VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marlboro County

Honorable Larry B. Hyman, Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

DAVID ERIC DIXON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001855

APPENDIX

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1 to him. Davie is wholly inapplicable. He knew of the
2 deadline. The testimony credible from counsel is that he
3 denied it once, not twice, not three times, but four times
4 all the way up to the very deadline. And that's just the
5 same realizing that the case against him was worst than
6 they had maybe originally believed.
7 Once he received the ballistic evidence fought, and
8 fought valiantly, and tried to get the plea offer held
9 open for him. He found some sympathy from the Court, but
10 ultimately, the Court properly recognized that it was not
11 within his province to force the offer to remain open.
12 THE COURT: What does Reed say? I know Reed says
13 that the State can withdraw essentially from a plea offer
14 at any time. But what does it say about situations when
15 the State has given an deadline or indicated a deadline or
16 an extension of a deadline when the State starts talking
17 in terms of timelines?
18 What does that mean? And does Reed allow the State
19 to withdraw a plea? It says, "Up until the time of the
20 plea is entered." Does that mean that the Solicitor can
21 offer a plea and the Defendant accept the plea. Say,
22 "Okay, I'll do that," but before the Defendant pleads
23 guilty does Reed say the State can say, "No, we're not
24 going to do that. We're not going to make that
25 recommendation. We're not going to have this negotiated

1 plea?"

2 MR. JAMES: I think it is wholly appropriate for the

3 State, so long as the Applicant, so long as the accused,

4 has not entered a plea of guilty or otherwise signed off

5 and performed and relied upon the agreement to then

6 withdraw the offer based upon contract principles we

7 operate by when it comes to plea negotiations.

8 THE COURT: I mean --

9 MR. JAMES: It is appropriate to have a firm offer

10 left open. Say you have until this date in order to

11 accept, and then after that we understand that

12 circumstances will change.

13 THE COURT: Well, what if the Solicitor then calls

14 back and say, "No. I'm not going to do that. I've

15 changed my mind." Can he do that? I mean isn't what Reed

16 says; that he can actually do that?

17 MR. JAMES: Yes.

18 THE COURT: What do you say about that Mr. Boozer? I

19 mean that's kind of how I'm left with Reed, and I mean,

20 Judge Anderson wrote that opinion some while back.

21 I mean it seems like Reed is saying up until the

22 moment, not that he accepts it, up until the moment he

23 enters his plea the State can step back and say, "No.

24 We're not going to do that." I mean isn't that what Reed

25 says?

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1 MR. BOOZER: I understand in Reed that that is what
2 Reed says, Judge. But I think that the facts in this case
3 coupled with the memo from Chief Justice Toal separate
4 this instance from Reed.
5 THE COURT: How does it distinguish?
6 MR. BOOZER: I'm sorry. How does it distinguish.
7 THE COURT: Yeah. How is this distinguishable from
8 Reed? Or how does it take it out of Reed?
9 MR. BOOZER: I think this case is taken out of Reed
10 the moment counsel files a request for Rule Five
11 materials. I think that at that point the State has a
12 duty to turn all that stuff over. And I know from
13 experience that it trickles in and trickles in up until
14 trial and sometimes ---
15 THE COURT: I think Judge Toal said it was in her
16 opinion unethical for them to prep it, a plea agreement,
17 upon the Defendant's waiver of his rights under Rule Five?
18 MR. BOOZER: Correct. But that's ---
19 THE COURT: And ---
20 MR. BOOZER: --- essentially what was done in this
21 case because he doesn't have all the discovery.
22 THE COURT: And Brady.
23 MR. BOOZER: Correct. And that's essentially what's
24 being done in Mr. Dixon's case because those items are

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1 if that stuff is not on his hands that's a defense.
2 Ballistics, if it's not shown that any sort of weapon
3 he may have had that's a defense. If you don't know if
4 those defenses are available to you how can you
5 intelligently go in and accept the plea or decide to go to
6 trial and not know what they're going to have.
7 THE COURT: But wouldn't he be in a situation where
8 no agreement would be enforceable where as Mr. James said.
9 What if we're in trial and new evidence develops as
10 Mr. James said? What if we're, you know, mid trial and
11 something pops up what no one knew about?
12 MR. BOOZER: I think that that is a ---
13 THE COURT: And, you know, the Defendant says, "Well,
14 if I'd of known this was coming down the pike I would have
15 pled guilty?" Don't we have a real problem then in
16 situations like that?
17 MR. JAMES: I think that is such a specific and rare
18 instance that that can be addressed separately. I think
19 in this case we don't have that. This isn't something
20 where, oh, this just popped up in the middle of trial and
21 nobody knew about it. It seems like it's kind just of
22 discovery taken ---
23 THE COURT: What if it pops up four days before
24 trial? In this case the deadline was the 26th of August
25 and trial wasn't held until, what, the 26th of October?

1 Isn't it something like that?
2 MR. JAMES: Yes, sir, late October.
3 THE COURT: Late October, wherever. I mean, almost
4 60 days later. I mean, what if within the next 60 days
5 some other stuff comes up? What if your client had
6 accepted the offer and then gets the ballistics and
7 changes his mind?
8 MR. BOOZER: Well, I guess that would certainly have
9 been a risk he would have accepted the offer and gone in
10 and done it before the Court. But then he would have a
11 newly discovered evidence claim ---
12 THE COURT: Yeah.
13 MR. BOOZER: --- after he entered the plea to go on
14 to P.C.R.
15 THE COURT: Absolutely.
16 MR. BOOZER: If that would have been the case. Here
17 ---
18 THE COURT: Rule 62? Something like that?
19 MR. BOOZER: Sure. A new trial. Here there is no --
20 the remedy is exactly that. He should be allowed to go
21 back and accept the plea and leave it up to the plea Court
22 and sentence as to what they're going to do.
23 THE COURT: Yeah, would probably have been easier if
24 the plea court would have just said, "Okay," but I don't
25 think that's enough time. It's a recommendation.

1 MR. BOOZER: Right.

2 THE COURT: Wouldn't it have been the same result?

3 Okay. I want you both to submit an order on this in the

4 next 30 days, please. Let me look at them.

5 MR. BOOZER: Thank you, Your Honor.

6 MR. JAMES: Thank you, Your Honor.

7

8 END OF TRANSCRIPT OF RECORD

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1 CERTIFICATE OF REPORTER

2

3

4 STATE OF SOUTH CAROLINA)
)
5 COUNTY OF MARLBORO)

6

7

8 I, HATTIE O. GORDON, Official Court Reporter for the
9 4th Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete Transcript of Record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the Court of Common Pleas for
14 Marlboro County, South Carolina, on the 24th day of July,
15 2018.
16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.

18

19

20 February 8, 2019

21

22 ______________________________

23 HATTIE O. GORDON, Court Reporter

24

25

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF MARLBORO)

David Eric Dixon,) Case No.: 2015-CP-34-00228
S.C.D.C. No. 331496,)
)
Applicant,)
) **ORDER OF DISMISSAL**
v.)
)
State of South Carolina,)
)
Respondent.)
)

This matter comes before the Court by way of an application for post-conviction relief filed by David Eric Dixon ("Applicant") on August 19, 2015, thereafter amended by filing on June 5, 2017. Respondent made its return on or about January 25, 2017, and thereafter amended on June 20, 2017. The Court convened an evidentiary hearing into the matter on Tuesday, July 24, 2018, at the Darlington County Courthouse in Darlington, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, T. Brandon Steen, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Marlboro County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

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CLERK OF COURT
MARLBORO COUNTY, S.C.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court. Applicant was indicted at the February

2013 term of the Marlboro County Grand Jury for murder (2015-CP-34-00228), attempted murder (2013-GS-34-00087); and possession of a weapon during the commission of a violent crime (2013-GS-34-00088). T. Brandon Steen, Esq., and Nicolas I. Lewis, Esq. represented Applicant. Mia David, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. On October 28, 2013, Applicant proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Applicant guilty as indicted on October 31, 2013. Judge Baxley sentenced Applicant to imprisonment for concurrent terms of 35 years for murder, 30 years for attempted murder, and one consecutive term of 5 years for the weapon charge, for a cumulative term of incarceration for 40 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Lara Caudy, Esq. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Applicant filed a *pro se* brief in response, raising the following issue:

> Whether the court erred by refusing to grant Appellant's Motion to keep the State's offer open until Discoverable Evidence is turned over.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Dixon, Op. No. 2015-UP-385 (S.C. Ct. App. filed July 29, 2015). The Remittitur was issued on August 14, 2015.

Present Application

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

1. "Ineffective assistance of Counsel"
    a. "Failed to have a mental health exam done before trial."
    b. "Failed to file a motion to keep state's offer of 25 years open in a timely manner."
    c. "Failed to object to the jury instruction that Attempted Murder is a general intent crime."

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2. "Ineffective Assistance of Appellate Counsel"

By amendment filed by and through PCR counsel on June 5, 2017, Applicant raised the following additional grounds for relief:

1. Ineffective assistance of counsel, in that:
   a. "Counsel failed to properly calendar and/or record the deadline with which to accept the State's plea offer and offered erroneous information to Applicant regarding the deadline to accept the plea. See trial transcript pg. 50-53. See also bond hearing transcript, pg. 6 and pg. 10."
   b. "Counsel failed to argue prior to trial that the State's plea offer should have been allowed to remain open after counsel was provided with ballistics information that was subject to Rule 5 disclosure <u>and</u> bring to the Court's attention Chief Justice Toal's March 1, 2004, memorandum regarding plea agreements and discovery to Solicitors."

At the evidentiary hearing, Applicant proceeded forward only on allegations set forth in the June 5, 2017, amendment, and indicated Applicant did not desire a new trial, but only wished for the offer to plead guilty in exchange for a sentence of 25 years.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; <u>Butler v. State</u>, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial

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process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

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

1. Misadvice as to Deadline to Accept Offer

Applicant alleges Counsel was ineffective for erroneously calendaring when the 25 year plea offer was to expire and, consequently, misadvising him as to when the offer would expire. The right to effective assistance of counsel is not limited to trial proceedings, but extends to the plea bargaining process. Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009) (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996)). Consequently defense attorneys have a duty to timely communicate "formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145 (2012); accord Davie, 381 S.C. at 609, 675 S.E.2d at 420. Prejudice from the failure to communicate a plea offer is determined on a case-by-case basis, and the ultimate analysis is "whether but for counsel's deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefitted from the offer." Id., 381 S.C. at 613, 675 S.E.2d at 422. Where an applicant for post-conviction relief establishes ineffectiveness for failure to communicate a plea offer, the appropriate remedy is a new sentencing hearing with the limitation that the applicant's sentence cannot exceed the original sentence. Id., 381 S.C. at 616-17, 675 S.E.2d at 424; cf. Lafler v. Cooper, 566 U.S. 156, 174-75 (2012) ("The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming

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respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence accordingly, or to leave the convictions and sentence from trial undisturbed.").

At a bond hearing on August 13, 2013, at which Applicant was present, the State firmly and clearly communicated on the record the parameters of the plea offer extended to Applicant:

> MS. DAVID: Your Honor, if I may. We are prepared to move forward with this case the week of September 30th. We have made an offer to the Defendant for 25 years, and it is the State's position that we're asking that he accept that offer before August 2th. And if not we're prepared to move to trial revoking the offer and that's it.

(R. 6, ll. 19-25). The Honorable Edward B. Cottingham thereafter inquired as to whether the offer had been properly communicated to Applicant and asked Applicant if he understood the deadline and parameters of the offer:

> THE COURT: They tell me, I'm not a party to it. I have nothing to do with it. They tell me that they have offered you a possible negotiated sentence. Is that right, Mr. Steen?
>
> MR. STEEN: Yes, Your Honor.
>
> THE COURT: Have you conveyed that to him?
>
> MR. STEEN: Yes, Your Honor.
>
> THE COURT: It is to his interest to know what I'm getting ready to say. That proposal will not be available to you when this case is set for trial in September. At that time all the witnesses would have been assembled. All the victim's family would have been notified. Your family would have been notified, and that offer will not be on the table.
>
> Mia, how long do you proposed to leave that proposal out there?
>
> MS. DAVID: Until our next term of court with you on August 26th.
>
> THE COURT: After August 26th it will not be available.

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MS. DAVID: Yes, sir.

THE COURT: Do you understand that?

MR. DIXON: Yes, sir.

THE COURT: I've been on the bench now 30 years, and I have seen so many defendants think that at the last minute they can get the same deal from three months ago. I as a trial judge have nothing to do with that. If she says, "Week after next that offer is over," it's over. And at that time you will be set for trial to face the charges of murder and attempted murder. Do you understand that?

MR. DIXON: Yes, sir.

THE COURT: All right, just so long as – now, your attorney has advised you of that, has he not?

MR. DIXON: Today, sir.

THE COURT: Sir?

MR. DIXON: Today.

THE COURT: Well, I've found from experience that there are experiences where people decide not to take the offer, get convicted and on appeal the first thing that they say is that my lawyer didn't tell me. In fairness to you I'm telling you, too.

I'm not suggesting to you that you do or do not. That's not my call. I'm just saying to you that that proposal will not be available after week after next. I just want you to understand.

MR. DIXON: Yes, sir.

(R. 10-11). On September 9, 2013, Counsel filed a motion seeking disclosure of SLED reports analyzing DNA and ballistics evidence, continue trial, and keep the plea offer open until all discoverable evidence was turned over to the defense pursuant to Chief Justice Jean Toal's memorandum dated March 1, 2004.[1] (R. 14-17).

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[1] "[I]t is unethical to premise a plea agreement on the defendant relinquishing the right to discovery in criminal cases. This practice is going to have adverse consequences in the future with claims of ineffective assistance of counsel based on a claim that the plea was not voluntary because the applicant did not have access to the solicitor's file."

During pre-trial motions on October 28, 2013, the trial court permitted Counsel to reaffirm on the record his motion to keep the offer open. (R. 67-74). Counsel noted the Court had declined to hear the motion, and thereafter explained Counsel and Applicant had been waiting for the ballistic report before accepting or rejecting the 25 year offer. (R. 67-68). Counsel argued the withdrawal of the offer was unreasonable, unfair, and then discussed the deadline as it related to a conference for the continuance request:

> MR. STEEN: Yes, sir. Per the Solicitor yesterday, I think she said that the deadline passed on August 26th. We did have a conference with Your Honor for the continuance on September 12th. At that time, based on that, I thought the offer was still opened. I'm not sure exactly at what point it was withdrawn or if the deadline was put on the record, but I thought that it remained opened.

(R. 69, ll. 2-9). The State argued the ballistics were never going to change its decision to prosecute Applicant in light of other evidence available and known to both parties prior to the ballistics report. (R. 71-72). The trial court thereafter explained to Counsel and Applicant that it declined to consider the motion because it had no authority to reinstate the State's plea offer. (R. 72-73). On subsequent appeal, in response to the Anders brief, Applicant filed a *pro se* brief that argued the Court erred in refusing to grant the motion to keep the plea offer open.

At the evidentiary hearing, Applicant testified he was waiting on the results of the ballistics report and did not want to plea before receiving that report. Applicant affirmed he knew the deadline for the plea offer, and claimed he was to be transported on the date of the offer in order to accept it, but that his transport was interfered with and prevented by the jail warden. On cross-examination, Applicant asserted he knew the deadline, that Counsel did not know the deadline, and that he didn't want the plea offer until the day of the deadline, at which time his transport was allegedly canceled.

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Counsel testified the offer was extended at the bond hearing on August 13, 2013, to plead to voluntary manslaughter for a negotiated sentence of 25 years. Counsel stated he took note of the August 26, 2013 expiration date and recalled meeting with Applicant multiple times prior to the expiration regarding the subject:

- On August 15, 2013, at which time Applicant was only willing accept a 20 year sentence;
- On August 20, 2013, and Applicant was still only willing to accept a 20 year sentence; and
- On August 26, 2013, at which time Counsel informed Applicant he could not guarantee the offer would remain on the table after the expiration. Counsel recalled Applicant was still unwilling to accept the 25 year offer.

Counsel recalled finally receiving the ballistics evidence on October 8, 2013, at which time Applicant wished to accept the offer. The prosecution refused to offer it again. Counsel attempted to get the trial court to hear his motion to keep the offer open, but the trial judge refused to do so before trial, only permitted him to establish the record after insisting he be permitted to do so. Asked about his seeming ignorance during the pre-trial hearing, Counsel asserted that he was referring to his motion to try and keep the offer open. On cross-examination, Counsel recalled Applicant declined the offer four times before the deadline passed and at no time expressed an interest in accepting the offer.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. The Court finds Applicant's self-serving testimony that he wished to accept the plea offer only on the deadline, only to be foiled by malevolence and ignorance, is not credible and is not supported by any evidence in the record. The record unequivocally shows both Applicant and Counsel knew of the August 26 deadline as put on the record at the bond hearing. Counsel repeatedly broached the subject of the offer with Applicant before the deadline, but Applicant repeatedly refused the offer, would only accept a more favorable deal, and generally desired to wait until he received

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the SLED ballistics report. Considering the record in its complete context, and having observed Counsel closely during the evidentiary hearing, the Court finds Counsel's explanation of his remarks during pre-trial hearings to be credible. Altogether, there was no confusion on the part of either Applicant or Counsel as to the plea offer's deadline, or the parameters of the deal, and Applicant declined to accept the offer on the basis of his own reasonable desire to see the complete record of evidence against him before accepting the offer. As such, Applicant has failed to meet his burden under either prong of Strickland, and his request for relief by way of this allegation is accordingly **DENIED**.

2. Failure to Argue to Keep Offer Open

Applicant alleges Counsel was ineffective in failing to argue the plea offer should remain open until all discoverable materials were disclosed to him, citing to then-Chief Justice Toal's memorandum dated March 1, 2004. Neither a defendant nor the government is bound by a plea offer until it is approved by the court, and the State may withdraw any plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999).

The facts set forth in Section II.A.1, above, are largely relevant to this allegation. Counsel filed on September 9, 2013, a motion which, in part, argued the trial court should force the State to keep its offer open until all discovery was disclosed to Applicant. (R. 16-17). Counsel specifically referred to and quoted from Chief Justice Toal's March 1, 2004 memorandum on Plea Agreements and Discovery in support of his argument. (R. 16). Counsel argued that "Defendant's offer expiring before the State has turned over discoverable evidence is tantamount to the Solicitor offering a plea agreement to the Defendant on the condition they forgo discovery which is, as stated before, [an] unethical practice." Id. The issue was again

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raised to the trial court during the pre-trial hearings and the trial court refused to consider the motion. (R. 72-73). Applicant raised the issue to the South Carolina Court of Appeals, which implicitly rejected the argument by dismissing the appeal and granting appellate counsel's motion to be relieved.

At the evidentiary hearing, Counsel explained he attempted to get the trial court to hear his motion before trial, but was only able to be heard with respect to the request for a continuance. Counsel explained he filed the March 1, 2004, memorandum as an attachment with his motion and sent a copy to Judge Baxley, in addition to quoting it verbatim in the body text of the motion itself.

Applicant, though PCR counsel, argued passionately that a defendant must know what will come out at trial in order to make a knowing, intelligent, and voluntary decision to enter a guilty plea, and cited to <u>Davie</u> and <u>Lafler</u>. The State cited to <u>Reed</u>, noted Counsel made the argument, and further argued that adoption of Applicant's position as the law would functionally eliminate plea bargaining as an institution, as discoverable matters may be unavailable to turn over to a defendant until very near to trial. This Court offered, and the State agreed, that matters may well only occur to be relevant and discoverable until after trial has started. The State also argued that Applicant mischaracterized the substantive purpose of Chief Justice Toal's memorandum, and advanced the interpretation that it pertained to a narrower scope of conduct where prosecutors may have discoverable materials, but condition plea offers on relief from their obligation to turn those materials over to the defense. Respondent contrasted the present circumstance, which was that the ballistics report simply was not completed by SLED until very near to trial

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CLERK OF COURT
MARLBORO COUNTY, S.C.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. First, and most importantly, Counsel did precisely what Applicant alleges he did not do—argue the offer should be kept open in reliance upon Justice Toal's memorandum. Second, the issue was preserved and raised to the South Carolina Court of Appeals by way of Applicant's *pro se* brief in response to the Anders brief, and the Court of Appeals implicitly rejected it. Third, the law is unequivocal that the power to extend or withdraw a plea offer is wholly within the power of the prosecutor unless and until it is either accepted by the circuit court or there is appropriate detrimental reliance by the accused. Fourth, the Court agrees with Respondent that requiring any plea offer be kept open until all discovery is complete would functionally eliminate plea bargaining before trial, and would be entirely unworkable where trial testimony may cause the parties to a case to seek additional materials or witnesses not known to be relevant until events at trial unfold. Accordingly, Applicant cannot meet his burden under either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

[*Conclusion and signature on following page*]

FILED
2018 OCT 12 AM 9 54
ANITA M. WILLIAMS
CLERK OF COURT
MARLBORO COUNTY, S.C.

III. CONCLUSION

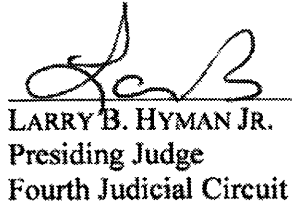
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 1 day of Oct, 2018.

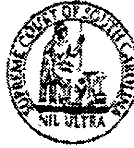


LARRY B. HYMAN JR.
Presiding Judge
Fourth Judicial Circuit

FILED
2018 OCT 12 AM 9 54
ANITA M. WILLIAMS
CLERK OF COURT
MARLBORO COUNTY, S.C.

Conway, South Carolina

EXHIBIT
APPLICANT
1
7-24-18



The Supreme Court of South Carolina

JEAN HOEFER TOAL
CHIEF JUSTICE

POST OFFICE DRAWER [illegible]
COLUMBIA, SOUTH CAROLINA [illegible]
TELEPHONE [illegible]
FAX [illegible]
E-MAIL [illegible]

MEMORANDUM

TO: All Solicitors

FROM: Chief Justice Jean Hoefer Toal

RE: Plea Agreements and Discovery

DATE: March 1, 2004

It has come to my attention that solicitors in some circuits are offering plea agreements to defendants on the condition that they forgo discovery. This practice is going to have adverse consequences in the future with claims of ineffective assistance of counsel based on a claim that the plea was not voluntary because the applicant did not have access to the solicitor's file.

Furthermore, I believe it is unethical to premise a plea agreement on the defendant relinquishing the right to discovery in criminal cases. *See* Rule 3.4, RLDE, Rule 407, SCACR. I ask that any solicitors who are currently pursuing this practice to stop immediately.

On a separate issue, apparently some magistrates are setting bonds after *ex parte* meetings with alleged victims. This is also unethical and, although I will be communicating directly with the magistrates regarding the issue, I ask for any assistance you might be able to provide if you are aware that this is happening in magistrates courts in your area.

FILED
AUG -2 AM
M. WILLIAMS
CLERK OF COURT
BORO COUNTY

WITNESSES

Jamie Seals S

Marlboro County Sheriff

Law Enforcement Case #: 2012-007225

112

WAIVER OF PRESENTMENT

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

Defendant

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

Defendant

ARREST WARRANT NUMBER
2012A3410100337

ARRESTED ON: 2012-12-28

ACTION OF GRAND JURY

True Bill

Terrance Bright

Grand Jury Foreperson

Date 2/26/13

VERDICT

Petit Jury Foreperson

Date

DOCKET NUMBER:
2013-GS-34-0086

The State of South Carolina

County of Marlboro

COURT OF GENERAL SESSIONS

Term:
FEBRUARY 2013

THE STATE

vs.

David Eric Dixon

INDICTMENT FOR

MURDER

§16-03-0010; 16-03-0020

CDR Code: 0116

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARLBORO)

INDICTMENT FOR

MURDER

§16-03-0010; 16-03-0020

At a Court of General Sessions, convened on FEBRUARY 26, 2013, the Grand Jurors of Marlboro County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That David Eric Dixon did in Marlboro County, on or about December 20, 2012, willfully, feloniously, and intentionally kill the victim, Christopher Bristow, with malice aforethought, either express or implied, by means of shooting, and the victim did die as a proximate result thereof on or about December 20, 2012, in Marlboro County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

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

WILLIAM B. ROGERS, JR.
SOLICITOR

WITNESSES

James Campbell 3

Marlboro County Sheriff

Law Enforcement Case #: 2012-007225

112

WAIVER OF PRESENTMENT

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

Defendant

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

Defendant

ARREST WARRANT NUMBER
2012A3410100339

ARRESTED ON: 2012-12-28

ACTION OF GRAND JURY

True Bill

Terrance Bright
Grand Jury Foreperson

Date 2/26/13

VERDICT

Petit Jury Foreperson

Date

DOCKET NUMBER:
2013-GS-34-0087

The State of South Carolina

County of Marlboro

COURT OF GENERAL SESSIONS

Term:
FEBRUARY 2013

THE STATE

vs.

David Eric Dixon

INDICTMENT FOR

ATTEMPTED MURDER

§16-03-0029

CDR Code: 3410

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	
COUNTY OF MARLBORO	)	ATTEMPTED MURDER
		§16-03-0029

At a Court of General Sessions, convened on FEBRUARY 26, 2013, the Grand Jurors of Marlboro County present upon their oath:

ATTEMPTED MURDER

CDR: 3410, 16-3-29

That David Eric Dixon did in Marlboro County on or about December 20, 2012, with specific intent to kill, shoot and attempt to kill Woodrow Garner with malice aforethought, either expressed or implied, in violation of Section 16-3-29 of S.C. Code of Laws, 1976, as amended.

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

WILLIAM B. ROGERS, JR.
SOLICITOR

WITNESSES

James Campbell S

Marlboro County Sheriff

Law Enforcement Case #: 2012-007225

James Campbell 112

WAIVER OF PRESENTMENT

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

Defendant

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

Defendant

ARREST WARRANT NUMBER
2012A3410100340

ARRESTED ON: 2012-12-28

ACTION OF GRAND JURY

True Bill

Terrance Bright
Grand Jury Foreperson

Date 2/26/13

VERDICT

Petit Jury Foreperson

Date

DOCKET NUMBER:
2013-GS-34-0088

The State of South Carolina

County of Marlboro

COURT OF GENERAL SESSIONS

Term:
FEBRUARY 2013

THE STATE

vs.

David Eric Dixon

INDICTMENT FOR

POSSESSION OF A WEAPON DURING COMMISSION OF A VIOLENT CRIME

§16-23-0490

CDR Code: 0549

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARLBORO)

INDICTMENT FOR

POSSESSION OF A WEAPON DURING COMMISSION OF A VIOLENT CRIME

§16-23-0490

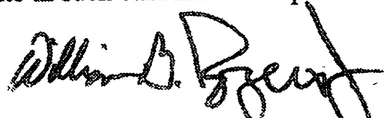
At a Court of General Sessions, convened on FEBRUARY 26, 2013, the Grand Jurors of Marlboro County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

CDR: 0549 16-23-0490

That David Eric Dixon did in Marlboro County, on or about December 20, 2012, possess a firearm, or visibly display what appeared to be a firearm, during the commission or attempted commission of a violent crime, in violation of Section 16-23-0490, S. C. Code of Laws, 1976, as amended.

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



WILLIAM B. ROGERS, JR.
SOLICITOR

528 3 0 yrs Life

STATE OF SOUTH CAROLINA

COUNTY OF Marlboro

STATE

VS. David Dixon

AKA:

Race: W Sex: M Age: 23

[redacted]

City, State, Zip: Bennettsville

DL# SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013 -GS- 34 - 0086

A/W#: 2012A3410100337

Date of Offense: 12-20-12

S.C. Code §: 16-13-10; 16-13 20

CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murder

In violation of § 16-3-10; -20 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [signature] 81112 [signature] 100241

Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 35 ~~days/months/~~years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of $; provided that upon the service of days/months/years and or payment of $; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total: $ plus 20% fee: $

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
§44-53-450(C) (Conditional Discharge)	$350	$
3% to County (if paid in installments)		
TOTAL		$

Clerk of Court/Deputy Clerk [signature: William B. Funderburk]

Court Reporter: [signature: Natalie Dahl]

PTUP

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. ☐

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $ Beginning

$ Paid to Public Defender Fund

Other:

☐ Conditional Discharge, §44-53-450(C) requires $350 be paid to the Clerk prior to case disposition

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

Presiding Judge [signature]

Judge Code: 2121

Sentence Date 10/31/13

FILED 2013 NOV 1 AM WILLIAM B. FUNDERBURK CLERK OF COURT MARLBORO CO. S.C.

SCCA/217 (06/2010)

0 - 30 yrs

STATE OF SOUTH CAROLINA

COUNTY OF Marlboro

IN THE COURT OF GENERAL SESSIONS

STATE

vs.

David Eric Dixon

AKA:

Race: W Sex: M Age: 23

City, State, Zip: Bennettsville SC 29512

DL# SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

INDICTMENT/CASE#: 13-GS-34-0087

A/W#: 2012 A3410100339

Date of Offense: 12-20-12

S.C. Code §: 16-03-0029

CDR Code #: 3410

0-30

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Attempted Murder

In violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [signature] 8/1/12 [signature] 100241

Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 30 days/months/years (years circled) or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of $; provided that upon the service of days/months/years and or payment of $; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 13-34-0086

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total: $ plus 20% fee: $

Payment Terms:

☐ Set by SCDPPPS

Recipient:

PTUP

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $ Beginning

$ Paid to Public Defender Fund

Other:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
§44-53-450(C) (Conditional Discharge)	$350	$
3% to County (if paid in installments)		$
TOTAL		

☐ Conditional Discharge, §44-53-450(C) requires $350 be paid to the Clerk prior to case disposition

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

Clerk of Court/Deputy Clerk William B. Funderburk

Court Reporter: Natalie Dahl

Presiding Judge [signature]

Judge Code: 2121

Sentence Date 12/31/13

FILED 2013 NOV 1 AM 9 26 WILLIAM B. FUNDERBURK CLERK OF COURT MARLBORO COUNTY, SC

SCCA/217 (06/2010)

530

5 years

STATE OF SOUTH CAROLINA) **IN THE COURT OF GENERAL SESSIONS**

COUNTY OF Marlboro)

STATE) INDICTMENT/CASE#: 2013GS-34-0088

VS. David Dixon) A/W#: 2012 A3410100340

AKA:) Date of Offense: 12-20-12

Race: W Sex: M Age: 23) S.C. Code §: 16-23-490

) CDR Code #: 549

City, State, Zip: Bennettsville SC 29512)

DL# * SID#) **SENTENCE SHEET**

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Possession of a weapon during Commission of a violent crime

In violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 549

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [signature] 81112 [signature] 160241

Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections** ☐ **County Detention Center,** for a determinate term of 5 ~~days/months/~~years or ☐ under the **Youthful Offender Act** not to exceed ______ years and/or to pay a fine of $ ______ ; provided that upon the service of ______ days/months/years and or payment of $ ______ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for ______ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 13-34-0086

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered** PTUP ______

Total: $ ______ plus 20% fee: ______ $ ______ ______ days/hours Public Service Employment

Payment Terms: ______ Obtain GED ☐

☐ Set by SCDPPPS Attend Voc. Rehab. Or Job Corp. ______

May serve W/E beginning ______

Recipient: ______ Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of $ ______ Beginning ______

$ ______ Paid to Public Defender Fund

Other: ______

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
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§14-1-213 (Drug Court Surcharge)	$150	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$
§44-53-450(C) (Conditional Discharge)	$350	$
3% to County (if paid in installments)		$
TOTAL		$

☐ Conditional Discharge, §44-53-450(C) requires $350 be paid to the Clerk prior to case disposition

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

Clerk of Court/Deputy Clerk [signature] Presiding Judge [signature]

Court Reporter: [signature] Judge Code: 2.21

Sentence Date 10/31/13

FILED 2013 NOV 1 ... 9 23 WILLIAM B. ... CLERK OF COURT MARLBORO COUNTY, SC

SCCA/217 (06/2010)