THE COURT: Have you had enough time to  
19 make up your mind as to whether or not you want to  
20 plead guilty?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you talked to your lawyer  
23 for as long as you need to for you to decide if  
24 you want to plead guilty?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And your completed satisfied  
2 with his services?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you have any complaints  
5 that you want to make about your lawyer, the  
6 police officer, the solicitor, or anyone else in  
7 this case?

8 THE DEFENDANT: Not at this time.

9 THE COURT: Well now is the time to tell  
10 me. If you have got a complaint, I want to hear  
11 about it now, not after you get over in the South  
12 Carolina Department of Corrections.

13 THE DEFENDANT: I don't have any.

14 THE COURT: You don't have any complaints?

15 THE DEFENDANT: No, sir.

16 THE COURT: Sir?

17 THE DEFENDANT: No, sir.

18 THE COURT: And do you understand that you  
19 have the right to appeal the guilty plea and the  
20 sentence of the court and you must do so within 10  
21 days?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Ms. Land, tell me about it.

24 MS. LAND: Your Honor, this occurred on  
25 December 4th of 2008, at Easy Shop which is a

1 convenience store located at I-95 Exit 102 and  
2 St. Paul Road. The complainant was Ms. Tramisa  
3 Martin, who was the cashier at that convenience  
4 store. She called and said she had just been  
5 robbed by a black male named Marco.

6 Officers responded. One of them that  
7 responded is the gentleman to my left, Mat Mims,  
8 who is with the Summerton Police Department. And  
9 was advised of the incident over his radio. He  
10 came across a white Mazda SUV. Which was the only  
11 vehicle in that area. It was very early morning  
12 hours, traveling north, from the North Santee  
13 area. He performed a traffic stop on the vehicle.  
14 And at the time of the stop he noticed two open  
15 containers in the vehicle. He asked them to step  
16 out of the car and asked them for their driver's  
17 license.

18 One of the individuals in the car was  
19 Marco, and was in fact Marco Clark. And I may not  
20 have mentioned, Ms. Martin who was the cashier at  
21 the store knew Mr. Clark because she went to  
22 school with him. When the video from the  
23 convenience store where he comes in, he gets out  
24 his gun. He asks for the money. She gives him  
25 the money. And then she calls 911, and she says I

1 know that his name is Marco, because I went to  
2 school with him.

3 When Officer Mims found out that that was  
4 the individual in the car, he at that point placed  
5 all three individuals under arrest for armed  
6 robbery and searched the vehicle. Or asked  
7 permission to search and consent was given. They  
8 found in the vehicle an Easy Shop plastic bag with  
9 an undisclosed amount of money, and a  
10 semi-automatic handgun along with drug  
11 paraphernalia.

12 Ms. Martin also indicated to the police  
13 that Marco was wearing a gray hoody. They did  
14 find that hoody between the point where they left  
15 the Easy Go and where they were apprehended by  
16 Mr. Mims. Ms. Martin is of course here today,  
17 because we believed we were going forward in a  
18 trial. I am sure that this incident scared her a  
19 great dealt. Mr. Clark has a prior criminal  
20 record. And that is of strong armed robbery in  
21 2006.

22 The date of that conviction was December  
23 11th of 2006. So not even a year before this  
24 incident, which concerns us greatly. I  
25 indicated to the court that there was a

1 recommendation on behalf of the state. That was  
2 30 years. And I have chosen not to go with that  
3 recommendation. But of course under the case  
4 management system we're required to make an offer.  
5 We feel like this is the only fair offer. Because  
6 of this prior conviction that was so similar in  
7 nature, because of the upset that he caused Ms.  
8 Martin, and because of the danger frankly that all  
9 those officers were in that night when they  
10 apprehended Mr. Clark. And we ask that you  
11 sentence him to the maximum amount.

12 THE COURT: A couple of questions,  
13 Ms. Land. Let me ask you about it. The strong  
14 armed robbery in 2006, what was the sentence on  
15 that, do you recall?

16 MS. LAND: He got 5 years suspended to  
17 time served and 2 years probation. That appears  
18 to be in Richland County.

19 THE COURT: This happened in December of  
20 2008. Mr. Devoe, was he on probation at the time  
21 that this happened?

22 MR. DEVOE: I believe so, Your Honor. I  
23 think he had 6 days left on his probation.

24 THE COURT: Sir?

25 MR. DEVOE: I think he had 6 days left on

1 his probation.

2 THE COURT: Six days left on his  
3 probation. So he was still on probation.

4 THE COURT: Ms. Land, I may have missed --  
5 you may have told me. What time of day or night  
6 was this?

7 MS. LAND: It was in the very early  
8 morning hours.

9 MR. BURGESS: It was shortly after  
10 midnight.

11 THE COURT: Shortly after midnight?

12 MR. BURGESS: Yes, sir.

13 THE COURT: Mr. Mims, Mr. Burgess,  
14 anything either one of you would like to add to  
15 what Ms. Land has told me about the facts?

16 MR. BURGESS: No, sir.

17 MR. MIMS: No, sir.

18 THE COURT: Let me address the victims for  
19 just a moment, and tell you that as a victim in  
20 this crime, under our law, the Victim's Right  
21 Amendment that was passed a number of years ago  
22 and the implementing legislation, it provides that  
23 the victim has the right to be kept fully advised  
24 of everything that is going on. And I am sure  
25 that the Solicitor's Office has kept you advised

1 of everything. They also, the Victim's Rights  
2 Bill says that you have the right to be present  
3 even if they had not thought it was going to be a  
4 trial, you would have the right to be present.  
5 And you also have the right to address the court  
6 and tell me anything that you would like me to  
7 hear. So I will be glad to hear from you if there  
8 is anything you would like to tell me. Just give  
9 the Court Reporter your name, I'll be glad to hear  
10 from you.

11 MS. MARTIN: My name is Tramisa Martin.

12 THE COURT: Speak up just a little bit.

13 MS. MARTIN: My name is Tramisa Martin.

14 Like I say, yeah, we went to school together. I  
15 knowed him. I just thought he wouldn't, wouldn't  
16 have did it. I mean....

17 THE COURT: Okay.

18 MS. MARTIN: Yeah.

19 THE COURT: All right.

20 MS. MARTIN: Yeah.

21 THE COURT: The Court does find that there  
22 is a substantial basis for the plea. I find the  
23 defendant's decision to plead guilty is freely,  
24 voluntarily, knowingly and intelligently made.  
25 That he has had the advice of counsel of an

1 attorney with whom he says he is satisfied.

2 I would go on to say that in this case, I  
3 am aware of some mental health issues in the past  
4 from having read the report of the South Carolina  
5 Department of Mental Health. But according to  
6 what I have read, I believe that he was  
7 responsible at the time that he committed this  
8 crime. Did know the difference between right and  
9 wrong, based upon my observations of his answers  
10 to these questions. And I further believe that he  
11 is competent to stand trial again based on the  
12 rulings this morning. And the court will accept  
13 the guilty plea as proffered. Mr. Devoe.

14 MR. DEVOE: Thank you, Your Honor. You  
15 asked him a question concerning how many times he  
16 has been in mental health or in alcohol and drug  
17 counseling.

18 THE COURT: Yes, sir.

19 MR. DEVOE: I think the report shows that  
20 it was 5 times since 2004. Two of which were  
21 alcohol and drug related. He got out Three Rivers  
22 Center behavioral health on December 2nd 2008.  
23 His grandmother brought him back to Vance.

24 So the next day he goes into a club and  
25 meets two people. And they talk about a robbery.

1 And he agrees, and they go get in the car and go  
2 off and do the robbery situation. And they gave  
3 him the gun to go in to rob the store. Which he  
4 admits that's what he did. But I think he is  
5 easily led, and he's led in the wrong direction by  
6 these new friends of his.

7 I don't what has happened to those two  
8 individuals that were co-defendants. But I don't  
9 know if they were kind of charged. I don't think  
10 they could charge armed robbery or accessory or  
11 that.

12 THE COURT: He is charged in the  
13 indictment to armed robbery. What is the status  
14 of those defendants?

15 MS. LAND: Your Honor, one of them, Leo  
16 Zene mhas pled to accessory after the fact. And  
17 received a probation sentence. And Alvin  
18 Washington's case is still pending.

19 THE COURT: Thank you.

20 MR. DEVOE: I have had some talks with his  
21 grandmother, who is standing in the greenish  
22 colored dress. Her name is Gussie Mae Clark. And  
23 his mother is next to him. And she is Bobby  
24 Clark. His grandmother has one granddaughter, and  
25 this is her only grandson. And Bobby Clark is her

1       only child.

2               They have a great concern with him, and  
3       trying to make him do. Led the fight, or the  
4       charge to have for him to go to mental health and  
5       get the help that he needed. They think he  
6       needed. It's a shame it didn't seem to quite  
7       work. But they tried hard. And I think it is a  
8       good family. I think they have some mental  
9       problems in the family. But basically it's a good  
10      family. It's a shame that Marco Clark has to be  
11      in front of you. But he understands what he did  
12      and what the charges are.

13              I would ask Your Honor, Amy Land mentioned  
14      she had made an offer and she did. The offer was  
15      20 years. I think she said 30.

16              THE COURT: She did say 30 on the record,  
17      but your trial list indicated what the previous  
18      offer was.

19              MS. LAND: I am sorry, judge.

20              THE COURT: Go ahead.

21              MR. DEVOE: Obviously, I didn't agree with  
22      her offer. So I talked to my client and he  
23      decided that first he was going to go to trial.  
24      And then he decided to plead straight up. And  
25      with your mercy. Hoping that you would understand

1 that maybe tentatively competent to go to trial,  
2 he has had some problems. And hopefully things  
3 will be solved. And maybe if he goes to Gilliam,  
4 in the system first, it might help a little bit.  
5 Because that's a mental health place to go to 30  
6 days or so.

7 I would ask Your Honor to consider a  
8 minimum sentence of 10 years. I know that both  
9 his mother and his grandmother would like to talk  
10 to you.

11 THE COURT: I will be glad to hear from  
12 you.

13 MR. DEVOE: His mother is hoping he won't  
14 get the 10 years. And I kept telling her that it  
15 is not possible. If he pleads to this he gets a  
16 minimum that he can possibly get. In any event,  
17 she is a very nice person.

18 THE COURT: I am going to call on them in  
19 just a minute. Let me ask you one other  
20 question. This occurred on December 4th 2008. He  
21 has been incarcerated since then?

22 MR. DEVOE: That's correct. He had no  
23 bond, and I didn't go in for a bond for him.

24 THE COURT: I will be glad to hear from  
25 anybody on behalf of Mr. Clark. If they would

1 like to address me. And just give me your name  
2 and I will be glad to hear from you.

3 MS. CLARK: I am Bobby Clark. I am Marco  
4 Clark's mother. And I would like to say that  
5 Marco is mentally ill. Marco has been in and out  
6 of inpatient treatments for several years. And he  
7 admits he does have a drug problem. And I believe  
8 that the night that he went to that store, he was  
9 to very delusional. He needs help. I am  
10 recommending that he go to some inpatient  
11 treatment like Morris Village or something like  
12 that versus spending a lot of time in jail.  
13 Because he needs to be rehabilitated. And I just  
14 want to say he is mentally ill.

15 THE COURT: Unfortunately, ma'am, Morris  
16 Village and Palmetto Center, those options are not  
17 available to me in this situation. I understand  
18 what your thoughts are. But from a legal  
19 standpoint, that's just not available to me. I  
20 don't have that option in this case.

21 THE COURT: Anyone else? Yes, ma'am.  
22 Tell me your name first of all.

23 MS. CLARK: My name is Gussie Mae Clark.

24 THE COURT: Okay. Gussie Mae.

25 MS. CLARK: I am Marco's grandmother. I

1 mostly raised Marco. Marco is a very carrying  
2 person, but Marco has mental problems. Somehow or  
3 another, he got tied up to taking some drugs  
4 sometimes. And when you take the drugs that, take  
5 medication out of his system. And the only thing  
6 I can say is that Marco needs some help.

7 I am concerned, and I am speaking from a  
8 long journey of mental illness. Marco can't help  
9 the things that he does, because his mother can  
10 stand by me. And I -- some things I will say and  
11 some things I will not say. Because you have to  
12 wear the shoe to know how it fits. She has mental  
13 problems. She been in the hospital 3 times. In  
14 fact, while she was in the hospital when Marco was  
15 arrested.

16 I was in Orangeburg seeking help to get  
17 her in the hospital. I got home and find out EMS  
18 had picked up Marco, and he was going to  
19 Orangeburg Hospital. Then Orangeburg sent him to  
20 Three Rivers. And I asked them to keep -- would  
21 they keep Marco. After two weeks they called me  
22 and said pick Marco up. I said, "Marco called and  
23 asked for help, and you sent him home. Would you  
24 please keep him long enough to do him some good."  
25 So she said: "I am sending Marco home." Pick him

1 up at the bus station." And the court ordered,  
2 his facts to a Mental Health Hospital in Holly  
3 Hill for him to have his medication put in his,  
4 10:30 on the 4th.

5 Marco leave home that Wednesday. Which is  
6 the Wednesday the time that he was supposed to  
7 have the medication. I haven't seen Marco  
8 anymore. Mental health didn't do anything. They  
9 didn't pick him up. They didn't give him any  
10 medication. The next thing I heard was, he was in  
11 the jail house calling me. Trying to find out  
12 what type of medication that Marco was on. I  
13 haven't see Marco anymore. When I go -- went to  
14 try and see him, he was on lock down in the jail  
15 house on a suicide watch.

16 He have been in several places. He have  
17 done several times. But no one have kept him long  
18 enough for him to take the treatments. I am  
19 standing here. You're saying you can't do things.  
20 And I am not telling you how to do your job. But  
21 I am saying that she has been in mental health.  
22 She is still heavily medicated. But she has made  
23 a difference in her life. She has been able to go  
24 to school with mental health help. She is a  
25 minister. And she has just recently started

1 working. She is a the president and the -- she is  
2 assistant to the President of Weber University.  
3 Marco could make a difference if someone would  
4 help him, instead of going to the jailhouse,  
5 sitting up there on the state budget. If he could  
6 get some help. He come out and help somebody  
7 else. And that is all I am hoping and wishing  
8 that someone would do something for him, besides  
9 let him rot in jail.

10 THE COURT: Thank you.

11 MS. CLARK: Thank you.

12 THE COURT: Mr. Clark, anything you would  
13 like to tell me?

14 THE DEFENDANT: First, I would like to  
15 apologize to the young lady I went to school with.  
16 I wasn't in my right mind, sir. And I think the  
17 investigators know that too. But like I say, I  
18 knew right from wrong. And I know you have to do  
19 your job. I am asking you to do your job, but I  
20 do need some punishment. I just ask for mercy  
21 from the court.

22 THE COURT: Thank you, sir. Anything  
23 else, Mr. Devoe?

24 MR. DEVOE: No, sir.

25 THE COURT: Anything else on behalf of the

1 State?

2 MS. LAND: No, sir.

3 THE COURT: Those of you who have appeared  
4 before me before, both law enforcement, defense  
5 lawyers and solicitors have heard me say this;  
6 that over the 13 years when I first got this job,  
7 I was told that the most difficult thing we would  
8 have to do would be criminal sentencing.

9 Nothing has changed in the last 13 years  
10 that makes me feel any differently than that. My  
11 colleagues were right, and it is the most  
12 difficult thing we have to do. We judges have no  
13 crystal ball. We cannot see the future. All we  
14 can do is to hear the facts, apply the law and our  
15 experience to the situation, and try to come up  
16 with a sentence that is right and appropriate  
17 under the circumstances.

18 Very seldom does it satisfy everyone.  
19 Sometimes it satisfies no one. But I do have the  
20 duty of taking the facts in this case and applying  
21 the law and coming up with a sentence that I think  
22 is appropriate for this defendant for the crime  
23 and for society.

24 Armed robbery of a convenience store is a  
25 very serious matter. Mr. Clark, you are very

1 lucky that somebody didn't kill you as a result of  
2 this. And then you would have been up here on a  
3 murder trial. A substantial prison sentence is  
4 appropriate. Although I don't think that the  
5 maximum sentence is appropriate in this  
6 circumstance.

7           You are to be given some consideration for  
8 the fact that even though you didn't do it until  
9 the jury was selected, that you came forward and  
10 have pled guilty and admitted you committed this  
11 crime. And have apologized to the victim. You  
12 also admitted that you knew it was wrong at the  
13 time that you did it. And while you may have had  
14 some mental problems in the past, I am convinced  
15 that you knew the difference from right and wrong  
16 at the time you committed this crime. And also  
17 that you are competent today to stand trial for  
18 that crime.

19           So I am going to have to impose a  
20 substantial prison sentence although I feel that  
21 as I said, you are entitled to some consideration  
22 for those things. And I will give you  
23 consideration for coming forward and pleading  
24 guilty and taking responsibility for this crime.  
25 The Sentence of the Court is that you, for the

1 armed robbery, the defendant is committed to the  
2 State Department of Corrections for a term of  
3 22 years. To be given credit for jail time since  
4 December 4, 2008. On the possession of a weapon  
5 during the commission of a violent crime,  
6 sentence is 5 years to run concurrent.

7 Good luck to you, young man. I hope that  
8 when you get out of prison you will be able to get  
9 your life straightened out and get in the right  
10 direction. Good luck.

11 MR. DEVOE: Your Honor, I just for the  
12 record, I make one comment. Amy Land knew he was  
13 going to be pleading guilty before the jury was  
14 picked.

15 THE COURT: I am giving him credit for the  
16 fact that he has come forward. He didn't do it  
17 before.

18 MR. DEVOE: It was done after the hearing.

19 THE COURT: It was on the trial roster,  
20 but that's all right. I understand the situation.  
21 He's going to get 22 years.

22 --End of Requested Transcript of Record,--

23

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C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third Judicial Circuit of the State of South Carolina, do hereby Certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the above captioned case, relative to appeal, in General Sessions Court, on July 7 2009, for Clarendon County, Manning, South Carolina.

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

6-22-10  
DATE

Margaret T. Sullivan  
COURT REPORTER  
My Commission expires: 10-03-11

FORM 5

STATE OF SOUTH CAROLINA )  
 )  
County of CLARENDON )  
 )  
MARCO A. CLARK )  
Full name and prison number (if any) of Applicant )

2013-CP14-109  
IN THE COURT OF COMMON PLEAS  
THIRD JUDICIAL CIRCUIT

v.

State of South Carolina

CERTIFIED TRUE COPY  
OF ORIGINAL FILED IN THIS OFFICE APPLICATION FOR

DATE 3/18/2013 POST-CONVICTION RELIEF

Beulah H. Roberts  
CLERK OF COURT  
CLARENDON COUNTY, SC

2013 MAR 18 11:11 AM

BEULAH H. ROBERTS  
CLERK OF COURT  
CLARENDON COUNTY, 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 Lee County Correctional Institution
2. Name and location of Court which imposed sentence Court of General Sessions, Third Judicial Circuit.
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) Unknown
  - (b) \_\_\_\_\_

- (c) \_\_\_\_\_
- 5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) July 7, 2009
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
- 6. Check whether a finding of guilty was made:
  - (a) after a plea of guilty X
  - (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?  
Yes
- 8. If you answered "yes" to (7), list:
  - (a) the name of each Court to which you appealed:
    - i. South Carolina Court of Appeals.
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. Conviction Affirmed.
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. February 1, 2012
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. Unpublished Opinion No. 2012- UP- 055
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
- 9. If you answered "no" to (7), state your reasons for not so appealing:
  - (a) \_\_\_\_\_
  - (b) \_\_\_\_\_

- (c) \_\_\_\_\_
- 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
  - (a) Court refusal to approve funds for Defendant's defense.
  - (b) Ineffective assistance of Counsel.
  - (c) Plea Counsel failed to order evaluation.
- 11. State concisely and in the same order the facts which support each of the grounds set out in (10):
  - (a) Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed 2nd 53 (1985)
  - (b) Defense Counsel admitted his ineffectiveness
  - (c) Plea Counsel admitted he failed to order correct exam.
- 12. Prior to this application have you filed with respect to this conviction:
  - (a) any petition in a State Court under South Carolina Law? \_\_\_\_\_
  - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? \_\_\_\_\_
  - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? \_\_\_\_\_
  - (d) any other petitions, motions or applications in this or any other Court? \_\_\_\_\_
- 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?  
\_\_\_\_\_  
\_\_\_\_\_

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) \_\_\_\_\_
- (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? \_\_\_\_\_
- (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. Devoe, Harry Leslie, Jr., Esq.  
7411 Black River Road, New Zion, SC 29111
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Plea
  - ii. Sentencing
  - iii. \_\_\_\_\_

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

New trial.

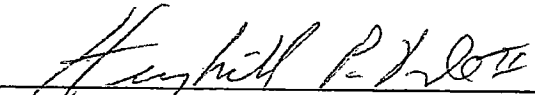
Sentence set aside.

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

No.

WHEREFORE, Applicant requests a full hearing.

Law Office  
of  
HEMPHILL P. PRIDE II, LLC



Hemphill P. Pride II (Bar No. 4569)

Post Office Box 4529

Columbia, South Carolina 29240

(803) 256-8015

e-mail: [hpride@bellsouth.net](mailto:hpride@bellsouth.net)

ATTORNEY FOR APPLICANT

March 15, 2013.



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

## II.

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

1. "Court refusal to approve funds for Defendant's defense."
  - a. "Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed 2<sup>nd</sup> 53 (1985)"
2. Ineffective Assistance of Counsel.
  - a. "Defense counsel admitted his ineffectiveness"
  - b. "Plea Counsel failed to order evaluation."
  - c. "Plea counsel admitted he failed to order correct exam."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

## III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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. The 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, the 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 the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the 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, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### IV.

The Respondent submits that Applicant's first allegation should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, the Court should summarily dismiss this allegation.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

DANIEL GOURLEY  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

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

June 12<sup>th</sup>, 2013

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CLARENDON )  
 )  
 MARCO CLARK, 335713, )  
 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS

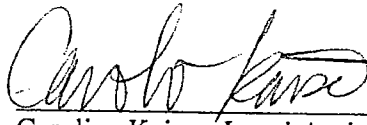
2013-CP-14-109

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:

**Hemphill P. Pride, II, Esquire**  
**Law Office of Hemphill P. Pride, II**  
**PO Box 4529**  
**Columbia, SC 29240**

DATED this 12<sup>th</sup> day of June, 2013.

  
 \_\_\_\_\_  
 Caroline Kaiser, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS  
THIRD JUDICIAL CIRCUIT

MARCO ANDREA CLARK,  
Applicant,  
v.  
STATE OF SOUTH CAROLINA,  
Respondent.

**MOTION TO BE RELIEVED AS COUNSEL**

**Docket No. 2013-CP-14-109**

COMES now the undersigned and respectfully moves this honorable Court for an Order relieving him as counsel for Applicant Marco Clark in the above-captioned matter. This motion is based on the following, to wit:

1. On March 13, 2013, Ms. Bobbie Clark, mother of the Applicant, executed a Retainer Agreement for the undersigned to represent the Applicant on Post-Conviction Relief.

2. The Retainer Agreement reads, in pertinent part:

. . . I understand further and hereby agree that Hemphill P. Pride II reserves the right to withdraw from the representation of my son . . . if I do not make mutually satisfactory and timely arrangements for payment.

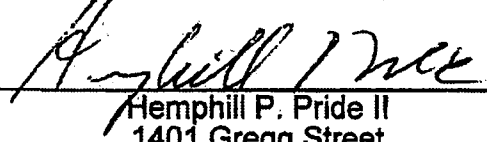
3. The undersigned avers Ms. Clark has breached the Retainer Agreement in that she has failed and refuses to pay the attorney's fee in accordance with said Agreement.

WHEREFORE, the undersigned prays that this honorable Court issues an Order relieving him as counsel for the Applicant, Marco Andrea Clark.

**(SIGNATURE PAGE ON NEXT BLOCK)**

DEPT. OF PROBATION  
CLARENDON COUNTY  
2013 FEB 22 PM 12:57

Law Office  
of  
HEMPHILL P. PRIDE II, LLC



---

Hemphill P. Pride II  
1401 Gregg Street  
Post Office Box 4529  
Columbia, South Carolina 29240-4529  
(803) 256-8015  
[hppride@bellsouth.net](mailto:hppride@bellsouth.net)

ATTORNEY FOR APPLICANT

February 19, 2014.

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

Marco A. Clark, 335713

Plaintiff,

v.

State of South Carolina

Defendant

IN THE COURT OF COMMON PLEAS  
THIRD JUDICIAL CIRCUIT  
CASE NO.: 2013-CP-14-109

ORDER SUBSTITUTING COUNSEL

\*\*\*\*\*

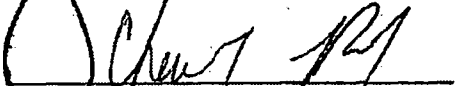
IT APPEARING to this court that **SHAUN COURTNEY KENT, ESQUIRE**, was appointed to represent this matter for the Plaintiff, **MARCO A. CLARK**, it is hereby:

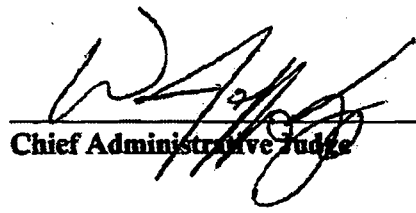
**ORDERED, ADJUDGED AND DECREED**, that **CHARLES T. BROOKS, III, Esquire**, be and is hereby substituted as appointed counsel of record in the above captioned for the Plaintiff as of the 7<sup>th</sup> day of November, 2014, **SHAUN COURTNEY KENT, ESQUIRE**, is hereby relieved of all duties of representation of the above-captioned for the Plaintiff.

**AND IT IS SO ORDERED!**

We Consent:

  
\_\_\_\_\_  
SHAUN COURTNEY KENT, Esquire

  
\_\_\_\_\_  
CHARLES T. BROOKS, III, Esquire

  
\_\_\_\_\_  
Chief Administrative Judge

*Sumter*, SC *13 Nov*, 2014

2014 DEC -9 PM 12: 27

BEULAH G. RODERTS  
CLERK OF COURT  
CLARENDON COUNTY, SC

State of South Carolina )  
County of Williamsburg )

In the Court of Common Pleas  
Third Judicial Circuit  
2013-CP-14-0109

Marco Andre Clark, )  
Applicant, )  
vs. )  
State of South Carolina, )  
Respondent. )  
\_\_\_\_\_ )

Transcript of Record

November 8, 2016  
Kingstree, South Carolina

B E F O R E:

The Honorable Brian M. Gibbons, Judge

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

Charles T. Brooks, III, Esquire  
Attorney for the Applicant

Julie A. Coleman, Esquire, Assistant Attorney General  
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM  
Circuit Court Reporter

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I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Marco Andre Clark	
Direct Examination by Mr. Brooks . . . . .	6
Cross-examination by Ms. Coleman . . . . .	15
Ruling of the Court . . . . .	22
Certificate Page. . . . .	23

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>
	No Exhibits Introduced.	

1 THE COURT: Ms. Coleman, yes, ma'am.

2 MS. COLEMAN: Yes. May it please the court?

3 THE COURT: Yes, ma'am.

4 MS. COLEMAN: This is *Marco Clark vs. The State of*  
5 *South Carolina*, docket number 2013-CP-14-109. Applicant is  
6 presently confined to the South Carolina Department of  
7 Corrections pursuant to orders of commitment of the  
8 Clarendon County Clerk of Court. The applicant was  
9 true-bill indicted at the March 2009 term of the Clarendon  
10 County Grand Jury for armed robbery and possession of a  
11 weapon during a violent crime. He was represented by Harry  
12 Leslie Devoe, Jr., Esquire.

13 On September 11, 2012, applicant pled guilty as  
14 indicted without negotiations or recommendations before the  
15 Honorable Doyet Early, III. He was sentenced to twenty-two  
16 years' imprisonment for the armed robbery charge and five  
17 years' imprisonment for the possession of a weapon during a  
18 violent crime charge to run concurrently.

19 The applicant subsequently appealed to the South  
20 Carolina Court of Appeals; the Court of Appeals affirmed  
21 the applicant's conviction and sentence. Remittitur was  
22 issued on February 21, 2012. Subsequently, applicant filed  
23 for post-conviction relief on March 18, 2013, alleging that  
24 he was being held in custody unlawfully based on  
25 ineffective assistance of counsel and the court's refusal

1 to approve funds for defendant's defense. The state made  
2 its return on June 7, 2013, and he's currently today  
3 represented by Mr. Charles Brooks.

4 THE COURT: Mr. Brooks, you are ready to proceed?

5 MR. BROOKS: Yes, sir, Judge. I would say that I  
6 think Judge King did the plea instead of Judge Early.

7 MS. COLEMAN: Oh. My apologies.

8 THE COURT: Okay.

9 MR. BROOKS: Because in the transcript it has Judge  
10 King. I think everything else was accurate.

11 I do want to tell the court we had -- we did acquire  
12 funds to have Mr. Clark evaluated after I was his PCR  
13 counsel with Dr. Tom Martin. Judge, you know who Dr. Tom  
14 Martin is, and of course Dr. Martin is not here. He  
15 basically indicated to me he was not able to help me. I  
16 just thought I wanted to put that on the record.

17 THE COURT: Yes, sir.

18 MS. COLEMAN: And, Your Honor, before we begin, if I  
19 may object for the record to the hearing going forward  
20 today? The state is missing one of its key witnesses, Mr.  
21 Harry Devoe. We believe that the -- his presence is  
22 necessary for this hearing to be done completely. So, I  
23 just wanted to object.

24 THE COURT: All right, and I believe we talked about  
25 that prior to the call of the case, and I believe you

1 indicated to me at that time the PCR hearing has been  
2 continued how many times?

3 MS. COLEMAN: I believe five times.

4 THE COURT: Okay.

5 MS. COLEMAN: And it's a 2013 case.

6 THE COURT: And is this, is this witness under  
7 subpoena?

8 MS. COLEMAN: Yes, Your Honor.

9 THE COURT: All right, and he's not present?

10 MS. COLEMAN: He's not.

11 THE COURT: All right.

12 MS. COLEMAN: And, Your Honor, there -- well, there --  
13 I'm not a hundred percent certain that the subpoena was  
14 served. I know I got a phone call the other day that there  
15 was some issue about it, but I had spoken with the witness  
16 on the phone multiple times. He said he would be present  
17 today. He has been subpoenaed to every hearing in the  
18 past, and we've had some trouble getting his presence to  
19 this.

20 THE COURT: Has he been, has he ever been at a PCR  
21 hearing?

22 MS. COLEMAN: Not since I have been in this position  
23 for the past year or so.

24 THE COURT: All right. Well, continuance is denied.

25 MS. COLEMAN: Okay. Thank you.

M. CLARK - DIRECT EXAMINATION BY MR. BROOKS

6

1 THE COURT: Okay, you may call your witness.

2 MR. BROOKS: We call Mr. Marco Clark to the stand.

3 THE COURT: All right. Yes, sir, Mr. Clark.

4 MARCO ANDRE CLARK, BEING DULY

5 SWORN, TESTIFIES AS FOLLOWS:

6 THE COURT: All right, Mr. Brooks.

7 DIRECT EXAMINATION BY MR. BROOKS:

8 Q. Mr. Clark.

9 A. Yes.

10 Q. How are you today?

11 A. Well.

12 Q. Now, I'm going to ask you to kind of talk up because  
13 you see this lady right here with the equipment over her  
14 mouth? She is the court reporter. She's got to take down  
15 everything that you say, so you're going to have to give a  
16 verbal response. You can't just rely on nodding of your  
17 head, and you're going to have to speak up, okay?

18 A. Yes, sir.

19 THE COURT: That's better.

20 Q. That's better.

21 THE COURT: As long as I can hear you real good,  
22 that's the main thing I need to do. Yeah, let them put  
23 that microphone right there in front of you.

24 (A PAUSE.)

25 THE COURT: All right, state your name for me.

1 WITNESS: Marco Clark.

2 THE COURT: That's good. Keep talking just like that,  
3 Mr. Clark.

4 BY MR. BROOKS:

5 Q. Marco, how old are you?

6 A. Thirty-four.

7 Q. Okay, and you are currently in jail. Is that correct?

8 A. Yes, sir.

9 Q. Do you remember when you pled guilty?

10 A. Yes, sir.

11 Q. It was in front of Judge King?

12 A. Yes, sir.

13 Q. Okay. Do you remember what you pled guilty to?

14 A. Yes, sir.

15 Q. What did you plead guilty to?

16 A. Armed robbery.

17 Q. Okay. Now, do you, do you know what this hearing is  
18 for?

19 A. Yes, sir.

20 Q. Okay. Tell me in your own words what, what you know  
21 this hearing, what this hearing is for.

22 A. I, I, I, I think maybe if there was any error in, in,  
23 in, in, in -- of the proceedings that they did on the, on  
24 the day of my plea or, or the court date.

25 Q. Okay. Now, do you understand -- you got twenty-two

M. CLARK - DIRECT EXAMINATION BY MR. BROOKS

8

1 years from Judge King. Is that correct?

2 A. Yes, sir.

3 Q. And that means you've got about twelve more to do?

4 A. Yes, sir.

5 Q. Now, you understand that Judge Gibbons here is the  
6 judge in your PCR and that his role is he can't cut your  
7 time. Remember we talked about that?

8 A. Yes, sir.

9 Q. Okay. The only decision he has to make is whether or  
10 not you should be granted a new trial or not granted a new  
11 trial. You understand that?

12 A. Yes, sir.

13 Q. And you understand what that would mean if you got a  
14 new trial. Is that correct?

15 A. Yes, sir.

16 Q. That would put you back in the position that you were  
17 in before.

18 A. Yes, sir.

19 Q. Before you pled. You understand that?

20 A. Yes, sir.

21 Q. Okay. All right, and you understand that if that  
22 happened, you could potentially go back and possibly get  
23 more time, and you could possibly get less time. Do you  
24 understand that?

25 A. Yes, sir.

1 Q. And you and I talked about that, and you told me you  
2 understood that. Is that correct?

3 A. Yes, sir.

4 Q. And that you still wanted to go forward with your  
5 post-conviction relief. Is that correct?

6 A. Yes, sir.

7 Q. Okay. Now, can you tell me in your own words? Why  
8 did you end up pleading guilty to this, these charges?

9 A. Really I was kind of cloudy that day, how they came at  
10 me, they saying put this suit on. You're going to trial.  
11 I had no information that I was going to trial before that  
12 day, but -- and also I knew that I did something wrong.  
13 That's, that's, that's not the question. I knew, I knew  
14 it, but -- oh, you was asking me why I -- because I knew I  
15 did something wrong, and I, and I didn't know what was  
16 going on. So, I just thought -- I asked the lawyer, you  
17 know, do he think I can win any, any way. He said no. So,  
18 that's when I told him I want an open plea.

19 Q. Okay. So, did, did you, did you understand what that  
20 meant?

21 A. Somewhat, yeah, in a way, yeah. I don't know I had  
22 the full details of it, but -- or, or comprehend the full  
23 details of it, but I, I understood enough of it to go with  
24 the plea.

25 Q. Okay. Did you -- did Mr. Devoe explain the case to

M. CLARK - DIRECT EXAMINATION BY MR. BROOKS

10

1 you? Did he explain the charges and what kind of time you  
2 were facing?

3 A. He told me some. I, I didn't -- I don't know if I  
4 caught on to everything he was saying, but he did tell me,  
5 he did tell me something, but he, he -- I don't know he  
6 explained everything. I can't remember everything, but I  
7 don't, I don't, I don't think he explained everything, but  
8 I, I believe he did, he did go over some things, though,  
9 about, about what was going on.

10 Q. How, how far did you go in school, Marco?

11 A. I graduated twelfth grade.

12 Q. Okay, and what kind of work did you do before you got  
13 locked up?

14 A. Pretty much just labor work. I, I never really picked  
15 up any trade. I was just a laborer, hard work kind of  
16 labor, labor pool, factories-type work, but I never picked  
17 up a trade.

18 Q. Okay, and you -- the crime that you were convicted of,  
19 do you want to talk about that?

20 A. Yes, sir.

21 Q. What do, what do you want to tell the court about  
22 that?

23 A. Well, before -- I've had mental illness since I was  
24 little, but before -- but the drug use really what kind of  
25 make the mental illness kind of worse and make me kind of

1 weak at times. A lot of time, most of the time it made me  
2 weak. I had no mind of my own, and when I got with the two  
3 guys, I don't know what the court gave for them or what, or  
4 what, but they, they mostly influenced me to do what I did.  
5 They -- you got to know -- because it was my truck and I  
6 was in the passenger seat when the police stopped us, and  
7 one was driving and now they make like they didn't know  
8 what was going on, but they the ones influenced me because  
9 they knew I was weak minded once I got to drinking and  
10 drugging and I -- and wasn't really wasn't on my medicine  
11 like I supposed to be.

12 Q. What medicine, what medicine are you talking about?

13 A. It's, it's -- I can't remember. I think they was  
14 giving me Depakote at the time, what -- I supposed to be on  
15 Depakote. I think that was Depakote. I don't know what  
16 other medicine, side-effect medicine.

17 Q. And what, what -- why were you taking that medicine?

18 A. I think they called it psycho, psychotropic medicine.

19 Q. Okay. All right, and did you say something about some  
20 drugs and drinking?

21 A. Yes, sir.

22 Q. What kind of drugs?

23 A. Crack cocaine, cocaine, marijuana, and alcohol.

24 Q. Okay. All right, and what else you want to tell the  
25 judge about the crime?

M. CLARK - DIRECT EXAMINATION BY MR. BROOKS

12

1 A. Well, I, I feel like mostly because the time I got --  
2 because I -- in 2006 I did some common-law robberies, but  
3 see the thing is nobody knew who done these, but I knew I  
4 needed help and I went to the police and told them that I  
5 had committed some crimes, trying to get off the streets.  
6 So -- because I didn't do any more but I couldn't -- I had  
7 no other way to help myself because I done went through the  
8 treatment centers and all that, but they never hold me  
9 long. And my mama and them ask them people to hold me.  
10 They never hold me. They always let me go, and I just  
11 needed more strength. So, I turned myself in on some crime  
12 that nobody knew who was the one who was doing it to stay  
13 off the street.

14 But they, see, what they did was they -- I stay in  
15 jail seven months. This was in Richland County. I stayed  
16 in jail seven months and then after seven months they had  
17 -- I had public defender. They said -- she came and got  
18 see me and took me to the court. Said they going to give  
19 me probation. Of course I'm going to take it because I'm  
20 thinking I'm okay. Maybe I got some strength now, but I  
21 knew that wasn't enough but they -- I feel like they should  
22 have gave me time then, at least five years then. And I, I  
23 really honestly feel like I wouldn't have the time I have  
24 now if they would have gave me time then and, and kept me  
25 off the streets some.

1           Now, since I've been locked, I still was doing things  
2 when I first got locked up for a long time because I had no  
3 mind of my own. I was -- I do what everybody else say and,  
4 and it took, I guess, God himself to save me.

5 Q.    Okay. Let me ask you this, Mr. Clark. What, what do  
6 you think Mr. Devoe should have done in representing you?

7 A.    I don't really know. I don't, I don't know. I just  
8 know -- I, I feel like he didn't give -- he didn't do  
9 everything he could have did for me at the time. And then  
10 it's like night and day with me, man. When, when I do  
11 things I ain't supposed to do, it's like night and day.  
12 When I'm straight, I'm straight but when I'm not, I'm not  
13 and I, I just, I just -- my problem was listening to what  
14 everybody else say, say to do and that's what I did, and I  
15 feel like I was, I was most -- really influenced the night  
16 of this crime.

17 Q.    Okay, but now we're talking about Mr. Devoe, who was  
18 your lawyer in your case. What do you think he should have  
19 done?

20 A.    I don't -- see, I don't know the law like that. I  
21 don't -- I, I never really studied the law, know too much,  
22 but I feel like -- I think -- I guess he feel like its  
23 something he could have did because he was the one when I  
24 was in -- when they took me to the holding cell after I  
25 went to court that day, he said I'm going to sign you up

M. CLARK - DIRECT EXAMINATION BY MR. BROOKS

14

1 for a direct appeal. He did it. I didn't ask him to do  
2 that. He the one that said he wanted to do that because I  
3 guess he felt -- but I still said -- I told the man thank  
4 you because I know I needed time, but when the man told me  
5 -- I know you're still talking about Devoe, but I don't --  
6 I can't really say.

7 But I'm saying when the man gave me time, I heard my  
8 grandmother holler. I knew I needed time but not that much  
9 time to take away from my family because all I needed was  
10 to find myself, man, and so I could do something for them  
11 and do something for, for all of -- for myself. They just  
12 want -- I just want to make my mama proud, man, and I don't  
13 know how much time any of us got left, but I, I just want  
14 to be right about myself and what's going on.

15 Q. Okay. Is there anything else you want to tell this  
16 judge about your case that we haven't talked about?

17 A. I don't know what to say. I did wrong. I admitted I  
18 was wrong and I know I needed time, but I just, I just, I  
19 -- all I'm saying is, man, that's a lot of time for, for --  
20 to be away from my loved ones, and I know, I know -- but I  
21 never hurt nobody, none of them crimes. Even though armed  
22 robbery is a hard title, I never hurt nobody in none of  
23 them crimes, even with the store situation. I ain't hurt  
24 the girl. I didn't even know how to use the gun. The only  
25 thing I ever used was knives and, and box cutters. I

1 didn't even know how to use that gun.

2 Q. Okay.

3 A. That wasn't my stuff.

4 Q. Okay. Is there anything else, Marco?

5 A. I don't know what to say but God help me. That's all.  
6 I, I've been truthful.

7 Q. Okay.

8 MR. BROOKS: Well, I'm going to sit down and this lady  
9 right here may decide to ask you some questions on behalf  
10 of the attorney general's office, okay?

11 THE COURT: All right, Ms. Coleman, your witness.

12 MS. COLEMAN: Thank you, Your Honor.

13 CROSS-EXAMINATION BY MS. COLEMAN:

14 Q. Good morning, Mr. Clark. How are you?

15 A. Yes. Good morning.

16 Q. Do you remember how many times you met with your  
17 attorney before your plea?

18 A. I guess at least, I guess, I think about three times,  
19 maybe more, but I can remember at least three times.

20 Q. Okay. Do you remember reviewing discovery with your  
21 attorney, the state's evidence against you?

22 A. I can't really remember; it was a little cloudy.

23 Q. Okay. Did you give your attorney any leads or  
24 witnesses to investigate?

25 A. No. See, see, I was so mixed up when I first got

M. CLARK - CROSS-EXAMINATION BY MS. COLEMAN

16

1 locked up. I wrote notes talking about them guys ain't  
2 hadn't nothing to do with it. So, I ain't -- that's how  
3 mixed up I was in the world.

4 Q. Now, think back to the day of your guilty plea,  
5 please. Do you remember waiving your constitutional rights  
6 like your right to a jury trial and your right to remain  
7 silent?

8 A. I can't remember saying that I do, but I know I, I had  
9 to if -- I guess if y'all went forward with the thing.

10 MS. COLEMAN: And, Your Honor, that's on page 9 just  
11 for your reference.

12 THE COURT: What's that? What did you say?

13 MS. COLEMAN: That's where he waived his  
14 constitutional rights on page 9 of the guilty plea  
15 transcript.

16 THE COURT: Okay.

17 BY MS. COLEMAN:

18 Q. Do you recall telling the plea judge that you were  
19 satisfied with your attorney's services?

20 A. Of course I, I did. I said that.

21 Q. You didn't have any complaints against him at the  
22 time. Is that right?

23 A. No, sir. I mean, I -- weak minded.

24 Q. Do you remember telling the judge that no one was  
25 promising or threatening you in order to plead guilty?

1 A. Yes, I told him all that.

2 Q. Do you remember apologizing to the plea judge and to  
3 the victim?

4 A. Yes.

5 Q. And you told the plea judge that you knew right from  
6 wrong. Is that right?

7 A. Yes.

8 Q. And you knew that you needed some kind of punishment?

9 A. Yes.

10 Q. And you said that again today, too.

11 You were mentally evaluated on June 12th of 2009,  
12 correct?

13 A. Yes.

14 Q. And they determined that you were mentally competent  
15 to stand trial. Is that right?

16 A. Yes.

17 Q. Okay. Are you the one who decided to plead guilty in  
18 this case?

19 A. Yes. Yes, ma'am.

20 MS. COLEMAN: Thank you. No further questions.

21 THE COURT: Mr. Brooks, any redirect?

22 MR. BROOKS: No, sir, Your Honor.

23 THE COURT: All right. Thank you, sir. You can step  
24 down. You can go back to your table.

25 (THE WITNESS EXITS THE STAND.)

1 THE COURT: Any other witnesses?

2 MR. BROOKS: No, sir.

3 THE COURT: All right, and of course the state has no  
4 witness.

5 MS. COLEMAN: Right, Your Honor.

6 THE COURT: All right, let me hear argument first from  
7 the applicant.

8 MR. BROOKS: Judge, we don't have Mr. Devoe here.  
9 You've heard from my client. He does feel the desire to  
10 have his post-conviction relief matter granted. He still  
11 wishes to have a new trial. He explained -- he answered my  
12 questions that he understands that he could potentially  
13 face more time. He has testified here. He's the only  
14 witness here to testify, and we would ask the court to  
15 consider that and grant him a new trial.

16 THE COURT: All right, Ms. Coleman.

17 MS. COLEMAN: Your Honor, the state would ask that you  
18 give some deference to the fact that our witness was  
19 unavailable. It's clear ---

20 THE COURT: I'd give deference to him, but isn't the  
21 law that court can also have an adverse inference against  
22 in a civil trial for a witness who's under subpoena and  
23 doesn't show up?

24 MS. COLEMAN: That's true, Your Honor. I would argue,  
25 though, our argument stands on the trial -- or the guilty

1 plea transcript itself and the fact that the applicant was  
2 mentally evaluated. He was found competent to stand trial.  
3 Everything in the transcript indicates that he seemed to  
4 understand what he was doing that day. The plea judge  
5 asked him if he had explained his constitutional rights  
6 that he was waiving, and he indicated that he did. He, the  
7 applicant, apologized to the judge and to the victims. He  
8 said he needed some punishment. We just rest our case on  
9 the guilty plea transcript.

10 THE COURT: Well, wasn't there also an issue as to  
11 criminal responsibility? He was, he was found competent to  
12 stand trial, but wasn't there an issue where he wasn't  
13 found -- where there was not a finding as to criminal  
14 responsibility?

15 MS. COLEMAN: I'm not sure, Your Honor, and that would  
16 be -- and I think I should ---

17 THE COURT: I'm looking at the motion hearing before  
18 Judge King. I don't know if y'all addressed that or not.

19 MS. COLEMAN: I don't think we did.

20 THE COURT: Let me see.

21 (A PAUSE.)

22 THE COURT: All right, the competent -- competency to  
23 stand trial was *Blair*. They had the *Blair* hearing, and  
24 then you had *McNaughton* to determine criminal  
25 responsibility. I'm looking on pages 7, 8, 9 of the motion

1 transcript.

2 So, what happened is on page 9, Judge King says:

3 The evidence in this case, the only evidence in  
4 this case is that the defendant did or is or was  
5 competent to stand trial, or by virtue of the  
6 Department of Mental Health report. No proof has  
7 been offered in the court regarding the criminal  
8 responsibility issue, and I think that at this  
9 late stage, it should have been brought up long  
10 before now of criminal responsibility if that was  
11 the case, if that was the case. It's simply a  
12 failure of proof to show the necessity of further  
13 evaluation.

14 And then Judge King used that to deny funds, I guess,  
15 for that. So, the issue as I see it in this application is  
16 the failure for Mr. Devoe to request a *McNaughton*  
17 evaluation for criminal responsibility for his client, who  
18 has a long history of mental illness.

19 MR. BROOKS: That's correct.

20 THE COURT: And who was apparently goaded into  
21 committing this armed robbery by two codefendants, one of  
22 which got probation and another one, I don't know what's  
23 going on. Is that what you're telling me?

24 MR. BROOKS: That's basically the argument that my  
25 client has, and I know it's -- that's basically his only

1 argument, Judge, because I don't think there was ever an  
2 issue, as he said, I don't think there was an issue about  
3 was he there and did it and all of that. The who done it,  
4 I don't think that was ever the issue. His issue has  
5 always been, as you gathered from his testimony, some  
6 issues about mental health and issues and those types of  
7 things, so.

8 THE COURT: I got you.

9 MS. COLEMAN: And, Your Honor.

10 THE COURT: Ms. Coleman.

11 MS. COLEMAN: I don't have a copy of that in front of  
12 me. I think I gave you my copy actually.

13 THE COURT: Okay.

14 MS. COLEMAN: I apologize, but is that -- was he  
15 requesting funding for that evaluation?

16 THE COURT: Right, and that was ---

17 MS. COLEMAN: And it was denied?

18 THE COURT: That was appealed. The Court of Appeals  
19 heard it.

20 MS. COLEMAN: Yes.

21 THE COURT: And issued a *pro curia* decision denying  
22 it.

23 MS. COLEMAN: Yes. So, I ---

24 THE COURT: They said that:

25 A general rule is that a plea of guilty voluntary

1           and understandingly constitutes a waiver of any  
2           nonjurisdictional defect or defects.

3           MS. COLEMAN: Right.

4           THE COURT: And they're correct. I mean, there's no  
5           conditional guilty plea, but the question is whether or not  
6           that was deficient of counsel not to request that, and  
7           whether or not that prejudiced his rights.

8           MS. COLEMAN: Right.

9           THE COURT: Right? So, if you've got somebody with a  
10          long history of mental illness who hasn't been, you know,  
11          evaluated for criminal responsibility and there is no  
12          finding by the trial court, certainly he -- the court made  
13          the finding, based upon the evidence in the record, that he  
14          was competent to stand trial. Just being competent to  
15          stand trial doesn't mean at the time you committed the  
16          alleged crime that you knew what you were doing, and that's  
17          the critical element that's missing here, and Mr. Devoe  
18          didn't ask for it.

19          RULING OF THE COURT:

20          THE COURT: I'm granting his PCR. He gets a new  
21          trial. Okay.

22          MS. COLEMAN: Thank you, Your Honor.

23          THE COURT: That's the order of the court.

24          --- END OF TRANSCRIPT OF RECORD ---

**CERTIFICATE**

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR WILLIAMSBURG COUNTY, SOUTH CAROLINA, ON THE 8TH DAY OF NOVEMBER, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

SEPTEMBER 26, 2017





represented by Charles T. Brooks, III, Esquire. Julie Coleman, Esq. of the South Carolina Attorney General's Office represented the Respondent.

This Court had before it the records of the Clarendon County Clerk of Court, the transcript of the proceedings against the Petitioner, and the Petitioner's records from the South Carolina Department of Corrections. The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Petitioner was true bill indicted at the March 2009 term of the Clarendon County Grand Jury for Armed Robbery and Possession of a Weapon during a Violent Crime (2009-GS-14-0069).

At the hearing the Petitioner testified on his own behalf. The Petitioner's Trial Counsel, Mr. Devoe, did not appear at the hearing. The Petitioner alleged that his trial counsel failed to order a mental evaluation, that the Court refused to fund any form of evaluation during his trial phase, and that his trial counsel admitted to being ineffective in failing to request the examination. The Petitioner's position was that he falls under the *M'Naghten* rule which states in part "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong". *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843). Since the Petitioner was not afforded an evaluation during the original trial phase in this matter, it is based upon this that he should be afforded a new trial.

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

This Court has had the opportunity to review the record and transcript from the trial in its entirety and has heard the testimony at this Post-Conviction Relief hearing. This Court has

further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17—27-80 (1985).

The Petitioner was sentenced by the Honorable Howard P. King for Armed Robbery and Possession of a Weapon during a Violent Crime (2009-GS-14-0069), and that Plea counsel's failure to obtain an independent evaluation to determine the Petitioner's criminal responsibility constitutes ineffective assistance of counsel.

The Court finds that the Petitioner was not evaluated for criminal responsibility in this matter and as such his case should be remanded for a new trial in the General Sessions Court.

**IT IS THEREFORE ORDERED:**

1. That the application for Post-Conviction Relief be granted; and
2. The Petitioner is granted a new criminal trial in the General Sessions Court in this matter.

AND IT IS SO ORDERED this 11/23 day of November, 2016

  
\_\_\_\_\_  
Honorable Brian Gibbons

  
\_\_\_\_\_, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF CLARENDON

Marco A. Clark, #335713,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
THIRD JUDICIAL CIRCUIT

2013-CP-14-109

MOTION TO ALTER OR AMEND  
PURSUANT TO RULE 59

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This matter comes before the Court by way of an application for post-conviction relief filed March 18, 2013.

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Applicant was true bill indicted at the March 2009 term of the Clarendon County Grand Jury for Armed Robbery and Possession of a Weapon during a Violent Crime (2009-GS-14-69). He was represented by Harry Leslie Devoc, Jr., Esquire. On September 11, 2012, Applicant pled guilty as indicted without negotiations or recommendation before the Honorable Doyet A. Early, III. He was sentenced to twenty two years imprisonment for the Armed Robbery charge and five years' imprisonment for the Possession of a Weapon during a Violent Crime charge to run concurrently.

Applicant subsequently appealed to the South Carolina Court of Appeals. The Court of Appeals affirmed Applicant's conviction and sentence. State v. Clark, Op. No. 2012-UP-55 (Ct. App. filed February 1, 2012). The Remittitur was issued on February 21, 2012.

## II.

Applicant subsequently filed a timely application for post-conviction relief on March 18, 2013, alleging that he was being held unconstitutionally based on the following allegations:

1. "Court refusal to approve funds for Defendant's defense."
  - a. "Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed 2<sup>nd</sup> 53 (1985)"
2. "Ineffective Assistance of Counsel."
  - a. "Defense counsel admitted his ineffectiveness"
3. Plea Counsel failed to order evaluation."
  - a. "Plea counsel admitted he failed to order correct exam."

An evidentiary hearing was convened on November 8, 2016, at the Williamsburg County Courthouse. Applicant was present and represented by Charles T. Brooks, III, Esquire. Respondent was represented by Julie A. Coleman, Esquire, of the South Carolina Attorney General's Office. The Honorable Brian Gibbons issued an "Order Granting Post Conviction Relief" signed on November 23, 2016 and filed December 1, 2016. This Motion to Alter or Amend Pursuant to Rule 59(e) follows.

## III.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

#### IV.

Respondent respectfully moves this Court to alter or amend the final order granting post-conviction relief based on the following reasons:

##### Ineffectiveness

Respondent submits that Plea Counsel was not ineffective in any manner during the course of his representation. In the Order Granting Post Conviction Relief, this Court found that Plea Counsel was ineffective for failing to obtain an independent evaluation to determine Applicant's criminal responsibility under the M'Naghten standard. However, the record before the Court clearly indicates that Plea Counsel requested funding from the plea court to obtain an independent evaluation for criminal responsibility prior to the trial and before Applicant decided

to plead guilty. Record on Appeal at 31 (Motions Hearing Transcript, July 7, 2009). Plea Counsel explained to the plea court in detail why he believed this evaluation was necessary, and the plea court denied his motion. This motions hearing transcript demonstrates that the plea court denied the motion for funding based on the fact that Applicant had already been thoroughly evaluated for mental competency and was found to be mentally competent to stand trial because he could clearly recall the facts and dates of the crime. Record on Appeal at 38. The plea court cited the case of State v. Covin, 372, S.C. 428, 641 S.E.2d 612 (2007), which held that the decision to order an evaluation for competency is within the court's discretion. Record on Appeal at 38. The plea court explained that the burden was on the defendant to prove by a preponderance of the evidence that he was incompetent to understand criminal responsibility, and the plea court held that Applicant had not done so. Record on Appeal at 39. The plea court explained its decision: "It is simply a failure of prove [sic] to show the necessity of further evaluation." Record on Appeal at 39.

Plea Counsel's request for funding for this evaluation was effective assistance of counsel. The plea court's decision to deny his request was out of Plea Counsel's control and does not render him ineffective. Plea Counsel requested this evaluation prior to the guilty plea, and the plea court denied his request. There was nothing further that Plea Counsel could have done at this point to obtain the evaluation. Therefore, because Plea Counsel *did* request a M'Naghten evaluation and his request was denied, Respondent submits that Applicant has failed to prove that Plea Counsel was ineffective in this regard.

#### Prejudice

The Order Granting Post Conviction Relief did not address the second prong on the Strickland test, prejudice. To prove ineffective assistance of counsel entitling an applicant to

post-conviction relief, the applicant must show that his counsel was ineffective and that he was prejudiced by that ineffectiveness. Strickland, supra. Respondent submits that Applicant has failed to demonstrate that Plea Counsel's failure to obtain a M'Naghten evaluation changed the outcome of the proceedings because he has produced no evidence to show that (1) Plea Counsel's request to obtain a M'Naghten evaluation would have been granted; and (2) a M'Naghten evaluation would have proven that he did not understand criminal responsibility.

A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In every criminal case, it is presumed the defendant is sane. State v. Milian-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985). Insanity is an affirmative defense to a prosecution for a crime. Id. South Carolina has adopted the M'Naghten test to determine insanity. State v. Lewis, 328 S.C. 273, 277-78, 494 S.E.2d 115, 117 (1997). A defendant is insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. Id.; see S.C. Code Ann. § 17-24-10(A) (Supp.1996).

First, Applicant has not met his burden in proving that he would have received funding for a M'Naghten evaluation had Plea Counsel requested it. In fact, Plea Counsel *did* request funding for an evaluation and the court denied his request. Thus, Applicant cannot prove that any further action would have changed the plea court's decision. It is in the discretion of the plea court to determine whether Applicant was entitled to an evaluation. State v. Covin, 372, S.C. 428, 641 S.E.2d 612 (2007). The plea court was within its discretion when it denied the request, and Applicant has provided no evidence to prove that any additional argument or information presented to the plea court would have changed its decision.

Second, Applicant has not presented any credible evidence at all to support his assertion that the M'Naghten evaluation would have shown that he did not understand criminal responsibility. South Carolina courts have repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice for the failure to present that testimony at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, 318 S.C. at 498-99, 458 S.E.2d at 540.

In determining if counsel is ineffective for failing to request a competency hearing, an applicant must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). "Under this second prong of Strickland, the petitioner need only demonstrate a 'reasonable probability' that he was either insane at the time of the [crime] or incompetent at the time of the plea. Jeter at 233-34, 417 S.E.2d at 596. "For an insanity defense, the accused must be unable to distinguish moral or legal right from wrong and to recognize the particular act charged as morally or legally wrong." Id. (citing S.C. Code Ann. 17-24-10 (Supp. 1991)). "To show prejudice for failing to pursue this defense, the petitioner must produce some evidence of insanity or a showing that with the exercise of due diligence, an insanity defense could have been developed." Id. (citing State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982), accord Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984)).

Here, Applicant has presented no credible evidence of his incompetency or lack of criminal responsibility. He has not presented expert witness testimony to explain what the results

of the M'Naghten evaluation would have been. He has provided no affidavits, evaluation results, or any other form of testimony to meet his burden of proof. Therefore, it is improper for this Court to speculate as to the results of the evaluation that never took place to assume prejudice. Criminal defendants are presumed sane in every criminal case. Milian-Hernandez, supra. For this Court to assume otherwise based only on Applicant's testimony that he was incompetent is improper under South Carolina law.

#### Guilty Plea

Furthermore, Respondent submits that, as a matter of law, Applicant waived his right to raise the affirmative defense of incompetence to understand criminal responsibility by pleading guilty.

In order to stand trial or plead guilty, a criminal defendant must be competent. State v. Finklea, 388 S.C. 379, 383, 697 S.E.2d 543, 546 (2010); see Pate v. Robinson, 383 U.S. 375, 378 (1966) (recognizing that the conviction of an incompetent person violates due process). The standard for evaluating competency is the same regardless of whether an accused ultimately chooses to proceed to trial or to enter a guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595-596 (1992); see Godinez, 509 U.S. at 398 (“[W]e reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the Dusky standard.”).

Although mental competency to stand trial cannot be waived by pleading guilty, here Applicant was evaluated and found to be mentally competent to stand trial and thus to plead guilty. He was further found competent by the plea judge on the record at the plea. Record on Appeal at 10, line 23-24. Applicant's argument that he was not mentally competent to understand the criminal responsibility of his actions is irrelevant to his competency to enter a

guilty plea and is only an affirmative defense to his criminal charges. S.C. Code Ann. 17-24-10 (1976). Applicant was competent to plead guilty and knowingly and intelligently waive his rights, including his right to present defenses on his behalf, such as the affirmative defense of incompetence to understand criminal responsibility.

Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Applicant's allegations regarding the charges against him are an inappropriate challenge to the sufficiency of the evidence. Simmons, 264 S.C. at 423, 215 S.E.2d at 885 ("[T]he Uniform Post-conviction Procedure Act 'shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.'" (citing Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))). "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, as a matter of law, Applicant knowingly and intelligently waived his right to present his affirmative defense when he pled guilty.

Because Applicant waived his right to raise this defense, post-conviction relief is in inappropriate avenue to seek relief on these grounds and this Court should not grant a new trial.

Plea Counsel

Respondent further submits that this Court improperly granted post-conviction relief based on Plea Counsel's failure to appear at the evidentiary hearing. Plea Counsel was

subpoenaed by this Court to appear at the evidentiary hearing to testify, but, for unknown reasons, he did not appear. At the hearing, Respondent requested a continuance and explained to the Court that Plea Counsel's testimony was necessary to create a full record and to make a proper decision in this case. This Court denied Respondent's motion for a continuance.

Respondent asks this Court to take note that Plea Counsel was subpoenaed by the court to appear at the evidentiary hearing on November 8, 2016, at the *Sumter* County Courthouse. Due to a last minute unexpected conflict and a change in scheduling due to a Sumter County holiday, the hearing was held at the Williamsburg County Courthouse. Plea Counsel was told about the change and instructed to appear in Williamsburg County, but he was not under subpoena to appear in Williamsburg County. Plea Counsel did, in fact, appear at the Sumter County Courthouse that day.

This Court further noted on the record at the conclusion of the hearing that it could use the fact that Plea Counsel did not appear to testify against him in its consideration of ineffective assistance of counsel. However, Respondent respectfully submits that any use of this factor is improper because it is not in accordance with South Carolina law. Courts should presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). **The applicant must overcome this presumption to receive relief.** Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (emphasis added). By presuming Plea Counsel was ineffective in his representation because he was not present to testify at the evidentiary hearing, this Court has unlawfully shifted the burden of proof from the applicant to the State. The State is under no obligation to present any witness in an action for post-conviction relief. It is entirely the

applicant's burden to prove his allegations. This Court's reasoning created an unfair inference against the State.

Furthermore, Plea Counsel's failure to appear at the hearing is not evidence that should be considered by this Court in any way. Plea Counsel's failure to appear at the PCR hearing does not prove that he was ineffective in his representation of Applicant six years prior. The Court should consider only the evidence before it in deciding this case.

V.

For the reasons explained above, Respondent submits that post-conviction relief was improperly granted and requests this Court to alter its judgment and deny Applicant's application for post-conviction relief.

Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT BOLCHOZ  
Chief Deputy Attorney General

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Senior Assistant Deputy Attorney General

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Columbia, South Carolina

December 8, 2016

STATE OF SOUTH CAROLINA )  
COUNTY OF CLARENDON )

COURT OF COMMON PLEAS

MARCO A. CLARK )  
PETITIONER, )

v. )

TRANSCRIPT OF RECORD  
13-CP-14-00109

STATE OF SOUTH CAROLINA, )  
RESPONDENT.)

May 3, 2017  
Manning, South Carolina

**BEFORE :**

THE HONORABLE BRIAN M. GIBBONS, JUDGE

**APPEARANCES:**

CHARLES T. BROOKS, III, ESQ.  
Attorney for the Petitioner

JULIE A. COLEMAN, ESQ.  
Attorney for Respondent

FRANCES B. RAY, RPR  
Circuit Court Reporter

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SEP 18 2017

APPELLATE DIVISION

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1           THE COURT: All right, let me look through  
2 what we got up here. You know, it's been six months  
3 so I may get y'all to give me a basic outline again  
4 of the stipulated facts that came out, if y'all can  
5 remember that, for the record back in November,  
6 okay. So, in fact, would one of you do that first.  
7 Ms. Coleman, it's your motion so go ahead and start.

8           You got the caption, Madam Court Reporter?

9           THE COURT REPORTER: Yes, sir.

10          THE COURT: Go ahead.

11          MS. COLEMAN: Thank you, may it please the  
12 Court.

13          THE COURT: Yeah.

14          MS. COLEMAN: This is Marco A. Clark  
15 versus the State of South Carolina, 2013-CP-14-109.  
16 We're here today over the State's motion to alter or  
17 amend pursuant to rule 59(e). We met back in  
18 November of 2016 in the Williamsburg County  
19 courthouse and had the evidentiary hearing.  
20 Applicant is presently confined in the Department of  
21 Corrections pursuant to orders of commitment of the  
22 Clarendon County Clerk of Court. Applicant was true  
23 bill indicted at the March 2009 term of the  
24 Clarendon County grand jury for armed robbery and  
25 possession of a weapon during a violent crime. He

1 was represented by Harry Leslie Devoe, Jr., Esquire.  
2 On September 11th, 2012, applicant pled guilty as  
3 indicted without negotiations or recommendations  
4 before the Honorable Howard P. King and was  
5 sentenced to 22 years imprisonment for the armed  
6 robbery charge and five years imprisonment for the  
7 possession of a weapon charge to run concurrently.

8 And Your Honor, I noticed a mistake and I  
9 think in my motion I said he was sentenced by Judge  
10 Early. That was incorrect; it's Judge King.

11 THE COURT: I do remember Judge King.

12 MS. COLEMAN: Applicant filed an appeal  
13 and the Court of Appeals affirmed the applicant's  
14 conviction and sentence. Remittitur was issued  
15 February 21st, 2012. Applicant subsequently filed a  
16 timely application for post-conviction relief on  
17 March 18th, 2013, alleging that he was being held  
18 unconstitutionally based on the following  
19 allegations. Number one, court refused to approve  
20 funds for defendant's defense. Number two,  
21 ineffective assistance of counsel. Defense counsel  
22 admitted his ineffectiveness. And number three,  
23 plea counsel failed to order an evaluation. Our  
24 evidentiary hearing was confirmed, as I said, in  
25 November of last year. Applicant was present and

1 represented by Charles T. Brooks, III, and I was  
2 present, Julie A. Coleman for the Attorney General's  
3 Office. And Your Honor signed an order granting  
4 post-conviction relief on November 23rd, 2016, and  
5 filed December 1st, 2016 and I filed this motion to  
6 alter or amend.

7 Your Honor, as you recall from the  
8 hearing, the State did not present testimony from  
9 trial. Plea counsel Harry Devoe, he was not present  
10 at the hearing which was one of the issues I  
11 addressed in my motion. We don't have the  
12 transcript from the hearing so I'm a little hazy on  
13 some of what happened, but I do have my handwritten  
14 notes if those come in handy.

15 THE COURT: Now as I recall he was under  
16 subpoena.

17 MS. COLEMAN: Yes.

18 THE COURT: And he didn't come, and this  
19 is about the fourth time this thing has been  
20 rescheduled.

21 MS. COLEMAN: Yes, and he was ---

22 MR. BROOKS: And back in November was  
23 about the fourth time.

24 THE COURT: Right.

25 MR. BROOKS: So I just want to make sure.

1 MS. COLEMAN: Right. Your Honor, and  
2 there's no question that this was continued and  
3 rescheduled over and over again, which of course is  
4 frustrating for all parties. I believe some of  
5 those continuances were the applicant filed a motion  
6 for funding and that was granted so it was continued  
7 until the next term; but yet, we had subpoenaed  
8 Mr. Devoe to appear actually at the Sumter County  
9 courthouse that day and that's where the hearing was  
10 originally set and it was election day so we had to  
11 move it to Williamsburg County. And I think we  
12 found out after the hearing that he showed up  
13 accidentally to the Sumter County Courthouse even  
14 though I told him it had been moved so that's  
15 although he was technically under subpoena, he was  
16 not subpoenaed to the Williamsburg County  
17 Courthouse. And if you'd like, I can go through  
18 each allegation or each part of my motion.

19 THE COURT: But he didn't come over to  
20 Williamsburg, he didn't call anybody and say, hey,  
21 I'm here, where's everybody?

22 MS. COLEMAN: Right, that's right.

23 THE COURT: Okay. And so what was the  
24 State's, what did the State present at the hearing?

25 MS. COLEMAN: Nothing, we had no testimony

1 from witnesses.

2 THE COURT: Well, there you go. Talk to  
3 me about why I should reconsider the order and then  
4 I'll, you know, give me the legal reasons ---

5 MS. COLEMAN: Sure.

6 THE COURT: ---why, then of course I'll go  
7 to Mr. Brooks.

8 MR. BROOKS: Sure.

9 MS. COLEMAN: Well, starting with the fact  
10 that we didn't present witnesses and this is  
11 something that I should have mentioned the first  
12 time and I apologize for not doing so, so I  
13 appreciate you having a hearing today to let me try  
14 to correct that mistake. What I should have  
15 mentioned is that under the Strickland standard,  
16 Strickland v. Washington, counsel he's presumed to  
17 be effective. It's applicant's burden to overcome  
18 that presumption and they have to present adequate  
19 evidence to show that counsel was ineffective. So  
20 any use of the fact that we didn't have counsel  
21 there to testify shouldn't be used as evidence in  
22 the hearing to show that he was effective --  
23 ineffective six years earlier when he represented  
24 that the applicant at his guilty plea.

25 THE COURT: Was there evidence presented

1 that he admitted he was ineffective?

2 MS. COLEMAN: I believe the applicant is  
3 referring to the trial, the plea transcript where  
4 he, he requested funds for a M'Naghten evaluation.  
5 The Court denied his motion and the judge said  
6 something along the lines of, if you had asked  
7 sooner we would have granted your motion but because  
8 you didn't, we're denying it today. So I believe  
9 that's what applicant is using as admitting he was  
10 ineffective.

11 THE COURT: Was that point raised on  
12 appeal in the substantive opinion of the merits of  
13 the appeal by the Court of Appeals, whether or not  
14 the plea judge erred as a matter of law by going  
15 forward with a guilty plea when request was made to  
16 evaluate him under M'Naghten?

17 MS. COLEMAN: I'll have to check, Your  
18 Honor, to see the ---

19 THE COURT: That kind of appears to me to  
20 be the crux of this matter.

21 MS. COLEMAN: Yes, and I'm happy to look  
22 that up.

23 THE COURT: Okay.

24 MS. COLEMAN: I believe I've got those  
25 records with me.

1 THE COURT: That's an unpublished opinion.

2 MS. COLEMAN: Uh-huh.

3 (Pause.)

4 MS. COLEMAN: I'm not sure if I have the  
5 appellate records on me or not, but so sorry if I  
6 don't. They should have been in the judge's packet  
7 and I don't know if you still have it. That was  
8 back in November when I gave it to you, but I'm  
9 happy to send, pull them up after this hearing and  
10 email them to you or mail them or whatever.

11 THE COURT: Go ahead, move on.

12 MS. COLEMAN: Okay, thank you. As far as  
13 the rest of the arguments go, there are four main  
14 reasons why I filed this motion today, one being  
15 plea counsel's attendance at the hearing which we  
16 discussed. We allege that he, or we submit that  
17 using his absence to assume that he was ineffective  
18 unlawfully shifts burden of proof from the applicant  
19 to the State. The first, another reason being that  
20 the -- well, plea counsel was not deficient we would  
21 argue because he did request funding. Applicant's  
22 allegation is that counsel was ineffective for  
23 failing to request an evaluation or request funding  
24 for an evaluation. The guilty plea transcript shows  
25 that he did request funding, and the judge denied

1 his motion. Now of course, as we've discussed the  
2 judge said that he might have granted his motion if  
3 he'd asked sooner; but at that point we argue that  
4 there's nothing further that he could have done  
5 because he did request funding for the evaluation  
6 and his request was denied. And as the trial court  
7 pointed out on the record at the plea, State v.  
8 Colden ---

9 THE COURT: Again, did he request funding  
10 for an evaluation or request an evaluation?

11 MS. COLEMAN: He requested funding for the  
12 evaluation.

13 THE COURT: Trial counsel did not, you  
14 understand the difference?

15 MS. COLEMAN: Yes.

16 THE COURT: There's a difference between  
17 funding for an evaluation versus that actual  
18 evaluation.

19 MS. COLEMAN: Right.

20 THE COURT: I mean, I understand the two  
21 are basically synonymous, but there's a difference  
22 there.

23 MS. COLEMAN: Right. And I'm not sure,  
24 you know, if we had plea counsel there ---

25 THE COURT: If Mr. -- okay. Assuming he

1 did not ask, trial counsel did not ask for an  
2 evaluation would that have been ineffective?

3 MS. COLEMAN: Depends on, I mean, in this  
4 case I would argue no because he talked in the  
5 transcript about he presented the trial judge the  
6 fact that he'd had him evaluated for mental  
7 competency. I believe he said he didn't think that  
8 there were any issues. I mean, he was found to be  
9 mentally competent to stand trial.

10 THE COURT: To stand trial. The question  
11 is whether or not he could conform, at the time he  
12 could have conformed his behavior to the law.

13 MS. COLEMAN: Right. And I would like to  
14 assume that if he believed that was an issue he  
15 would have raised it. Of course, he did raise it to  
16 the trial judge so, I mean, we would argue that he  
17 did request the evaluation.

18 THE COURT: Okay.

19 MS. COLEMAN: But of course, we don't have  
20 plea counsel here to testify about what he was  
21 thinking or what happened so we're really just not  
22 sure.

23 THE COURT: Right.

24 MS. COLEMAN: But I would argue he's not  
25 deficient because he did request the evaluation.

1 More importantly, the prejudice was not addressed in  
2 the order granting post-conviction relief. In order  
3 to show ineffective assistance of counsel there must  
4 be deficiency and prejudice; and in order for the  
5 applicant to meet his burden of proving prejudice,  
6 he must present some kind of evaluation that proves  
7 what the M'Naghten evaluation would have shown. He  
8 must put up an expert witnesses or show a result or  
9 a report written up for some evaluation that says,  
10 yes, he was proved that he didn't know what was  
11 going on at the time, that he could use at that  
12 trial. And because they didn't present anything at  
13 the hearing they can't overcome that burden. And  
14 I've got a couple of cases I can hand up if you'd  
15 like.

16 Bannister v. State and Glover v. State are  
17 both South Carolina cases that address this issue.  
18 And these cases basically read that the applicant  
19 must present the testimony of the favorable witness  
20 in order to prove what they would have said at the  
21 trial. And without that it's just mere speculation  
22 as to what could have been said, but it doesn't  
23 prove that the trial would have been different  
24 unless you actually have the results that say that  
25 it would have been different. And the final reason

1 I would argue that the order is improper is because  
2 he pled guilty to these charges which waives his  
3 right to address this on appeal. As you said, we  
4 can we can pull up the appellate records and see if  
5 this was argued on direct appeal. But this issue,  
6 at least his first allegation which reads that the  
7 trial court improperly denied -- let's see, Court's  
8 refusal to submit funding for defendant's defense.  
9 That's a direct appeal issue. That should have been  
10 raised at the trial before he pled guilty or on  
11 direct appeal; and because he pled guilty and  
12 admitted to his guilt, he has waived that, the right  
13 to challenge that. PCR is not a substitute for a  
14 trial or a direct appeal. I've got some case law on  
15 that as well.

16 I've got a quote from Whetsell v. State.  
17 The general rule is that guilty pleas freely and  
18 voluntarily entered act as a waiver of all  
19 jurisdictional defects and defenses including the  
20 claims of a violation of the constitutional right  
21 prior to the plea. Furthermore review of a trial  
22 error is unnecessary where a defendant admits in  
23 open court after his conviction he's guilty, that  
24 he's guilty, after his conviction of his guilty.

25 THE COURT: I was reading something while

1 you were saying that. Let me ask you a question.  
2 All right, in your brief you say although mental  
3 competency to stand trial cannot be waived by  
4 pleading guilty, okay. That's not what we're  
5 talking about here.

6 MS. COLEMAN: Right.

7 THE COURT: We're talking about capacity  
8 to conform—

9 MS. COLEMAN: Yes.

10 THE COURT: —correct?

11 MS. COLEMAN: Yes, Your Honor.

12 THE COURT: Did that case say capacity to  
13 conform can not be waived?

14 MS. COLEMAN: No, this was—

15 THE COURT: Do you know of any case law  
16 that says that cannot be waived by doing a guilty  
17 plea? I mean, 'cause it seems to me if you can't  
18 waive mental competency to stand trial by doing a  
19 guilty plea, you certainly shouldn't be able to  
20 waive capacity to conform by doing a guilty plea. I  
21 don't know if there's any case law in South Carolina  
22 on that.

23 MS. COLEMAN: Let me check on the brief if  
24 you would allow me. I'm not sure if I have any  
25 specific case law on that issue in the brief. I

1 would argue, however, that that was a defense, or an  
2 affirmative defense that we could use at trial and  
3 because he chose to plead guilty rather than go to  
4 trial he waived his right to embrace that defense.

5 THE COURT: And I'm just trying to give  
6 the Court of Appeals and the Supreme Court  
7 everything they can have because this thing is going  
8 to be reviewed one way or the other. I want to make  
9 sure they understand what I'm thinking when they're  
10 looking at whatever issues they want to---

11 MS. COLEMAN: Right.

12 THE COURT: ---make whatever decision on.

13 MS. COLEMAN: Yes. And I don't have a  
14 specific case that would say that. And there might  
15 be one out there that I haven't seen, but I would  
16 argue that this is an affirmative defense that he  
17 could, that he waived his right to bring by pleading  
18 guilty.

19 THE COURT: All right.

20 MS. COLEMAN: So in order to ---

21 THE COURT: Is -- okay. So affirmative  
22 defense of incompetence, okay, I understand what  
23 you're saying.

24 MS. COLEMAN: Yes. And in order to attack  
25 this, and you can raise this issue on

1 post-conviction relief, but in order to raise it at  
2 PCR, he must bring it as an issue of ineffective  
3 assistance of counsel which he's done in allegations  
4 two and three I believe. But I just wanted to  
5 clarify that as far as his first allegation goes,  
6 that the court improperly denied his motion for  
7 funding, that's not something that he can raise at  
8 PCR; and so if it was granted on those grounds  
9 alone, then I would argue that that's improper. I  
10 believe that's all four of the reasons that I have,  
11 and I'm happy to answer any questions you have.

12 THE COURT: Okay.

13 MS. COLEMAN: Or go into something further  
14 if you'd like me to.

15 THE COURT: I'll come back to you.

16 Mr. Brooks.

17 MR. BROOKS: Judge, it seems like  
18 sometimes you get, talking about PCRs, when we get  
19 one we want to do the best we can to maintain. I do  
20 have the Court of Appeals' opinion which is only a  
21 paragraph. And Judge, just to surmise it for you,  
22 the three justices on the Court of Appeals basically  
23 just said that Marco Clark appeals his conviction,  
24 he argued the trial court erred in denying his  
25 motion to fund to hire an expert. Talked about the

1 capacity to distinguish moral legal right from  
2 wrong. We affirm pursuant to rule 22(b) subsection  
3 one of the appellate rules and the following  
4 authorities which is Rivers versus Strickland and  
5 the case cite, cite the case from 1975. And they  
6 just basically say the general rule is that a plea  
7 of guilty voluntarily and understanding may  
8 constitute a waiver of non-jurisdictional defects  
9 and defenses including claims of violation of  
10 constitutional right prior to plea. I did want to  
11 -- since Ms. Coleman was having a little difficulty  
12 I found mine. That's what they said.

13 So obviously our position is kind of going  
14 back to what you originally questioned, Judge, when  
15 you said did he request to have evaluated or did he  
16 request funds? Because my client is indigent, you  
17 know, that's kind of one and the same, you know,  
18 because obviously without the money you, in essence,  
19 deny him the ability to be evaluated and I think  
20 that would have been critical in this particular  
21 situation. And as far as the prejudice is  
22 concerned, Judge, he got almost 22 years sentence.  
23 I think that's prejudice enough on its face. And I  
24 just think that, Judge, that, you know, what would  
25 probably have cleared all this up is if Mr. Devoe

1 was present to answer the questions as far as his  
2 representation of Mr. Clark; but of course, he  
3 wasn't there and obviously that would in essence  
4 hurt us because we didn't have the ability to call  
5 him as a witness either. But we could have called  
6 him as a witness, but we only had to work with the  
7 limited means that we had which was Mr. Clark.  
8 There were certain questions I would like to ask  
9 Mr. Devoe: How long did you meet with him, how long  
10 did you talk to him, what was his demeanor like, and  
11 all the attorney client contact; but of course, we  
12 don't know that. And I think in light of that,  
13 Judge, since the Court ruled based on Mr. Clark's  
14 testimony that he was never evaluated, never had the  
15 opportunity to be evaluated ---

16 THE COURT: And plus, my concern about his  
17 capacity to conform based upon the way and manner of  
18 which he testified at that hearing. You know, that  
19 went a lot into, you know, my credibility  
20 determination and make whatever decision I make so  
21 that. You know, but talk to me about Ms. Coleman's  
22 argument and her brief, that well, I mean, you  
23 should have an expert, you didn't prove what a  
24 M'Naghten evaluation would have proved so therefore,  
25 you failed to prove your prejudice prong under

1 Strickland.

2 MR. BROOKS: Well, Judge, obviously that  
3 was a very good question but all we had is what we  
4 have, and that's all I can give you, Judge, which is  
5 Mr. Clark's testimony which we had an opportunity to  
6 hear and see. We did not have an expert. It's our  
7 position that, you know, with Mr. Devoe, if he was  
8 present we could have done a greater inquiry as far  
9 as who he could have gotten, when he could have  
10 gotten them. And of course, we didn't have it and  
11 we can only go off of the evidence that we had and  
12 the evidence that we had was Mr. Devoe wasn't  
13 available to get into that.

14 Judge, what we got is what we got and we  
15 just ask the Court to err on the side of caution and  
16 maintain this order 'cause as you said, Judge, it's  
17 gonna get reviewed one way or the other.

18 THE COURT: It's gonna be reviewed one way  
19 the other, I mean.

20 MR. BROOKS: I know I'm really not —

21 THE COURT: I imagine when the appellate  
22 court reads this, I hope they take it with the grain  
23 of salt I say it. I'm used to being reversed. That  
24 doesn't offend me, okay, but I'm trying to get it  
25 right.

1 MR. BROOKS: But I know I'm not giving you  
2 an answer as far as, hey, is there an expert out  
3 there; if there is, why we didn't have that person  
4 available. Judge, I mean, we gave you all we had  
5 and you ruled in favor of us, and we would ask you  
6 to maintain that and deny the State's motion to  
7 reconsider your order.

8 THE COURT: You know, the two issues that  
9 I see here -- and thank you, I will come back to  
10 y'all if you need to. But the two issues I see,  
11 number one, the waiver. Counting on the arguments  
12 of did the fact that Mr. Clark pled guilty, did  
13 that, that in and of itself, -- you agree, Ms.  
14 Coleman -- that did not waive his mental competency  
15 to stand trial. You agree with that?

16 MS. COLEMAN: That's correct, to stand  
17 trial.

18 THE COURT: So the question is, does that  
19 guilty plea waive his capacity to conform his  
20 conduct to the underlying criminal act which led to  
21 the charge. I don't know of any case law. You  
22 didn't hand up any case law so ---

23 MS. COLEMAN: I'm happy to look into that  
24 further just to be sure I wasn't missing anything.

25 THE COURT: Okay. That's one issue that

1 we need. The second one is, was trial counsel's  
2 failure to request a M'Naghten in a more timely  
3 manner ineffective, okay. And that's obviously done  
4 at the PCR standard, and I found that it was because  
5 it was such, you know, late in the game and I  
6 believe as he testified he went ahead with the plea  
7 that time hoping to get less, but he got more at 22  
8 years. And I, you know, I kind of agree with Mr.  
9 Brooks' assertion that's prejudicial enough, got 22,  
10 a 22 year sentence. How old was he at the time it  
11 happened?

12 PETITIONER CLARK: I just turned 27 I  
13 think.

14 THE COURT: July of '09?

15 PETITIONER CLARK: Yes, sir.

16 THE COURT: How old was he?

17 MR. BROOKS: How old were you then?

18 PETITIONER CLARK: At that time I was 27.

19 THE COURT: Of course, I can't remember  
20 the prior record that he had. I think we talked  
21 about some of that, we may have. That's a stiff  
22 sentence for a 27 year old. Of course, armed  
23 robbery, what's the number for robbery? Ten? Yeah,  
24 that's a big sentence so.

25 MR. BROOKS: If had gotten the minimum,

1 Judge, he probably would have been even his PCR ---

2 THE COURT: Right, okay. We got the  
3 record open. Anything else either one of y'all want  
4 to tell me? You know, those are the two ultimate  
5 issues I see for appellate purposes understanding  
6 that no matter what I do on this decision it's gonna  
7 be appealed one way or the other. Of course, I'm  
8 gonna try to get it right. I'm gonna leave the  
9 record open for either one of you to submit  
10 additional case law supporting or going against  
11 those two major issues that I just framed.

12 Today is May 3rd. You know, we need some  
13 finality, he needs some finality, so I'm gonna give  
14 y'all until the end of May. Let's say June 1st to  
15 get me that, okay, that's a couple of weeks. I know  
16 we got spring and all that kind of stuff going on,  
17 different terms of court. Mr. Brooks is spread  
18 around, I know that. Ms. Coleman, you're all over  
19 the place anyway and meet with the AG's Office so  
20 that should give you plenty of time to find out.  
21 You don't have to submit it to me in a brief format.  
22 You can just send it to me by way of email if you  
23 want with a little paragraph or whatever as to why  
24 you think it's applicable or not, and then I'll take  
25 all that and issue a decision one way or the other.

1 All right, anything else?

2 MS. COLEMAN: Your Honor, if the parties  
3 would like to or if you would like to hear it, we  
4 can try to obtain testimony from Harry Devoe maybe  
5 by form of deposition or an affidavit. I don't know  
6 if that, I mean...

7 THE COURT: Well, see, that's re-opening  
8 the record.

9 MS. COLEMAN: Right.

10 THE COURT: And you know, I don't ---

11 MS. COLEMAN: We certainly don't have to,  
12 but I know he expressed it might be helpful for him  
13 as well to have that testimony.

14 THE COURT: Well, the only way to do that  
15 would be by way of live testimony. I'm kind of  
16 hesitant to---

17 MR. BROOKS: Judge, my position on that is  
18 we've done this dance, it's over, the process is  
19 over, ---

20 THE COURT: I agree.

21 MR. BROOKS: ---to try to get him, and ---

22 MS. COLEMAN: And that's fine, I agree.

23 THE COURT: The trial is done, we have the  
24 record, okay, and this is the record which is either  
25 gonna survive on appeal or be reversed on appeal,

1 okay. Whatever it is, whatever happens happens.  
2 And of course, I know you've explained to Mr. Clark  
3 and his family the appellate process and then what  
4 happens but, we'll go from there but. All right, so  
5 we'll leave the record open till June 1st then for  
6 you to any further submissions, and of course,  
7 whatever order the court issues we'll make sure  
8 those submissions will reflect so they will be part  
9 of whatever record on appeal there is. Anything  
10 else?

11 MR. BROOKS: That's it.

12 THE COURT: All right. That concludes the  
13 hearing in this matter. Thank you so much.

14  
15 \* \* \* END OF TRANSCRIPT OF RECORD \* \* \*

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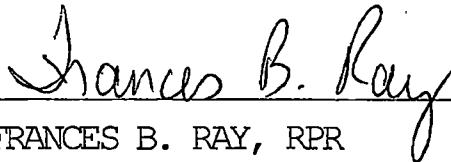
**C E R T I F I C A T E   O F   R E P O R T E R**

STATE OF SOUTH CAROLINA )  
COUNTY OF FLORENCE        )

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

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

Witness my hand at Florence, South Carolina, this 22nd day of August, 2017.

  
FRANCES B. RAY, RPR

STATE OF SOUTH CAROLINA )  
COUNTY OF CLARENDON )

IN THE COURT OF COMMON PLEAS )  
THIRD JUDICIAL CIRCUIT )

Marco A. Clark, #335713, )

2013-CP-14-109 )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

CERTIFIED TRUE COPY  
OF ORIGINAL FILED IN THIS OFFICE

DATE 7/3/2017

Beverly H. Roberts

CLERK OF COURT  
CLARENDON COUNTY, SC

AMENDED ORDER

DENYING POST-CONVICTION RELIEF

2017 JUN 30 PM 12:43  
BEULAH A. ROBERTS  
CLERK OF COURT  
CLARENDON COUNTY, SC

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on March 18, 2013. Respondent submitted its Return on June 12, 2013. An evidentiary hearing was convened on November 8, 2016, at the Williamsburg County Courthouse. Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Plea Counsel was not present to testify at the hearing. Respondent made a motion to continue the hearing until a time when Plea Counsel could be present, and, based on the age of this case and number of times it had previously been continued, this Court denied the motion. The Court had before it a copy of the motions hearing transcript, the Record on Appeal including the plea transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. Following the hearing, this Court issued an "Order Granting Post Conviction Relief" signed on November 23, 2016 and filed December 1, 2016. On December 15, 2016, Respondent filed a Motion to Alter or Amend

Pursuant to Rule 59(e). A hearing over the motion was held with all parties present on May 3, 2017, at the Clarendon County Courthouse. This Order follows.

After careful deliberation and consideration of the entire record before the Court, and considering applicable law, this Court hereby orders that Respondent's Motion to Alter or Amend Pursuant to Rule 59(e) is GRANTED. The "Order Granting Post Conviction Relief" filed December 1, 2016, is hereby VACATED, and this application for post-conviction relief is DENIED and DISMISSED with prejudice. The Court now finds as follows:

### I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Applicant was true bill indicted at the March 2009 term of the Clarendon County Grand Jury for Armed Robbery and Possession of a Weapon during a Violent Crime (2009-GS-14-69). He was represented by Harry Leslie Devoe, Jr., Esquire. On September 11, 2012, Applicant pled guilty as indicted without negotiations or recommendations before the Honorable Howard P. King. He was sentenced to twenty-two years' imprisonment for the Armed Robbery charge and five years' imprisonment for the Possession of a Weapon during a Violent Crime charge to run concurrently.

Applicant subsequently appealed to the South Carolina Court of Appeals. The Court of Appeals affirmed Applicant's conviction and sentence. State v. Clark, Op. No. 2012-UP-55 (Cl. App. filed February 1, 2012). The Remittitur was issued on February 21, 2012.

## II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. "Court refusal to approve funds for Defendant's defense."
  - a. "Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed 2<sup>nd</sup> 53 (1985)"
2. "Ineffective Assistance of Counsel."
  - a. "Defense counsel admitted his ineffectiveness"
3. Plea Counsel failed to order evaluation."
  - a. "Plea counsel admitted he failed to order correct exam."

## III. 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 pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

#### V. SUMMARY OF RELEVANT TESTIMONY

At the evidentiary hearing, Applicant testified that he met with Plea Counsel at least three or more times prior to the plea. He stated that he pled guilty to this crime before Judge King. He stated that he was kind of "cloudy" the day of the guilty plea, and he did not know that he was supposed to go to trial that day. Applicant stated that he knew that he did something wrong, but he didn't know what was going on, and his attorney told him that he would not win at trial, so he decided to plead guilty. He stated that Plea Counsel explained the charges to him, but he does not know if he really understood everything. He stated that Plea Counsel did explain some things, but probably not everything.

Applicant testified that he previously used drugs, and the drug use made him weak at times. He stated that he had no mind of his own. He stated that he had turned himself into law enforcement on another crime before this happened, but they should have given him time in prison then instead of leaving him on the streets.

Applicant testified that he was in the passenger seat of his truck when he was pulled over; he had been drinking and he was not on the drugs he was supposed to take at the time. He stated that during the crime, he was under the influence of crack-cocaine, cocaine, marijuana, and



alcohol. He testified that he admits he did wrong and he knew it, but he was given too much time because he never hurt anybody.

## VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

### LACK OF M'NAGHTEN EVALUATION

Applicant alleges that he is entitled to post-conviction relief based on the trial court's refusal to approve funds for his defense. This allegation must be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160.

An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20 (1976).

Although the trial court did deny Applicant's request for funds for a M'Naghten evaluation, this fact does not support a cognizable claim for post-conviction relief under any of the statutory grounds. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

Furthermore, Applicant waived his right to challenge the trial court's denial of his request for funds, which is a direct appeal issue, by pleading guilty. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). "Furthermore, review of a trial error is unnecessary where a defendant admits in open court after his conviction that he is guilty." Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing State v. Sroka, 267 S.C. 664, 230 S.E.2d 816 (1976)).

Finally, Applicant's claim that he was not able to understand criminal responsibility at the time he committed the crime is an affirmative defense that he also waived by pleading guilty.

S.C. Code Ann. § 17-24-10 (1976) reads:

**Affirmative defense.**

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

Applicant waived his right to raise this affirmative defense by pleading guilty. In South Carolina, a guilty plea has been recognized to be “a confession of guilt, made in a formal manner[.]” and such a plea “has the same effect in law as a verdict of guilty[.]” Sanders v. Leake, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970). By entering a guilty plea, a criminal defendant admits all elements of the charged offense, **waives all other non-jurisdictional defects and defenses**, and leaves open for review only the sufficiency of the indictment. State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000) (emphasis added); see State v. Snowdon, 371 S.C. 331, 333, 638 S.E.2d 91, 92 (Ct. App. 2006) (“Generally, a knowing and voluntary guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional violations.”). As a result, “[a] defendant who pleads guilty usually may not later raise independent claims of constitutional violations.” Gibson v. State, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

Applicant solemnly admitted his actions were criminal in nature and sufficient to satisfy the elements of armed robbery and possession of a weapon during the commission of a violent crime. By admitting to the plea court that Applicant was criminally responsible for the crime, he waived any defense he may have had to this crime, including the affirmative defense of competency to understand criminal responsibility. Applicant was found competent to plead guilty, thus he knowingly and intelligently waived this defense by entering a valid guilty plea.

The South Carolina Court of Appeals used this exact reasoning in denying Applicant’s direct appeal, citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975): “The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of

A handwritten signature or set of initials in black ink, located in the bottom right corner of the page. The signature is stylized and appears to consist of several loops and a final flourish.

nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea." State v. Marco Andrea Clark, Unpublished Opinion No. 2012-UP-055 (filed February 1, 2012). Based on this holding by the Court of Appeals, Applicant's allegation is also barred by the doctrine of *res judicata*.

Therefore, because this allegation fails to state a cognizable claim for post-conviction relief, because Applicant waived his right to challenge this direct appeal issue by pleading guilty, because Applicant waived his right to raise the affirmative defense of lack of criminal responsibility, and because the argument is barred by *res judicata*, the allegation is denied and dismissed with prejudice.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises an allegation arguing that Trial Counsel was ineffective in his representation surrounding his trial. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). This Court finds that the testimony presented at the PCR hearing satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus this allegation should be denied and dismissed with prejudice.

Applicant alleges that Plea Counsel was ineffective for failing to order a M'Naghten mental evaluation, and that he admitted his ineffectiveness on the record before the plea. The trial transcript before the Court indicates that Plea Counsel had Applicant mentally evaluated in June of 2009, and he was found competent to stand trial. Motions hearing tr. 3 line 18-19. Plea Counsel moved the plea court on July 7, 2009 for additional funding to have Applicant evaluated in order to determine criminal responsibility, and the plea judge denied his motion. See motions



hearing transcript; ROA 10 line 6-19. During the guilty plea, the plea judge made a determination on the record that Applicant was competent to stand trial and that Applicant understood criminal responsibility at the time he committed the crime. ROA 19 line 2-13.

This Court notes that, although Plea Counsel was not present at the evidentiary hearing to testify, Plea Counsel is presumed to be effective. Courts should presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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).

#### *Deficiency*

Based on the record before this Court, it is clear that Plea Counsel made a motion for funding to obtain an independent M'Naghten evaluation for criminal responsibility of Applicant. Plea Counsel explained to the plea court in detail why he believed this evaluation was necessary, and the plea court denied his motion. It was within the trial court's discretion to deny Plea Counsel's motion. State v. Colden, 372 S.C. 428, 641 S.E.2d 612 (2007). Plea Counsel's request for funding for this evaluation was effective assistance of counsel. The plea court's decision to deny his request was out of Plea Counsel's control and does not render him deficient. Plea Counsel requested this evaluation prior to the guilty plea, and the plea court denied his request. There was nothing further that Plea Counsel could have done at this point to obtain the evaluation. Therefore, because Plea Counsel *did* request a M'Naghten evaluation and his request was denied, this Court finds that Plea Counsel was not deficient in this regard.

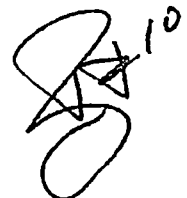


*Prejudice*

Applicant has failed to meet his burden of proving prejudice because he did not present evidence to show that (1) Plea Counsel's request to obtain a M'Naghten evaluation would have been granted; and (2) a M'Naghten evaluation would have proven that he did not understand criminal responsibility. Thus Applicant has failed to demonstrate that Plea Counsel's failure to obtain a M'Naghten evaluation changed the outcome of the proceedings, and he cannot prove prejudice.

A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In every criminal case, it is presumed the defendant is sane. State v. Milian-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985). Insanity is an affirmative defense to a prosecution for a crime. *Id.* South Carolina has adopted the M'Naghten test to determine insanity. State v. Lewis, 328 S.C. 273, 277-78, 494 S.E.2d 115, 117 (1997). A defendant is insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. *Id.*; see S.C. Code Ann. § 17-24-10(A) (Supp.1996).

First, Applicant has not met his burden in proving that he would have received funding for a M'Naghten evaluation had Plea Counsel requested it. In fact, Plea Counsel did request funding for an evaluation and the court denied his request. Thus, Applicant cannot prove that any further action would have changed the plea court's decision. It is in the discretion of the plea court to determine whether Applicant was entitled to an evaluation. State v. Colden, 372, S.C. 428, 641 S.E.2d 612 (2007). The plea court was within its discretion when it denied the request,



and Applicant has provided no evidence to prove that any additional argument or information presented to the plea court would have changed its decision.

Second, Applicant has not presented any credible evidence at all to support his assertion that the M'Naghten evaluation would have shown that he did not understand criminal responsibility. South Carolina courts have repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice for the failure to present that testimony at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

In determining if counsel is ineffective for failing to request a competency hearing, an applicant must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). "Under this second prong of Strickland, the petitioner need only demonstrate a 'reasonable probability' that he was either insane at the time of the [crime] or incompetent at the time of the plea. Jeter at 233-34, 417 S.E.2d at 596. "For an insanity defense, the accused must be unable to distinguish moral or legal right from wrong and to recognize the particular act charged as morally or legally wrong." Id. (citing S.C. Code Ann. 17-24-10 (Supp. 1991)). "To show prejudice for failing to pursue this defense, the petitioner must produce some evidence of insanity or a showing that with the exercise of due diligence, an insanity defense could have been developed." Id. (citing State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982), accord Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984)).



Here, Applicant has presented no credible evidence of his incompetency or lack of criminal responsibility. He has not presented expert witness testimony to explain what the results of the M'Naghten evaluation would have been. He has provided no affidavits, evaluation results, or any other form of testimony to meet his burden of proof. Therefore, it is improper for this Court to speculate as to the results of an evaluation and to assume prejudice. Criminal defendants are presumed sane in every criminal case. Milian-Hernandez, supra. Based on this, this Court finds Applicant has failed to meet his burden of proving prejudice.

This Court finds Applicant has failed to show either prong of the Strickland test. Accordingly, this allegation is denied and dismissed with prejudice.

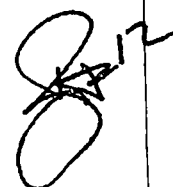
#### ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### VII. CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-

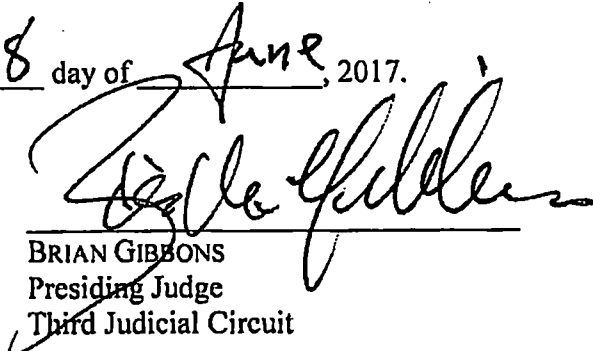



conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That Respondent's Motion to Alter or Amend Pursuant to Rule 59(e) is granted;
2. That the "Order Granting Post Conviction Relief" filed December 1, 2016, is vacated;
3. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
4. That Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 18 day of June, 2017.

  
 BRIAN GIBBONS  
 Presiding Judge  
 Third Judicial Circuit

  
 \_\_\_\_\_, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CLARENDON ) INDICTMENT FOR  
 ARMED ROBBERY  
 POSSESSION OF A WEAPON DURING A VIOLENT CRIME

At a Court of General Sessions, convened on March 5, 2009, the Grand Jurors of CLARENDON COUNTY present upon their oath:

**COUNT ONE – ARMED ROBBERY**

That MARCO ANDREA CLARK, ALVIN WASHINGTON, AND LEO LAMONT ZENE did in Clarendon County on or about December 4, 2008, violate Section 16-11-330 of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, to-wit: a handgun, did feloniously take from EZ Shop Convenience Store by means of force or intimidation goods or monies of the said EZ Shop Convenience Store, such goods or monies being described: cash.

**COUNT TWO – POSSESSION OF A WEAPON DURING A VIOLENT CRIME**

That MARCO ANDREA CLARK did in Clarendon County on or about December 4, 2008, was in possession of and did visibly display a handgun during the commission of a violent crime, to-wit: Armed Robbery, in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

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

CERTIFIED TRUE COPY  
 OF ORIGINAL FILED IN THIS OFFICE

DATE 3/18/2013

Brenda B. Roberts

CLERK OF COURT  
 CLARENDON COUNTY, SC

C. Kelly Jackson  
 SOLICITOR

WITNESSES

Thomas Burgess-CCSO

DOCKET NO. 2009-GS-14- DD69

The State of South Carolina

County of CLARENDON

COURT OF GENERAL SESSIONS

MARCH TERM 2009

THE STATE

vs.

MARCO ANDREA CLARK

ALVIN WASHINGTON

LEO LAMONT ZENE

ARREST WARRANT NUMBER

M081966 M081965 M081964

M081967

ACTION OF GRAND JURY

*True Bill*

*[Signature]*  
Foreperson of Grand Jury  
Date: *3-5-09*

VERDICT

Foreperson of Petit Jury

Date:

Indictment for

ARMED ROBBERY  
POSSESSION OF A WEAPON DURING A  
VIOLENT CRIME

C. KELLY JACKSON, SOLICITOR

FILED  
MAR 11 2009  
CLARENDON COUNTY  
SOUTH CAROLINA  
CLERK OF COURT  
OFFICE  
JIE COBY