

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
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SC SUPREME COURT

Appeal from Charleston County

Roger E. Henderson, Family Court Judge

DARRYL GRANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002182

APPENDIX

ROBERT M. PACHAK
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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AW 9 1
2014/451

State of South Carolina
The Circuit Court of the Ninth Judicial Circuit

Deborah A. Garrison
Circuit Court Reporter

July 3, 2014

P O Box 901
Johns Island, SC 29457

Attn: Anne Henley
OFFICE OF ATTORNEY GENERAL
P O Box 11549
Columbia, SC 29211-1549

Re: Transcript Request
State v. Darryl V. Grant
14-CP-10-1684
March 2, 2006
Before The Honorable R. Markley Dennis, Jr.

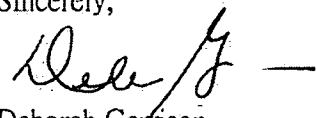
Dear Anne:

I received your letter requesting a transcript in the above action for the hearing of March 2, 2006.

Since that is more than five years old, that record has been purged.

I note that the date of the action is a 2014 case. Is the date of 2006 correct?

Sincerely,


Deborah Garrison

/dg

cc: Desiree Allen, Court Administration

FORM 5

STATE OF SOUTH CAROLINA

County of CHARLESTONDarryl V. Gentry 314123
Full name and prison number (if any) of Applicant

v.

State of South Carolina

2014-CP-10-11684
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2014 MAR 12 PM 12:19
JULIE ARISTRONG
CLERK OF COURT**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.

- MACDONALD, C. I., MAC 2/15C, 1516 OLD GILLARD RD
- Place of detention RIDGEVILLE, S.C. 29472
 - Name and location of Court which imposed sentence CHARLESTON County
JUDICIAL CENTER, 100 Broad St. CHAS, S.C. 29402
 - Name(s) of co-defendant(s) (if any) Darwin NELSON, Lyndee IS GREEN
 - The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2005-GS-10-2169
(b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) MARCH, 2ND, 2006
- (b) 15 years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) ☒ after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NOTION OF RECONSIDERATION OF SENTENCE
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. CHARLESTON County Water Circuit Judicial
- ii. CENTER
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. EXCESSIVE UNEXCUSED Delay
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. N/A
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. N/A
- 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) CONFLICT OF INTEREST, INEFFECTIVE ASSISTANCE
- (b) OF COUNSEL, INTENTIONALLY & KNOWINGLY
- (c) UNOBTAINED PEA, 14 MONTHS OF PROCESS VIOLATION
trial stage violation
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE MEMORANDUM TO SUPPORT
- (b) ATTACHED
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? YES
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? YES
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. TWO P.C.R.'s PRIOR TO THIS ONE - THEY BOTH
- ii. WAS DISMISSED WITHOUT PREJUDICE AND
- iii. MOTION TO REINSTATE MY MOTION OF RECONSIDERATION OF SENTENCE
- iv. IDEALIZATION OF SENTENCE
- (b) the name and location of the Court in which each was filed:
- i. CHARLESTON COUNTY JUDICIAL CENTER
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. P.C.R.'s Dismissed without Prejudice
- ii. Due to my motion of Reconsideration
- iii. of Sentence
- iv. _____

(d) the date of each such disposition:

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

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

- i. _____
- ii. N/A
- 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?

~~YES~~ NO

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

(a) which grounds have been presented:

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

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

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

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

(a) _____
 (b) N/A
 (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? N/A
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES, But NO JUDGEMENT IMPAIRED
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
YES

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. ALAN D. TOPPICK
17 1/2 Broad Street
 ii. CHARLESTON, S.C. 29401
NATHANIEL BARNWELL
 iii. 6605 ST. ANDREW'S BLVD
CHARLESTON, S.C. 29407
 (b) the proceedings at which each such attorney represented you:
 i. Civilly PLEA, Post-Trial Motion
 ii. BOND/Preliminary Hearings
 iii. _____

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

CONVICTION & SENTENCE BE REVERSED & DISMISSED
BASED ON THE FOLLOWING CONSTITUTIONAL VIOLATIONS
CHARGE VACATED

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

NO

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Charleston)

I, Darryl Vernon Grant, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Darryl Vernon Grant

SWORN to and subscribed before me this 10 day of December, 2013.

Martha Wilson (L.S.)
Notary Public

My Commission Expires: 3/8/2020

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

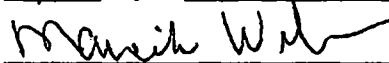
I, Darryl Vernon Caste, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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


Applicant

SWORN or affirmed to and subscribed before me this

11 day of December, 2013.


Notary Public

My Commission Expires: 3/8 2014

Conflict of Interest

Applicant contends that a conflict of interest had an adverse effect on his defense.

On March 2nd, 2006, Applicant submitted an unlawful Plea of Guilty to the charge of Armed Robbery. While in a colloquy at Applicant's plea³ sentence, the Applicant's appointed counsel stated on the record that he personally knew the alleged victim for awhile.

The conflict of interest basically destroyed the entire integrity of Applicant's case. The conflict of interest had an adverse effect on the defense because of his loyalty to his friend. Also the adverse effect was indeed pre-trial & post-trial because the same incompetent attorney filed but failed to perfect Applicant's motion of reconsideration of sentence. The right to effective assistance of counsel is not confined to trial but extends also to the first appeal as of right. See *Evitts v. Lucey*, 4169 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) which also violated Applicant's due process under the 14th Amendment in the U.S. Constitution. See *Harris v. Champion*, 51, 3rd 901.

Applicant contends that his 5th, 6th & 14th Amendment rights were violated by an actual conflict of interest. The right to a competent counsel is guaranteed by the 6th Amendment is a fundamental right.

(SEE U.S.C.A. CONSTITUTION 6th AMENDMENT)
 APPLICANT'S COUNSEL HAD AN ETHICAL
 OBLIGATION TO AVOID CONFLICTING REPRESENTATION & TO ADVISE THE CLERK OF COURT
 WHEN ASSIGNED TO APPLICANT'S CASE &
 ALSO THE COURT PROMPTLY WHEN A CONFLICT
 OF INTEREST ARISES DURING COURSE
 OF PRE-TRIAL OR TRIAL. (SEE A.B.A. CODE
 OF PROFESSIONAL RESPONSIBILITIES, EC5-15,
 DR5-105)

A STATE CRIMINAL TRIAL, A PROCEEDING
 INITIATED & CONDUCTED BY THE STATE
 ITSELF, IS AN ACTION OF THE STATE WITHIN
 THE 14th AMENDMENT. IF A DEFENDANT'S
 RETAINED COUNSEL DOES NOT PROVIDE THE
 ADEQUATE LEGAL ASSISTANCE GUARANTEED
 BY THE 6th AMENDMENT, A SERIOUS RISK OF
 INJUSTICE EFFECTS THE TRIAL ITSELF, WHEN
 THE STATE OBTAINS ~~ON~~ A CONVICTION
 THROUGH SUCH A TRIAL, ITS THE STATE THAT
 UNCONSTITUTIONALLY DEPRIVES THE DEFENDANT
 OF HIS LIBERTY. ALSO SEE 5th AMENDMENT U.S.C.A.
 IN CHAYLER V. SULLIVAN 100 S. CT. THE COURT
 HELD THAT PREJUDICE IS PRESUMED WHEN
 COUNSEL IS BURDENED BY AN ACTUAL CONFLICT
 OF INTEREST. BECAUSE UNDER THESE CIRCUM-
 STANCES, COUNSEL BREACHES THE DUTY OF
 LOYALTY, PERHAPS THE BASIC OF COUNSEL'S

Duties Given the Obligation of Counsel to Avoid Conflict of Interest

By Counsel Having a Personal Relationship with the Alleged Victim, as well as Counsel's personal input as to victim's credibility. Plus Counsel's failure to perfect a post-trial motion which clearly violated Applicant's due process, all demonstrated that Counsel actively represented conflicting interest that turned out to be "no interest." Applicant's Counsel's performance fell so low below professional norms & the reason could not be doubted because of his "struggle to serve ~~two~~ masters." His ethical duties as an attorney or his friendship

Applicant argues that in his case, his attorney's conflict of interest had effected his entire case which would indicate that the alleged conflict resulted in an ineffective assistance of counsel & did in fact render the plea in question involuntary & unintelligently made

Applicant asserts that had not counsel represented an actual conflict of interest or even respectfully denied being ^{his} attorney because of the conflict of interest, Applicant would have had a competent attorney & the

UNBIAS LEGAL COUNSEL TO HAVE RIGHT
TO TRIAL OR PREPARE AN APPROPRIATE DEFENSE.
A CONFLICT OF INTEREST EVER PREJUDICE
BECAUSE OF, IS A VIOLATION OF CONSTITUTIONAL
LAW. THEREFORE, APPLICANT SHOULD BE
CONSIDERED A NEW TRIAL.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant contends that his 6th, 14th & 14th Amendment was violated under the US Constitution due to an actual ~~error~~ ineffective assistance of applicant's counsel. Applicant's attorney failed to properly investigate the facts of applicant's case which would've prove applicant's innocence. In Heard v. N. Sargeant (1976), held that counsel has a duty to investigate witnesses who allegedly possessed knowledge concerning the defendant's guilt or innocence. However, counsel ~~was~~ failed to fulfill his duty of a constitutional magnitude.

FACT THE ALLEGED VICTIM & OF THE TWO EYE WITNESSES WERE IDENTIFIED APPLICANT TO BE ONE OF THE SUSPECTS INVOLVED WITH THE ROBBERY. Counsel was indeed ineffective for failing to investigate the facts & circumstances surrounding the events of the case. THE SCOPE OF COUNSEL'S DUTY TO INVESTIGATE IS A GREAT ONE, THAT MUST BE DONE UPON A REASONABLE & ADEQUATE UNDERSTANDING OF THE CASE FROM AN OVERALL VIEW.

Runnel V. ESTELLE, 590 F.2d 103 (1979) HELD that the investigation & presentation are the keys to effective representation & (11)

Therefore, Court Appointed Counsel has a duty to interview potential witnesses & make an independent examination of the facts, circumstances, pleadings & laws involved in a criminal prosecution.

FACT: WHEN THE REPORTING OFFICERS INTERVIEWED THE VICTIM & TWO EYE WITNESSES TO DESCRIBE THE MEN THAT WERE INVOLVED IN THE ROBBERY. THEY ALL DID PROPERLY & SHORTLY AFTER ALL THREE SUSPECTS WERE UNDER ARREST THE VICTIM & THE TWO EYE WITNESSES IDENTIFIED THEM AS BEING THE CORRECT PEOPLE. HAD COUNSEL WASN'T UNDER THE BURDEN OF AN ACTUAL CONFLICT OF INTEREST & ALSO FULLY HIS DUTIES AS COMPETENT COUNSEL PROMISED UNDER THE 6th AMENDMENT, COUNSEL WOULD HAVE BEEN ABLE TO PERSONALLY INVESTIGATE & PRESENT THE INFORMATION TO APPLICANT SO THE PROPER DEFENSE OR EVEN MOTION TO DISMISS CHARGE COULD'VE BEEN SUBMITTED. FACT: APPLICANT WAS NEVER IDENTIFIED OR WAS THERE ACTUAL & FACTUAL EVIDENCE TO SAY THAT APPLICANT WAS INVOLVED. (SEE 4th AMENDMENT U.S. CONSTITUTION)

ISSUE B

APPLICANT COUNTERS THAT COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE OF HIS FITNESS TO STAND TRIAL.

DUE PROCESS PROHIBITS THE CONVICTION
OF AN INCOMPETENT DEFENDANT & THIS RIGHT
MAY NOT BE WAIVED BY A GUILTY PLEA.
(SEE *SEER V. STATE*, 417 S.E. 2d (1992))

ON MARCH 7th 2006, THE APPLICANT WAS
SCHEDULED TO BE GIVEN A PSYCHOLOGICAL
ASSESSMENT AND EXAMINATION BY DR. GORDON
TEICHNER, PH.D. APPLICANT'S MENTAL STATE
WAS QUESTIONED BY NOT ONLY APPLICANT'S
ATTORNEY, BUT SOLICITOR ^{BLAIR} ~~BLAIR~~ & THE
HONORABLE JUDGE M. DENNIS BECAUSE ALL
PARTIES SIGNED THE ORDER & IT WAS THEN
DECREED & PROTECTED UNDER CONSTITUTIONAL
LAW. THE BLAIR HEARING WAS SET BUT APPLICANT
NEVER HAD THE EVALUATION. ALLIANCE FEDERAL
& STATE LAW STATES THAT ONCE A DEFENDANT'S
MENTAL CONDITION IS QUESTIONED & AN ORDER
IS MADE TO SEE A PROFESSIONAL DOCTOR FOR
A DIAGNOSIS, ONLY AFTERWARDS, THE DEFENDANT
MAY BE CONSIDERED SANE OR INSANE (SEE BLAIR).
APPLICANT WAS SCHEDULED TO GO BEFORE A
JUDGE THE WEEK OF THE 6th, WHICH WAS THE
FOLLOWING WEEK FROM THE ASSESSMENT.
COUNSEL MISADVISED & ALLOWED APPLICANT
ALONG WITH TRIAL COURT, TO PLEA GUILTY VOLUNT-
ARILY, UNKNOWNLY & WITHOUT THE GUILTY THE DAY
OF MARCH 7th 2006. (ON AMENDMENT VIOLATION, U.S.C.A.)
(3)

IN JETER, APPLICANT NEED TO ONLY SHOW A "REASONABLE PROBABILITY" THAT HE WAS EITHER LUNATIC AT THE TIME OF THE CRIME WAS COMMITTED OR INCOMPETENT AT THE TIME OF TRIAL. JETER V. STATE 308 S.C. @ 233, 417, S.E. 2d. APPLICANT'S 8th AMENDMENT RIGHT WAS ALSO VIOLATED (SEE U.S. & A 8th AMENDMENT).

THE APPLICANT COUNTERS THAT ATTORNEY'S PERFORMANCE WAS "UNREASONABLY UNDER PROFESSIONAL NORMS." CHERRY V. STATE, 300 S.C. @ 117, 386 2d @ 125 CITING STRICKLAND. THE APPLICANT COUNTERS THAT DEFICIENT PERFORMANCE PREJUDICED HIM IN SUCH A WAY THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S IMPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT. CHERRY, 300 S.C.

SO IN STRICKLAND, ONE MUST PROVE THAT COUNSEL WAS INEFFECTIVE & THAT HIS INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICE APPLICANT. (SEE STRICKLAND V. WASHINGTON.)

IF COUNSEL DID IN FACT HAD INVESTIGATE PERSONALLY THE FACTS & CIRCUMSTANCES SURROUNDING APPLICANT CASE, THE PROPER DEFENSE WOULD HAVE BEEN PREPARED. IF COUNSEL HAD RELIEVED HIMSELF FROM APPLICANT'S CASE, HIS CONFLICTING INTEREST WOULD NOT DESTROY THE INTEGRITY OF APPLICANT'S CASE & A COMPETENT & DEDICATED ATTORNEY WOULD HAVE BEEN ASSIGNED TO HIM. GUARANTEED BY THE 6th AMENDMENT.

If Counsel Alton were trial court & Solicitor would've had the psychological ASSESSMENT that was signed, ordered & decreed by trial judge, THE HONORABLE M. DENNIS, THE PROPER DEFENSE OR MOTIONS would've CHANGED THE ENTIRE outcome of Applicant's SENTENCING.

Issue C

Also, Applicant contends that due to his Attorney's PERFORMANCE, which fell below PROFESSIONAL NORMS OF A CONSTITUTIONAL STANDARD (SEE 6th AMENDMENT U.S. CONSTITUTION) HIS DUE PROCESS WAS VIOLATED.

FACT: Shortly after Applicant submitted an unlawful Plea of Guilty that violated HIS 6th AMENDMENT (RIGHT AGAINST SELF-INCRIMINATION) & WAS COMMITTED TO THE DEPARTMENT OF CORRECTIONS for 15 years. Applicant's Attorney filed but failed to perfect the post-trial "MOTION OF RECONSIDERATION OF SENTENCE". THE MOTION WAS PROPERLY FILED within 10 days after Applicant's SENTENCE BUT NEVER PURSUED. Years passed before Applicant attempted to file for a POST-CONVICTION RELIEF But Both P.C.R.'s WAS DISMISSED without PREJUDICE because Applicant was on a post-trial MOTION OF RECONSIDERATION OF SENTENCE. UNDER HARRIS V. CHAMPION, 51 F.3d 901, it was ruled by NICHOL

Courts that it is unlawful for any appeal to be ~~more~~ ^{longer} two years. ~~It~~ ^{It} goes to say that "two years is too long." Due to the excessive & unexcused delay & upon self study Applicant decided to dismiss the motion of reconsideration & bring this issue before the state in the form of a post-conviction relief. (See Rule 71.1 of Civil Procedures). In Champion's case, Applicant waited four years & six months where ~~he~~ ^{he} waited over seven years.

Clearly Applicant's Attorney was ineffective for not perfecting post-trial motion & allowing the process to become "stale" & in a sense suspended in a "vacuum" of some sort. The prejudice against Applicant arose because Applicant right & privilege to exhaust state & federal remedies was taken away. The right to a competent attorney is guaranteed by the Sixth Amendment & ~~Applicant~~ ^{counsel} did not display such competency even at a minimal level. If ~~Applicant~~ ^{counsel} had perfected & pursue post-trial motion, which was his duty, Applicant's case would've been reviewed more intensely & in Applicant's Attorney's words "my client ~~was~~ ^{deserved} a lesser sentence" would've been considered.

14th Amendment Due Process Violation

Applicant ~~contends~~ that an actual Due Process Violation under State & Federal Law had an adverse effect on his case.

FACT: Shortly after Applicant was sentenced March 2nd, 2006, Applicant's Attorney Mr. Alan ~~Robertson~~ ~~Robert~~ submitted a post-trial Motion of Recalcidiation of Sentence in regards to Applicant's sentence of 15 years in the Department of Corrections. The Motion was submitted to the Charles County Clerk of Court in Anne Arundel County. It was clocked, stamped, signed & filed by Ms. Julie S. Armstrong on March 10th, 2006. Since the Motion was filed, Applicant's Attorney failed to perfect & pursue the Motion. Applicant's Attorney backed the Motion with his personal opinion that Applicant deserved a lesser sentence. Many years passed before Applicant attempted to file a Post Conviction Relief & the Application was respectfully dismissed without Prejudice because the Motion of Recalcidiation of Sentence was ruled upon approx. two years after Applicant's sentence. Applicant attempted to file another P.C.R. & that too was dismissed without Prejudice for the same reason.

In Harris v. Champion, 51 F.3d 901, it was ruled that the time of sentence & the time to exhaust remedies are considered in a claim of due process violations. Also, it was ruled that "two years is too long" for any appeal. Applicant was on an unperfected motion of reconsideration of sentence well over two years, which blocked applicant from pursuing any other remedies for relief.

Applicant contends that his 14th & 6th Amendment Constitutional Right was violated due to Applicant's incompetent counsel (see U.S.C.A. 6th & 14th).

Applicant also contends that if his counsel, which was also under conflict of interest had either moved properly before the court under his ethical duties or didn't bother with submitting the post-trial motion, Applicant would've attempted to find relief within the year he had under Rule 71.1.

INCOMPETENT, INDEED ONLY INTELLECTUALLY
PLEA

ON MARCH 1st, 2006, APPLICANT WAS
 SCHEDULED TO BE GIVEN A PSYCHOLOGICAL
 ASSESSMENT & EXAMINATION BY DR. GORDON
 TEICHNER, PH.D. BEFORE THE PSYCHOLOGICAL
 ASSESSMENT ORDER OR "BLAIR" HEARING, APPLICANT
 WAS EXPERIENCING MANY CHANGES & BEHAVIORAL
 DIFFERENCES APPLICANT'S BEHAVIOR OBVIOUSLY
 CAUGHT SOMEONES ATTENTION BECAUSE A MENTAL
 EVALUATION WAS AGREED UPON BY APPLICANT'S
 ATTORNEY, SENTENCE JUDGE & SOLICITOR TO OPEN
 COURT, APPLICANT WAS ASKED IF HE WAS BASICALLY
 MENTALLY COMPETENT, APPLICANT TOLD HIM THAT
 HE WAS EXPERIENCING "BAD DREAMS", BUT DIDN'T EXPLAIN
 WHAT THEY WERE LIKE. THE TRIAL JUDGE THEN
 ASKED APPLICANT IF HE FELT HE COULD CONTINUE
 THE PLEA HEARING & APPLICANT TOLD HIM YES
 UNDER THE BLAIR CASE & JETTER V. STATE,
 ONCE THE QUESTION OF A DEFENDANT'S SANITY
 ARISES & A DECREED ORDER IS ISSUED, ONLY AFTER
 THAT ORDER IS FULFILLED & THE PROFESSIONAL
 EXAMINER SAYS HE'S COMPETENT, ONLY THEN CAN
 THE DEFENDANT STAND BEFORE COURT.

APPLICANT TESTIFIED THAT HE, HIS ATTORNEY,
 TRIAL JUDGE OR THE SOLICITOR HAS THE
 PROPER EDUCATION TO MAKE THE ULTIMATE
 DECISION THAT APPLICANT WAS INDEED COMPETENT
 ENOUGH TO STAND TRIAL

DUE PROCESS PROHIBITS THE CONVICTION OF AN INCOMPETENT DEFENDANT & THIS RIGHT MAY NOT BE WAIVED BY A GUILTY PLEA (SEE JETER V. STATE 417 S.E. 2d)

ALSO IN JETER, APPLICANT NEED ONLY TO SHOW A "REASONABLE PROBABILITY" THAT HE WAS EITHER INSANE AT THE TIME OF THE CRIME OR INCOMPETENT AT THE TIME OF TRIAL (SEE JETER V. STATE 308 S.C. @ 233, 417 S.E. 2d)

APPLICANT WAS BOUND BY A FEDERAL & STATE ORDER TO BE EXAMINED BY THE PROPER PROFESSIONALS. BOTH THE PLEA WAS INDEED VOLUNTARY, KNOWINGLY & INTELLIGENTLY MADE. PLUS THE ACCEPTANCE OF THE PLEA WAS VOLUNTARY UNDER THE U.S. CONSTITUTION & AMENDMENT.

TO FIND A GUILTY PLEA IS VOLUNTARY & KNOWINGLY ENTERED INTO THE RECORD MUST ESTABLISH THE APPLICANT HAD A FULL UNDERSTANDING OF THE CONSEQUENCES OF HIS PLEA & THE CHARGES AGAINST HIM. (SEE BOYKIN V. ALABAMA, 395 U.S. 238, 243-44, 89 S.C.T.) IN BOYKIN, THE UNITED STATES SUPREME COURT HELD THAT BEFORE A COURT CAN ACCEPT A GUILTY PLEA, A CRIMINAL DEFENDANT MUST BE ADVISED OF THE CONSTITUTIONAL RIGHTS HE IS WAIVING. SPECIFICALLY, THE ACCUSED

(2)

MUST BE AWARE OF THE PRIVILEGE AGAINST
SELF-INCRIMINATION, THE RIGHT TO A JURY TRIAL
THE RIGHT TO CONFRONT HIS ACCUSEE(S).
MOREOVER, THE DEFENDENT MUST BE AWARE OF
THE CONSTITUTIONAL RIGHTS BEING WAIVED.
(SEE PITMAN V. STATE 337 S.C. 382)

SINCE THE APPLICANT'S MENTAL STABILITY
WAS STILL IN QUESTION, ITS NORMAL UNDER-
STANDING TO QUESTION APPLICANT'S UNDER-
STANDING OF THE CONSTITUTIONAL RIGHTS
HE WAIVED DULY AND FULLY.

Applicant contends that if trial judge preferred a "Garcia" hearing & relieve counsel from the case, a competent & unbiased attorney would have been assigned & the integrity of applicant's case would have been preserved. (See US Constitution 6th & 14th Amendments)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Darryl Grant, #314123,

2014-CP-10-1684

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

The Respondent, making its Return to the application for post conviction relief (PCR) filed March 12, 2014, would respectfully show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's order of commitment. The Applicant was indicted at the April 2005 term of the Charleston County Grand Jury for Armed Robbery (2005-GS-10-2169). The Applicant was represented by Alan D. Toperek, Esquire. On March 2, 2006, the Applicant pled guilty before the Honorable R. Markley Dennis, Jr. and was sentenced, pursuant to a negotiated sentence, to fifteen (15) years. Based on his incarceration from December 13, 2004, until the time of sentencing, the Applicant received credit for time served in the amount of four hundred and forty nine (449) days. The Applicant then filed a timely motion of reconsideration of sentence on March 10, 2006. Upon information and belief, the motion was denied on January 10, 2014.

Prior the current application, the Applicant filed two previous applications for post conviction relief (2010-CP-10-4400; -3386). The Applicant filed his first application on May 28,

2010. The state filed a Return and motion to dismiss. By order dated October 28, 2010, the Honorable Roger M. Young, Sr., dismissed without prejudice the application based on the Applicant's pending motion for reconsideration. The Applicant filed his second application on May 24, 2012. By Order dated March 27, 2013, the Honorable Roger M. Young, Sr., again dismissed without prejudice the application based on the Applicant's pending motion.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject conviction(s), the application, the motion of reconsideration dated March 10, 2006, and the two orders of dismissal without prejudice. 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. "Ineffective Assistance of Counsel"
 - a. "Applicant contends that a conflict of interest had an adverse effect on his defense"
 - b. "Applicant contends that his 5th, 6th, and 14th amendment rights were violated by an actual conflict of interest"
2. "Applicant contends that counsel was ineffective in failing to raise the issue of his fitness to stand trial"
3. Counsel's performance fell below professional norms
4. Due Process Violations

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

III.

Respondent construes these allegations as ineffective assistance of plea counsel. Respondent submits plea counsel rendered effective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 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 Applicant alleges that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

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.

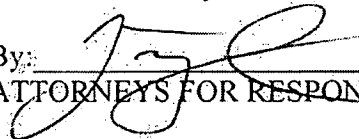
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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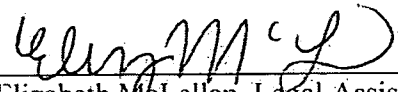
June 3, 2015.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
	)	2014-CP-10-1684
	)	
DARRYL GRANT, #314123,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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:

Rodney D. Davis, Esq.
Lowcountry Law Office
4000 Faber Place Dr.
Ste 300
Charleston, SC 29405

DATED this 3rd day of June, 2015.


 Elizabeth McLellan, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
DARRYL V. GRANT,	)	CASE NO. 2014-CP-10-01684
	)	
APPLICANT,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	
	)	

July 21, 2015

Charleston, South Carolina

B E F O R E:

The Honorable Robert E. Henderson

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

Rodney D. Davis, Esquire
For the Applicant

J. Rutledge Johnson, Esquire
For the Respondent

I N D E X

PCR Hearing -- 03

EXHIBITS - None Proffered

WITNESSESDarryl Grant (Applicant Witness):

Direct Examination by Mr. Davis -- 11

Cross-Examination by Mr. Johnson -- 24

Alan Toporek (Respondent Witness):

Direct Examination by Mr. Johnson -- 26

Cross-Examination by Mr. Davis -- 36

Argument by Mr. Davis -- 39

Argument by Mr. Johnson -- 42

CERTIFICATION OF TRANSCRIPT -- 44

Look for an original signature in blue ink on the certification sheet to verify that the court reporter has certified the transcript you are viewing.

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 MR. DAVIS: May it please the court, Your Honor. This
2 is the case of Darryl Grant versus the State of South
3 Carolina. It is Case Number 2014-CP-10-1684.

4 Mr. Grant was indicted at the April 2005 term of the
5 Charleston County Grand Jury for armed robbery. On March 2,
6 2006, he pled guilty before the Honorable R. Markley Dennis,
7 Jr., and was sentenced pursuant to a negotiated sentence to
8 15 years.

9 Based on his incarceration from December of 2004 until
10 the time of sentencing he received credit for time served in
11 the amount of 449 days.

12 He thereupon filed a timely motion for reconsideration
13 of sentence on March 10th, 2006. Upon information I believe
14 this motion was not denied until January 10th, 2014.

15 He has filed two previous PCR applications; however,
16 they were dismissed without prejudice because of the pending
17 motion.

18 He filed this one March 12th, 2014. And the State
19 filed its return on June the 3rd, 2015. And he is
20 represented here today by Mr. Rodney Davis.

21 MR. DAVIS: Excuse me, Your Honor.

22 (WHEREUPON, counselors confer.)

23 MR. JOHNSON: Oh, it was not. Excuse me.

24 MR. DAVIS: It was not a negotiated sentence.

25 MR. JOHNSON: Yes. Okay. I stand corrected, Your

Darryl Grant - PCR

1 Honor. It was an open plea.

2 And, Your Honor, just for the record, I forgot to
3 mention this: I guess because it had been so long while the
4 motion was pending -- we have attempted to order the
5 transcript. Upon information and belief I believe it is no
6 longer -- it doesn't -- it does not exist. Excuse me.

7 THE COURT: This carries up to 30 years; is that
8 correct?

9 MR. JOHNSON: Ten to thirty, yes, sir.

10 THE COURT: Ten to thirty.

11 Okay. Mr. Grant.

12 MR. GRANT: Yes, sir.

13 THE COURT: Would you swear him, please.

14 (WHEREUPON, the witness was duly sworn.)

15 THE COURT: Okay. Mr. Grant, you have filed an
16 application for post-conviction relief. What is it you are
17 seeking from this court?

18 MR. GRANT: I would like my case to be overturned and
19 possibly dismissed.

20 THE COURT: I can't dismiss your case. Do you
21 understand the only thing I can do is if I grant you relief
22 is send this back and you would be facing the armed robbery
23 charge all over again and you would be facing the possible
24 sentence of 10 to 30 years? You were sentenced I believe I
25 read in the application to 15 years; is that right?

1 MR. JOHNSON: Yes, Your Honor.

2 THE COURT: You would be facing, you know, doubling
3 that time if you went back and went to trial and were
4 convicted; do you understand that?

5 MR. GRANT: Yes, sir.

6 THE COURT: So there is a certain risk you are taking
7 in seeking this relief; do you understand that?

8 MR. GRANT: Yes, sir.

9 THE COURT: And do you want to take that risk?

10 MR. GRANT: Yes, sir.

11 THE COURT: Are you sure?

12 MR. GRANT: Yes, sir.

13 THE COURT: Knowing that you might double the time that
14 you are serving?

15 MR. GRANT: (Nods head.)

16 THE COURT: Answer yes or no.

17 MR. GRANT: Yes, sir.

18 THE COURT: Okay. Is anybody making you do this?

19 MR. GRANT: No, sir.

20 THE COURT: Are you doing so freely and voluntarily?

21 MR. GRANT: Yes, sir.

22 THE COURT: You are not under the influence of any
23 alcohol or drugs?

24 MR. GRANT: No, sir.

25 THE COURT: Have you had enough time to discuss this

1 with Mr. Davis, your lawyer?

2 MR. GRANT: Yes, sir.

3 THE COURT: Okay. And Mr. Davis, do you have any
4 questions for your client concerning his desire?

5 MR. DAVIS: Judge, I don't have questions. If I may I
6 will just point out that he went to the 10th grade at North
7 Charleston, did not finish school but was in Job Corp for a
8 couple of years.

9 MR. GRANT: Yes, sir.

10 MR. DAVIS: A couple of years. And did obtain his GED
11 in '06. So I do think he certainly understands. I've
12 discussed this with him thoroughly.

13 He is dressed out differently than everyone else you
14 are going to see. He is actually a trustee at Abbeyville
15 County Jail. He has done well enough at SCDC that he is
16 there and he is working doing maintenance there and doing
17 very well. But I went over with him several times; and I do
18 think he understands, Your Honor.

19 THE COURT: Okay. All right. Thank you.

20 MR. JOHNSON: Just for Your Honor's knowledge, his max
21 out date is September of 2017. And if you -- if you were to
22 grant this application, Your Honor, the State's position is
23 that all this time that he has been serving - and I will
24 have to appeal this up if this gets, you know, denied - but
25 that will go all away and he faces 10 to 30 starting from

1 scratch.

2 THE COURT: So he is looking at release ---

3 MR. JOHNSON: So just to let him know that.

4 THE COURT: --- in two years, ---

5 MR. JOHNSON: Yes, sir.

6 THE COURT: --- release?

7 MR. DAVIS: The last printout I ran showed -- this
8 may -- I apologize, I didn't hear the dates the attorney
9 general said; but I have got projected parole eligibility of
10 September 13th, '17 -- well, then, Judge, the release date
11 is September 9th it looks like so. But anyway September of
12 2017.

13 Judge, if I can just talk to him about one thing that
14 was said there if I may.

15 THE COURT: Yes, sir.

16 (WHEREUPON, break for Mr. Davis to confer with client.)

17 MR. DAVIS: Thank you, Your Honor.

18 THE COURT: Mr. Johnson, were y'all able to resolve the
19 dispute about whether he gets credit for the time served or
20 are y'all still arguing over that?

21 MR. JOHNSON: We are probably still arguing over that.

22 MR. DAVIS: If I may, Judge, that is exactly what I was
23 just talking to him about. And I think the best way to say
24 it where we are at, a very learned counsel we both know
25 chimed in on this and this is what I just relayed to my

1 client is the best we can tell -- since there is not a real
2 clear answer one way or the other the best we can tell is --
3 I am letting him know that it is likely a discretionary
4 matter and the way I just explained it is if we were to win
5 this and he went back and the State did not offer him
6 something better - which they never have to offer anything -
7 so he didn't plead and it went to trial or even if he pled
8 straight up and were convicted and the judge getting ready
9 to impose a sentence the judge may or may not - that is the
10 way I just explained it to him - give him credit for all
11 this time he has already done.

12 I wish I could confidently tell him there is a statute
13 or case law that says it is accurate, but I know that Mr.
14 Johnson has reached out to his firm and I have spoken to
15 appellate defense and we wish we could tell you there is an
16 absolute correct answer.

17 I know from this side I don't have authority to
18 definitely say it would count, and I don't believe the State
19 has authority to say it absolutely would not. So I think
20 that is the best ---

21 MR. JOHNSON: Correct. ---

22 MR. DAVIS: --- blanket statement.

23 MR. JOHNSON: I agree with counsel on that one.

24 THE COURT: Mr. Grant, how much time have you served?

25 MR. GRANT: Sir?

1 THE COURT: How much time have you served already?

2 MR. GRANT: Almost 11 years.

3 THE COURT: Almost 11 years.

4 MR. GRANT: Yes, sir.

5 THE COURT: Okay. Again I want to discuss this risk in
6 the event the sentencing judge if I granted the relief that
7 you are requesting if he didn't bother to give you time for
8 the time served and you got a 10-year sentence you would end
9 up serving 23, 24, or 25 years total. Do you understand
10 that?

11 MR. GRANT: Yes, sir.

12 THE COURT: If for some reason that judge -- if it is
13 in the judge's discretion - and this is all up in the air as
14 just has been explained - you know, you could serve, you
15 know, what you've already served again. Do you understand
16 that?

17 MR. GRANT: Yes, sir.

18 THE COURT: And you are going to be out in two years.
19 I mean have you really weighed this, ---

20 MR. GRANT: Yes, sir.

21 THE COURT: --- what you might be stepping into?

22 MR. GRANT: I think it is more of a right or wrong
23 thing with me.

24 THE COURT: Well, you know, if you were to end up
25 serving another 10, 15, 30 years, you know, you might not

1 think it was so right or wrong at that point in time. But I
2 mean I am not trying to talk you into it. I just want to
3 make sure that you understand the risk that you are taking.
4 That is what I am trying to point out to you.

5 MR. GRANT: Yes, sir.

6 THE COURT: And I think I have done that. You are an
7 intelligent young man. I think you clearly understand what
8 I have explained to you. So -- and your lawyer. So if you
9 want to go forward tell me yes now.

10 MR. GRANT: Yes, sir.

11 THE COURT: Okay. We will go forward.

12 MR. DAVIS: Thank you, Your Honor.

13 Your Honor, if I could have just a moment just dealing
14 with the transcript issue if I could for just a moment.

15 THE COURT: Sure.

16 (WHEREUPON, counselors confer.)

17 MR. DAVIS: Thank you, Your Honor. We have had a
18 moment. We call Mr. Grant.

19 THE COURT: All right. Mr. Grant, come around please.

20 (WHEREUPON, the witness was duly sworn.)

21 THE CLERK: Once seated please state your first and
22 last name and spell your last name clearly for the record.

23 MR. GRANT: Can you ...?

24 THE CLERK: State your name and spell your last name.

25 MR. GRANT: Okay. Darryl Grant, G-R-A-N-T.

26

1 **DIRECT EXAMINATION BY MR. DAVIS OF DARRYL GRANT:**

2 Q. Mr. Grant, you went to court here in Charleston County
3 on the charge of armed robbery; is that correct?

4 A. Yes, sir.

5 Q. And your attorney was Mr. Alan Toporek up through and
6 including the guilty plea in this case?

7 A. Yes, sir.

8 Q. And he is here in court with us today?

9 A. Yes, sir.

10 Q. And you filed this application for post-conviction
11 relief challenging that conviction; is that right?

12 A. Yes, sir.

13 Q. You have complaints about things that happened prior to
14 the guilty plea, during the guilty plea, and after the
15 guilty plea; is that accurate?

16 A. Yes, sir.

17 Q. Okay. If you don't mind let's do backwards, because
18 the afterward effects why we are here so many years after
19 your conviction; all right?

20 A. Okay.

21 Q. After the guilty plea and sentencing what if anything
22 did you ask Mr. Toporek to do?

23 A. Well, nothing -- well, I was told months into my prison
24 date that I was on a motion of reconsideration sentence. I
25 didn't know exactly what it was so I asked for information

1 in regards to what is it or what to expect, certain things
2 like that. But I -- you know, I didn't ask him to put it
3 in.

4 Q. But you became aware of it while you were in the
5 Department of Corrections?

6 A. Yes, sir.

7 Q. Okay. And I believe you attempted to file a PCR
8 proceeding two times?

9 A. Yes, two times for this one.

10 Q. And why is it that those were dismissed with the
11 ability to file another one; do you know why?

12 A. It was told to me that they were being dismissed
13 without prejudice due to my motion of reconsideration that
14 was put in.

15 Q. Had there been a ruling on that motion to reconsider?

16 A. No, sir.

17 Q. And so that was what was delaying a PCR action?

18 A. Yes, sir.

19 Q. At some point did you get that motion resolved, the
20 motion to reconsider?

21 A. I asked for it to be terminated after -- I'm not sure
22 exactly when, but years and years went by and I just wanted
23 to forget about it and move on so I asked for it to be
24 dismissed.

25 Q. When you say you asked for it, you wrote a letter to

1 Mr. Toporek?

2 A. Yes, sir, a certified letter.

3 Q. Okay. And then he followed through with that action?

4 A. Yes, sir.

5 Q. And withdrew the motion to reconsider?

6 A. Yes, sir.

7 Q. Do you know the timeframe on that?

8 A. From the time I asked him to dismiss it or the entire
9 time?

10 Q. I will just ask it that way. Do you know when you
11 asked for it to be withdrawn?

12 A. November 2013.

13 Q. And you had entered the plea on March 2nd, 2006; is
14 that accurate?

15 A. Yes, sir.

16 Q. Did you ask that the motion to be withdrawn because you
17 didn't want the judge to consider giving you a lower
18 sentence or because you wanted to have a PCR after all of
19 these years?

20 A. Well, I figured it was never going to happen. I mean
21 if you look at the pattern, it was never going to get
22 resolved. I mean, you know, from there -- from the time it
23 was put in and the four years all the way up until I put in
24 my first PCR I was in question. I was writing and I was
25 asking questions. None of my questions were being answered.

1 I put the PCR in and they dismissed it. From there I
2 wrote another letter. No response. I actually thought I
3 didn't have an attorney at the time, so I actually put in a
4 motion to reinstate and I put in a motion to appoint
5 counsel. Because I didn't thought I had one.

6 But come to find out that I actually were still
7 assigned to Mr. Toporek and I was actually still on a
8 reconsideration of sentence. And years went by. I put in
9 another PCR. That was dismissed as well.

10 And I actually came across some information saying that
11 if I really -- if I needed to get rid of it this is how to
12 do it. So I wrote him a letter saying that I am done, I
13 want it to be over. And I seen a lot of activity then, you
14 know, as far as the correspondence was concerned.

15 Q. Meaning from Mr. Toporek?

16 A. Yes, sir. And he put in the proper motion for it to be
17 dismissed. And it was signed. And I was open to put in
18 this PCR right here.

19 Q. Now I want to skip back prior to your guilty plea,
20 okay?

21 A. Okay.

22 Q. Leading up to your guilty plea how often would you say
23 you met with Mr. Toporek?

24 A. Twice.

25 Q. And during those discussions did he discuss potential

1 defenses with you?

2 A. No, sir.

3 Q. During those discussions did you talk about your right
4 to go to trial?

5 A. Yeah. Yes, sir, he did.

6 Q. Up to your guilty plea did you feel he was prepared to
7 go to trial if you had asked him to?

8 A. No, sir. I mean, you know, just me guessing I felt
9 that he -- he wasn't interested in going into a trial.

10 Q. Did you receive a copy of your Rule 5, your discovery
11 from Mr. Toporek?

12 A. No, sir. But I actually wrote twice. I wrote a
13 motion. And my public defender before I had Mr. Toporek,
14 Ms. Kelly Kassis, she actually put in the motion as well for
15 my Rule 5. And I didn't receive anything dealing with my
16 case.

17 Q. Really quickly on that, was Ms. Kassis your attorney
18 when this went to court for the guilty plea?

19 A. No, ma'am.

20 Q. Is there any complaints about Ms. Kassis?

21 A. No, sir.

22 Q. During your discussions with Mr. Toporek did he discuss
23 to you what armed robbery meant and what the State would
24 have to prove to convict you of armed robbery?

25 A. No, not necessarily. I kind of guessed that, you know,

1 dealing with armed robbery you have to be armed of course
2 and someone would have to, you know, get some type of
3 property taken away from them. I know that much.

4 And come to find out it wasn't really common sense
5 because it was actually elements to lead up to the charge.
6 And I didn't know that into going into this plea.

7 Q. You were not the only person charged in this incident?

8 A. No, sir.

9 Q. Did -- in during these meetings with Mr. Toporek did he
10 go over what if any evidence the witnesses including
11 codefendants provided?

12 A. Yes, sir.

13 Q. Did you meet with anyone else that Mr. Toporek worked
14 with to help you on this case?

15 A. Once before I actually met him there was a guy I think
16 his name was -- I don't know if it is his first or last
17 name, but it was Denver. I think that was his investigator.

18 Q. Okay. And how many times would you have met with him?

19 A. Once.

20 Q. Okay. You -- there was -- there was a written
21 statement obtained by law enforcement from you; is that
22 correct?

23 A. Yes, sir.

24 Q. During these meetings with Mr. Toporek did you discuss
25 that statement?

1 A. Yes, sir.

2 Q. Did he discuss the ability to try to block that
3 statement if you were to go to trial?

4 A. No, sir.

5 Q. Between you and your codefendants who was the youngest
6 of the group?

7 MR. JOHNSON: Objection. Relevance, Your Honor.

8 MR. DAVIS: I will rephrase it.

9 THE COURT: All right.

10 Q. How old were you at -- how old were you at the time you
11 were arrested?

12 A. I was 17.

13 Q. Leading up to the court date do you recall discussions
14 with Mr. Toporek about whether you would be going to court
15 at the same times or different time from your codefendants?

16 A. No, sir, I just assumed that, you know, it was no other
17 time that we were actually linked. I figured once I was to
18 go to court it would be by myself because it was actually
19 talk about a trial the week after the week that I pleaded.

20 Q. Meaning if this plea hadn't been entered, the very next
21 week there would be a trial in this case?

22 A. Well, it was never -- there was never anything spoken
23 about a plea all the way up until actually March 2nd, 2006,
24 which was the day I pleaded.

25 Q. Okay. But is it my understanding you are saying -- you

1 are telling the court that if you had not accepted this plea
2 when you did that it would have gone to court the next week?

3 A. Yes, my understanding was March 6th was the day that I
4 was going to go to trial.

5 Q. Do you remember discussions with Mr. Toporek about what
6 potential sentence you might receive?

7 A. Yes.

8 Q. And what were those discussions?

9 A. I can get 30 years for this charge.

10 Q. Did he indicate anything to you about if you pled
11 guilty to what you might get?

12 A. March 6 -- well, excuse me. March 2nd when I was going
13 to -- well, I thought I was going to get a mental health
14 evaluation.

15 I met with him and he told me that it was a negotiation
16 between him and the solicitor, and it was said that it was
17 going -- two charges were going to be dropped and one was
18 going to be reduced.

19 The two charges were assault and battery high and
20 aggravated nature and possession of firearms during the
21 commission of a violent crime.

22 And what led me to believe that the armed robbery was
23 going to be reduced even more was the fact that the weapons
24 charge was actually being dropped.

25 So my assumption was okay he said it so, you know. And

1 this charge was going to be dismissed. Why wouldn't it be.
2 So at that particular time the thought of 30 years left.
3 The potential thought of receiving 30 years left because ---
4 Q. What did you think you were facing at that point then
5 after the agreement to dismiss the gun charge was made?
6 A. Well, I also didn't know that, you know, strong-arm
7 robbery carried a maximum of 15 years. But it was said once
8 reduced I -- it made me eligible for a YOA. Didn't know
9 what it was. He explained to me in brief a YOA is a
10 Youthful Offender's Act.
11 Q. So you had a discussion about a YOA sentence with Mr.
12 Toporek?
13 A. Very small. That few minutes before I came in.
14 Q. Now at the time of your guilty plea in this charge did
15 you have any record?
16 A. Sir?
17 Q. At the time of your guilty plea did you have any
18 criminal record?
19 A. No, sir.
20 Q. At the time of your guilty plea had you ever been in
21 General Sessions Court before?
22 A. No, sir.
23 Q. Have you ever been through a guilty plea before?
24 A. No, sir.
25 Q. Have you ever been through a trial before?

1 A. No, sir.

2 Q. You mentioned this just a moment ago. Was there some
3 other place you thought you were going to be on March 2nd,
4 2006?

5 A. Yes, sir.

6 Q. Where was that?

7 A. I was told that morning that I was going on
8 transportation to be evaluated.

9 Q. Do you know where you were going?

10 A. The particular place, no; but I knew I was leaving
11 Charleston County to go somewhere.

12 Q. Meaning Charleston County Detention Center?

13 A. Yes, sir.

14 Q. Okay. For what purpose were you going to be evaluated?

15 A. I have no clue.

16 Q. Okay. Had you talked to Mr. Toporek about having an
17 evaluation done?

18 A. No, sir.

19 Q. And just to be clear, what type of evaluation;
20 physical, mental health; what type of evaluation?

21 A. It was said that it was a mental health evaluation.

22 Q. Did you actually go to that evaluation?

23 A. No, sir.

24 Q. Can you tell the court then why it is that you entered
25 a guilty plea to this charge in front of Judge Dennis?

1 A. Well, one, I guess the first thing would be the plea
2 was better than 30 years. You know, it was never said to me
3 that armed robbery carried 10 to 30, basically saying that
4 this is what you can get. And I never had no thought of a
5 minimum of 10 years. I was looking at it as well if I am
6 going to plea to 30 years I might as well go to trial and
7 possibly be set free and my innocence be found.

8 It turned from a 100 percent chance of going to prison
9 to a 50 percent chance that I may be found innocent for the
10 charge of armed robbery. It was brought to me that these
11 charges was going to get dropped and one charge was going to
12 be reduced, taking away the possibility of a 30-year
13 sentence. So it -- I was more comfortable with that instead
14 of the 10 to 30 spread.

15 Q. If you had --

16 MR. DAVIS: Forgive me, Your Honor. If I could strike
17 that.

18 Q. If Mr. Toporek had discussed potential defenses with
19 you would you have pled guilty or gone to trial?

20 A. If he were to have talked to me in any kind of manner
21 as far as having something less than 30 years -- I wouldn't
22 say 29 or 28 years, but just anything saying that if I felt
23 like I was innocent this is how we can prove the innocence,
24 yes, I would have took the trial.

25 Q. If Mr. Toporek had discussed the actually elements of

1 armed robbery rather than you guessing what they were would
2 you have pled guilty or gone to trial?

3 A. Oh, yeah, I would have went to trial.

4 Q. If Mr. Toporek had discussed the possibility of trying
5 to block or suppress your statement would you have pled
6 guilty or gone to trial?

7 A. I would have went to trial.

8 Q. And similarly if he had talked about the possibility of
9 blocking or suppressing the codefendant's statements would
10 you have pled guilty or gone to trial?

11 A. Yes, I would have went to trial.

12 Q. Finally, there is an issue actually during the guilty
13 plea that you have a complaint about; is that right?

14 A. Yes, sir.

15 Q. During the actual guilty plea did you learn of a
16 connection between Mr. Toporek and the victim of the crime?

17 A. Yes, sir.

18 Q. And what was that connection?

19 A. Well, in open court Mr. Toporek told me and everyone
20 who was in the courtroom, Mr. Dennis, that he was friends
21 with the victim -- the alleged victim, Mr. Frisch (ph). I
22 didn't know that.

23 And if I knew that he had any relationship with the
24 alleged victim at that particular time, me being told by my
25 public defender Ms. Kelly Kassis Solar before I had her as

1 far as, you know, my being trusting in the course of this
2 case and who to trust and, you know, to have adverse ideas
3 of this case I wouldn't feel that -- I would have felt -- I
4 wouldn't have felt confident that he would have been able to
5 represent me because, you know, that is his friend. And,
6 you know, friends don't sell out friends out regardless.
7 And I felt like I wouldn't have been no different.

8 So if I had known that, I would have -- I would have
9 personally asked him to be relieved. But when he said it in
10 front of, you know, the judge and everyone and it was
11 actually no response it kind of made me feel like well maybe
12 it's not a big deal.

13 But, you know, thinking back on the different, you
14 know, things being said as far as him being my attorney and,
15 you know, just not having a drive within my case I can only
16 think and guess that all of this was due to his
17 relationship.

18 Q. Had you known about that fact prior to being in the
19 court before the guilty plea?

20 A. Sir?

21 Q. Had you known about that fact prior to being in the
22 courtroom before the guilty plea?

23 A. Had I?

24 Q. Yes.

25 A. That he knew the victim?

1 Q. Yes.

2 A. No, I didn't.

3 Q. Mr. Grant, forgive me if I asked this previously, but
4 prior to the plea if you had asked for a trial do you --
5 what was your feelings about Mr. Toporek's readiness for a
6 trial?

7 MR. JOHNSON: Objection. Asked and answered, Your
8 Honor.

9 THE COURT: That has been asked and answered.

10 MR. DAVIS: Thank you. I will rely on the record then.

11 Mr. Grant, I have no other questions. The attorney
12 here may have questions for you.

13 MR. JOHNSON: Mr. Grant, I just have a few for you.

14 MR. GRANT: All right.

15 **CROSS-EXAMINATION BY MR. JOHNSON OF DARRYL GRANT:**

16 Q. I know we have already discussed prior to your
17 testimony that if you go back you may face 10 to 30 years,
18 correct?

19 A. Yes, sir.

20 Q. Okay. And you also realize that if you undo this
21 guilty plea the assault and battery of a high and aggravated
22 nature comes back?

23 A. Yes, sir.

24 Q. And the possession of a weapon comes back?

25 A. Yes, sir.

1 Q. So you are looking at about 55 years in prison?

2 A. I understand.

3 Q. And you are willing to jeopardize all that for another
4 two years of service?

5 MR. DAVIS: Your Honor, relevancy.

6 THE COURT: Well, I went into it earlier. I don't have
7 a problem with that. You can answer the question.

8 A. Yes.

9 Q. Okay.

10 MR. JOHNSON: No further questions, Your Honor.

11 MR. DAVIS: No redirect, Your Honor.

12 THE COURT: Okay. You can step down, sir.

13 MR. DAVIS: If I could have just a moment with my
14 client.

15 THE COURT: Yes, sir.

16 (WHEREUPON, Mr. Davis confers with client.)

17 MR. DAVIS: Your Honor, no other witnesses for the
18 plaintiff -- the applicant.

19 THE COURT: Mr. Johnson?

20 MR. JOHNSON: Call Mr. Toporek to the stand, Your
21 Honor.

22 MR. TORPOREK: Good afternoon, Your Honor.

23 THE COURT: Yes, sir.

24 (WHEREUPON, the witness was duly sworn.)

25 THE CLERK: Once seated please state your first and

1 last name and spell your last name.

2 THE WITNESS: My first name is Alan, A-L-A-N. Last
3 name is Toporek, T-O-P-O-R-E-K.

4 **DIRECT EXAMINATION BY MR. JOHNSON OF ALAN TOPOREK:**

5 Q. Good afternoon, Mr. Toporek. How long have you been
6 practicing law?

7 A. I was sworn in in November 1979.

8 Q. And about how much of your practice is criminal?

9 A. I don't -- I am guessing 10 to 15 percent. Not a ton.
10 I used to do more than I do now. But I still do some work
11 in criminal court.

12 Q. And have you handled cases like this client's before?

13 A. Yes, sir.

14 Q. About how many criminal cases roughly have you handled
15 in your career?

16 A. Hundreds I guess. Maybe more.

17 Q. And were you retained in this case?

18 A. No, sir, I was appointed.

19 Q. About how many times did you meet with the client?

20 A. I met with -- let me preface this by saying that I am
21 extremely fond of Darryl Grant and was extremely fond of
22 Darryl Grant when I first met him. I met with him several
23 times.

24 And he is correct that I do have an investigator by the
25 name of Denver Simpson who I probably asked to go see Darryl

1 in the immediate aftermath of my being appointed to
2 represent him.

3 I met Darryl's mom. There is also a woman in the
4 courtroom today by the name of Brayden Coolman who I got to
5 know very very well who did a lot of work in the community
6 with underprivileged families and took this family under her
7 wing. And I spent a considerable amount of time with her on
8 the telephone, with her in my office, and told her today
9 that she looks the same as she did the last time I saw her
10 about 10 years ago.

11 To give you a finite number of how many times I met
12 with him, I cannot remember. I don't want to lie under
13 oath. I know that I saw him considerably more than the two
14 times that he testified to.

15 Q. And did you file a Rule 5 or did you get that from his
16 prior counsel?

17 A. I filed -- I filed a Rule 5. And in fact if -- and if
18 I'm jumping ahead, I apologize. But this case was a very
19 serious case, and it was assigned two solicitors, two very
20 competent solicitors, David Williams who is now with the
21 U.S. Attorney's Office and Bryan Alfaro who now runs this
22 office in -- or runs the Ninth Circuit office in Berkeley
23 County were assigned to this case. And I spoke with them
24 frequently.

25 And in fact I found in my file a letter that Darryl had

1 sent me on August 11th telling me how he feels about
2 himself, how he feels about his family, and he wants to get
3 on with his life. And I even forwarded a copy of this
4 letter to Brian Alfaro and asked that Bryan and I if we
5 could meet sometime soon and discuss the possibility of
6 resolving this case.

7 The first correspondence that I could find from anyone
8 in the Solicitor's Office was dated February 16th, 2006. In
9 fact I have got two letters dated that day. The first one
10 was from Brian Alfaro, and it said: The supplemental
11 discovery we discussed yesterday should be ready for you
12 today. I also discussed potential plea officers (sic) with
13 Nathan - talking about his co-counsel Nathan Williams -
14 after our conversation yesterday morning. At this time
15 there is no offer on the table. We will meet with the
16 victim as soon as possible to discuss potential plea offers,
17 offers. Either Nathan or I will call you to discuss the
18 possibility of a plea officer (sic) after meeting with the
19 victim. Please feel free to contact me if you have any
20 question.

21 I got a letter dated that same date from Nathan
22 Williams and Brian Alfaro advising me that this matter had
23 been placed on the trial docket for - I assume Monday -
24 March 6, 2006.

25 Q. And did you relay all those -- that information to Mr.

1 Grant?

2 A. I did. In fact I have got a memo to my file -- I
3 apologize, Your Honor. I have got a memo to my file dated
4 February 23rd, 2006, that I met with him. Referenced Darryl
5 Grant. And it is dated February 23, 2006, that: I met with
6 him last week. I believe it was on Thursday, February 16,
7 2006. I talked to him about a trial coming up March 6,
8 2006. He told me he did not want to go to trial but that he
9 did not want to go to prison. I explained to him that he
10 was probably going to prison for a considerable period of
11 time. I left him a complete copy of all of the documents I
12 receive in discovery. He was despondent.

13 I met -- I meet -- I must have said -- I meant to say
14 meet -- meet -- met. And this is dated February 23: I met
15 with him today -- again today, which was February 22, '06.
16 I talked to him about it. He does not know what is going
17 on. I'm going to drop all of his records off at Randy
18 Waid's office. I have left a message for Randy, asked him
19 if he could help me with this case.

20 MR. TOPOREK: And, Your Honor, Randy Waid is a local
21 clinical psychologist who does a lot of forensic work.

22 Q. And in these meetings would you have discussed the
23 possible defenses, any possible defenses in this case?

24 A. I would have. And -- and I am not the best criminal
25 lawyer out there. These four -- these three gentlemen were

1 caught in the immediate aftermath of this very very -- it
2 was a bad -- it was a bad crime.

3 And Darryl gave a comprehensive five-page statement to
4 law enforcement that night after he had been mirandized. I
5 did not feel confident that I could challenge that.

6 We did get an offer of pleading straight up to armed
7 robbery. I am sure I discussed with Darryl that as armed --
8 if I could convince the solicitor to allow him to plea to
9 strong-arm robbery then he would be eligible for a much
10 lesser sentence and he would be eligible for a Youthful
11 Offender but that he was not eligible as -- in armed
12 robbery. And armed robbery was never on the table. I
13 tried. I pled. I begged. But it was never on the table.

14 Q. That would be strong-arm robbery?

15 A. Strong-arm robbery - I'm sorry - was never on the
16 table. I thought that it was -- he did have the other two
17 very serious charges, ABHAN, which quite frankly I was
18 surprised which was not -- which was then known as assault
19 and battery with intent to kill. Because this gentleman was
20 beaten with -- over the head with a heavy flashlight as well
21 as the butt of a gun. And he was beaten -- the pictures
22 were pretty bad.

23 And Darryl was found in a -- this -- where this -- this
24 pawnshop was on Highway 17 South. I don't know if you are
25 familiar -- I know you are not from Charleston, Your Honor.

1 But it is right across West Ashley bridge, and there's a
2 neighborhood called Burns Down right behind this shopping
3 center. And there used to be railroad tracks back there.
4 It is now what they call a greenway where you can ride your
5 bikes. And maybe it was even a greenway then.

6 But anyways, he was found right back there in the
7 immediate aftermath. And his buddies were found -- I say
8 his buddies. There were two other codefendants were found
9 somewhere down the road, and the getaway car was found
10 somewhere down the road.

11 And I don't know -- the two codefendants that were in
12 the store with him said that it was Darryl's idea to do that
13 robbery. Darryl said it was not his idea. But he readily
14 admitted his participation.

15 And I don't know that as his counsel I would have had
16 standing to challenge the other two statements as Mr. Davis
17 suggested. Maybe I am missing something there or maybe I
18 did have the authority to challenge that. But I didn't even
19 think about that.

20 Q. Would you have discussed the charges of armed robbery
21 and the elements thereof?

22 A. Yes, sir.

23 Q. And ABHAN and possession?

24 A. Yes, sir.

25 Q. So from the get go you started negotiating with the

1 solicitors on a plea negotiation, correct?

2 A. I reached out to them. I really -- short of this
3 horrible incident this young man was a very impressive young
4 man. And I am now told he is a trustee at the Abbeyville
5 County Jail, and I hope and pray that he has got a great
6 life ahead of him. And I am confident that he does.

7 He was involved with the Job Corp. He had never been
8 in trouble before. I don't think he had ever been arrested
9 as a juvenile. He was a young adult at the time, under the
10 eyes of the law. And I really liked him. I really liked
11 his mom. I was very impressed with Ms. Coolman's interest
12 in this young man. And I wanted to get him the best result
13 I can -- I could.

14 And I know that I told Judge Dennis on the record that
15 I hate to see any of my clients go to jail but he is going
16 to jail because it is mandatory.

17 And in fact I -- I don't know that I have ever done
18 this before but I hand wrote out everything I said before
19 the judge that day, and I've got it in front of me.

20 MR. JOHNSON: Would Your Honor like to hear that?

21 A. No, I mean it doesn't matter.

22 Q. Okay.

23 A. I just where -- if you want me to go forth, you want me
24 to continue, his suggestion that I knew the victim is
25 correct. I didn't know I knew the victim until the day

1 before the plea. And if I told him that day or told him in
2 the courtroom -- I may have told him that day. I think I
3 would have told him before we came into the courtroom.

4 The victim's name is James Frisch. A gentleman by the
5 name of Randy Frisch who I really -- I say I knew him. I
6 knew who he was. A gentleman by the name of Randy Frisch
7 grew up right down the street from me. He was about ten
8 years older than me. And everybody in the neighborhood knew
9 Randy Frisch. He was a very popular guy. I didn't know
10 until the day before the plea that James Frisch and Randy
11 Frisch were one in the same.

12 And in fact I had -- I thought that his being the
13 youngest, his having no record, his -- I thought he was the
14 least culpable of the three.

15 And in fact I had one of my partners who knows Randy
16 Frisch reach out to Randy and try to tell Randy that we
17 represented this young man; short of that horrible thing
18 that happened in November of '04 he is a remarkable young
19 man, he has got a great future ahead of him and I would
20 like your permission to tell the court tomorrow or the
21 next day - I think it was one or two -- it was -- it may
22 have been two days, but it was no more than two days
23 beforehand - that you have no objection to his getting the
24 lightest sentence possible under the statute.

25 And I don't blame Mr. Frisch for this, but he said I

1 don't have any -- I don't have any compassion for any of
2 those guys. I could have died.

3 So I did in my remarks to the judge tell him I know Mr.
4 Frisch, my heart goes out to him, he is a gentleman, they
5 come no finer than him.

6 And then I said, Your Honor, this young man is going to
7 prison for a long time, the law mandates that he receive a
8 minimum of 10 years, he must do most -- he must do most of
9 whatever you sentence him -- whatever sentence you impose,
10 he is not eligible for a YOA, I respectfully ask that you
11 sentence this young man to 10 years. Those were my closing
12 remarks to Judge Dennis.

13 Q. And along those lines one of his allegations that he
14 did not know that it was a minimum ten-year sentence, did
15 you explain the ranges of the sentences?

16 A. There's no question in my mind that I did. And we had
17 quite a few people here on his behalf at the sentencing.

18 Q. So you would have discussed the potential defenses?

19 A. Yes, sir.

20 Q. You would have discussed the elements of the crime?

21 A. Yes, sir.

22 Q. You would have discussed his statement?

23 A. Yes, sir.

24 Q. And you would have discussed the codefendant's
25 statements?

1 A. Yes, sir.

2 Q. Did you feel prepared for this trial?

3 A. Yes, sir. Was I -- was I confident he could prevail,
4 no. I felt confident that had we tried the case he would
5 have ultimately gotten a sentence well in excess of the
6 sentence he got. I wasn't happy with the sentence, but I
7 think he would have gotten a sentence well in excess of what
8 he got had we tried the case.

9 Q. And he knew the plea would be straight up without any
10 recommendations?

11 A. Yes, sir.

12 Q. And he was on board with that?

13 A. He wasn't happy as -- and he didn't want to go to
14 prison. But yes, he was on board with it.

15 Q. Did you ever threaten or coerce him to take the guilty
16 plea?

17 A. No, sir, absolutely not.

18 Q. And whose decision was it to plead guilty?

19 A. It was his.

20 MR. JOHNSON: No further questions at this time, Your
21 Honor.

22 THE COURT: Okay.

23 Mr. Davis.

24 MR. DAVIS: Thank you, Your Honor. May it please the
25 court.

1 **CROSS-EXAMINATION BY MR. DAVIS OF ALAN TOPOREK:**

2 Q. Mr. Toporek, you have reviewed Mr. Grant's statement to
3 law enforcement?

4 A. Yes, sir.

5 Q. Is it accurate to say in that statement that he talks
6 about the group entering the establishment more than one
7 time?

8 A. I think they went in three times.

9 Q. Is it fair to say that in that statement he indicated
10 each time that he hesitated and was apprehensive to
11 physically do anything; is that fair?

12 A. Yes, sir.

13 Q. Also during the actual event in his statement does he
14 describe talking -- holding the victim to prevent -- kind of
15 to de-escalate the situation; is that the way he kind of
16 described it, holding the individual?

17 A. You could read it that way. But what he also says is
18 that -- I think what he says -- and we can look -- the
19 statement speaks for itself. But he -- when -- when the
20 victim realized he was being robbed he pulled out a pistol
21 and Darryl at that time jumped over the counter.

22 Q. The victim pulled out a pistol?

23 A. Yeah, and at that time Darryl jumped out over the
24 counter and grabbed him around his back while his
25 codefendants beat him up. So you can construe that however

1 you want.

2 Q. You have testified just briefly about providing
3 documentation and Dr. Waid. And in fact you had gotten a
4 transport order for Mr. Grant to go to Dr. Waid's office; is
5 that correct?

6 A. I got the order. So I would -- I don't remember; but,
7 yes, I do have an order.

8 Q. And the order for transport actually is on the day of
9 this guilty plea?

10 A. It was -- well, it was filed -- Brian Alfaro consented
11 to it on my motion. And my motion says February, slash,
12 '06. And then below that is handwritten March 2, '06, and
13 it has got Judge Dennis' signature on that date. It wasn't
14 even filed until a week after the plea. So it makes little
15 if any sense.

16 Q. I apologize. At the top it's -- it appears that Judge
17 Dennis signed it on the date of the guilty plea. That is
18 what it appears on the document?

19 A. Yes.

20 Q. That evaluation was not completed?

21 A. Obviously not. The transport -- the order says that he
22 was to be transported on Wednesday, March 1, and arrive at
23 Dr. Teichner's office. So Teichner is a doctor that works
24 in Randy Waid's office. So I assume Dr. Waid was out of
25 town. And he was supposed to arrive at that office on

1 March 1 at 11:30.

2 Q. What were your concerns about Mr. Grant's mental
3 status?

4 A. All I can say -- all I can relate back is to this memo
5 that I wrote to my file stating that I met with him on
6 February 16, I left him a complete copy of all the
7 documents, he told me he didn't want to go -- he didn't want
8 to go to trial but he didn't want to go to prison, and he
9 was despondent.

10 And then when I met with him again on February 22nd I
11 just put down -- I said I talked to him about it. I assume
12 the case. And I just wrote down he does not know what is
13 going on. I don't have any independent recollection of that
14 conversation, but obviously I was concerned at the point
15 that I thought he should be examined.

16 MR. DAVIS: Your Honor, if I could have one moment with
17 my client.

18 THE COURT: Yes, sir.

19 (WHEREUPON, Mr. Davis conferred with his client.)

20 MR. DAVIS: Thank you, Your Honor.

21 Mr. Toporek, no other questions. Thank you so much.

22 MR. JOHNSON: No redirect, Your Honor.

23 THE COURT: All right. You can step down. Thank you,
24 sir.

25 MR. JOHNSON: And the State has no further witnesses.

1 THE COURT: All right, sir.

2 MR. DAVIS: Argument, Your Honor?

3 THE COURT: Yes, sir.

4 **ARGUMENT BY MR. DAVIS:**

5 Judge, this is similar to -- and forgive me, the names
6 are going to blur together. But there was one earlier. We
7 kind of have three different instances here that we would
8 ask for relief on. I will work backwards.

9 There was a motion to reconsider that sat languid for
10 years, right about seven years. We would argue that is
11 ineffective. We would ask that he be returned to that place
12 in time and have a ruling on that.

13 He certainly requested to be withdrawn. He wrote -- he
14 wrote to Mr. Toporek to have that done. And it was done --
15 the purpose of that though was to have this hearing, because
16 he was concerned about his conviction and his sentence.

17 The appropriate way would have been to go forward and
18 actually have the hearing on that and let presentation be
19 made. So relief could be granted would be to return him to
20 the place of that reconsideration being in place and allow
21 that to be heard.

22 That connects to the middle of the plea in which for
23 the first time my client is aware that his attorney who has
24 been working on this case for a substantial amount of time
25 is aware of -- or acquaintances with, grew up down the

1 street from, the victim in this case. And in fact on the
2 record in front of Judge Dennis he speaks quite glowingly of
3 the victim. Obviously that causes concern to my client.

4 We would argue although there may be some benefit of
5 showing deference to the victim that we are concerned that
6 that was not -- that Mr. Toporek did not argue in the
7 client's best interest in trying to obtain the lowest
8 sentence possible both in the courtroom at that time and
9 leading up to it if he had known the victim in this case.

10 And then finally, Your Honor, I will not belabor each
11 point; but you heard my client's testimony about the
12 meetings, lack thereof, the discussions, lack thereof,
13 leading up to this.

14 Most importantly I will just comment on this: There
15 were statements obtained in this case, but the ability to
16 use Mr. Grant's statement against himself at trial was not
17 discussed about suppressing that, and codefendant statements
18 what would be able to be used or redacted or suppressed was
19 not discussed.

20 Clearly that was -- including the business owner, but
21 that would have been the strongest evidence in the case.
22 They didn't discuss it. He was not given the opportunity to
23 decide would he want to try to have those statements fought
24 and try to be suppressed at the beginning of the trial or
25 not.

1 He testified to you as to a list of things that had
2 they been discussed he would have then invoked his right to
3 trial and not pled guilty. So for that reason we would
4 argue you could grant relief on the PCR and just as he had
5 requested.

6 Now I am offering of course these other two issues as
7 well, but certainly that would be the major relief would be
8 to reinstate -- I'm sorry, to overrule a conviction and then
9 reinstate the charges.

10 So on all those grounds we would ask you to consider
11 relief, any or all of those options. Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Davis.

13 MR. JOHNSON: Just briefly, Your Honor. May it please
14 the court.

15 **ARGUMENT BY MR. JOHNSON:**

16 Working backwards. First of all Mr. Toporek has
17 testified that he did have numerous numerous meetings with
18 Mr. Grant and discussed all the statements and all the
19 evidence. So that is directly repeated by Mr. Toporek's
20 testimony.

21 As far as the conflict with the victim they are
22 alleging a conflict; however, he knew him from growing up in
23 the neighborhood. He also tried to reach out to him and the
24 victim said: Hell no I'm not going to, you know, come in
25 there and ask for the minimum; I have no compassion for

26

1 them. So clearly there is no conflict whatsoever.

2 And as far as the motion to reconsider, the State's
3 position is there is no prejudice because he got what he
4 wanted. He wanted to withdraw so he could get here. He has
5 had his hearing and therefore there can be no prejudice.

6 And also, you know, with the motion to reconsider, as
7 Your Honor knows, they can turn the 15-year sentence into a
8 30-year sentence. I mean I hope that that would not happen,
9 but that is a possibility which I don't think counsel has
10 really reflected on.

11 But he has failed to prove that Mr. Toporek was
12 ineffective in any way whatsoever and certainly failed to
13 prove any prejudice.

14 That you, Your Honor.

15 THE COURT: Okay. Thank you, gentlemen. Okay.

16 All right. I am going to take this matter under
17 advisement, and I am also going to take a little short break
18 right now at this point in time.

19 (WHEREUPON, 7/21/15, 4:09 p.m., the PCR hearing concluded.)

(NOTE: A transcript which has been certified by the court reporter will bear an original signature on the below certification sheet. Please contact the court reporter for additional certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth 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 captioned case, relative to appeal, in the Court for Charleston County, South Carolina, on July 21, 2015.

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

PHYLLIS NORTON, CVR
(Signature in blue ink.)

Date: November 6, 2015

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Darryl V. Grant, #314123,

2014-CP-10-1684

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED
2015 SEP 23 PM 4:23
JULIE J. HENDERSON
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 12, 2014. Respondent made its Return on June 3, 2015. An evidentiary hearing into the matter was convened on July 21, 2015 at the Charleston County Courthouse. Rodney Davis, Esquire, represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Alan Toperek, Esquire also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the guilty plea transcript.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's order of commitment. The Applicant was indicted at the April 2005 term of the Charleston County Grand Jury for Armed Robbery (2005-GS-10-2169). The Applicant was represented by Alan Toperek, Esquire. On March 2, 2006, the Applicant pled guilty

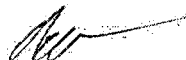


before the Honorable R. Markley Dennis, Jr. and was sentenced to fifteen (15) years. Based on his incarceration from December 13, 2004, until the time of sentencing, the Applicant received credit for time served in the amount of four hundred and forty nine (449) days. The Applicant then filed a timely motion of reconsideration of sentence on March 10, 2006.

Prior to the current application, the Applicant filed two previous applications for post-conviction relief (2010-CP-10-4400; -3386). The Applicant filed his first application on May 28, 2010. The state filed a Return and motion to dismiss. By order dated October 28, 2010, the Honorable Roger M. Young, Sr., dismissed the application without prejudice based on the Applicant's pending motion for reconsideration. The Applicant filed his second application on May 24, 2012. By Order dated March 27, 2013, the Honorable Roger M. Young, Sr., again dismissed the application without prejudice based on the Applicant's pending motion to reconsider. The motion to reconsider was withdrawn December 2013.

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

1. "Ineffective Assistance of Counsel"
 - a. "Applicant contends that a conflict of interest had an adverse effect on his defense"
 - b. "Applicant contends that his 5th, 6th, and 14th amendment rights were violated by an actual conflict of interest"
2. "Applicant contends that counsel was ineffective in failing to raise the issue of his fitness to stand trial"
3. Counsel's performance fell below professional norms
4. Due Process Violations



At the hearing, the Applicant proceeded on his claims of ineffective assistance of plea counsel.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified that after his plea, Counsel failed a motion to reconsider on his behalf that was resolved because he requested that it be withdrawn. Applicant pled guilty in March of 2006 and corresponded with Counsel via letters.

Prior to the plea, Applicant testified he met with Counsel only twice, did not discuss a defense, did not receive the Rule 5 materials and that Counsel was not prepared for trial. Applicant also stated Counsel did not explain to him Armed Robbery or the elements. Applicant testified Counsel never discussed with him any of the evidence that witnesses or co-defendants provided to law enforcement, namely statements implicating Applicant. Applicant claimed he only met with Counsel's investigator once. Applicant admitted he and Counsel discussed his written statement Applicant gave to law enforcement, but did not discuss a possible suppression hearing. Applicant stated he was seventeen (17) years old at the time of arrest and thought he was going to court by himself.

Applicant testified he thought he was proceeding to trial as there was no discussion about a plea until March 2, 2006. Applicant stated Counsel discussed with him the potential of a thirty (30) year sentence, and he admitted there were two (2) other charges (Assault and Battery of a High and Aggravated Nature and possession of a firearm during the commission of a violent crime) dropped in exchange for his guilty plea. Applicant stated he thought he could get a lesser charge than Armed Robbery, such as strong armed robbery which he stated would be eligible for a Youthful Offender Act (YOA) sentence. Applicant testified he has no prior criminal record as he has not been through a



guilty plea or trial before. Applicant also claimed he thought he was going to be mentally evaluated, but never received the evaluation.

Applicant then testified he entered the plea as a plea was better than facing the potential of a thirty (30) year sentence, but did not know there was a mandatory minimum sentence of ten years prior to his plea. Applicant admitted he had other charges dropped and one charge reduced and was more comfortable with the plea than the 10-30 year spread. Applicant then claimed if potential defenses or the elements of the crimes had been discussed, he would have pursued a trial. Applicant also claimed had he known that his statement could have been suppressed or that his co-defendants' statements could have been suppressed, he would have pursued a trial.

Applicant testified that he learned during the plea that there was a connection between the victim and Counsel. He claimed had he known, he would not have been confident that Counsel could properly represent him, although, in Applicant's words, it may not have been a big deal.

On cross-examination, Applicant admitted he knew if PCR was granted, all of the original charges come back and he would be facing a potential much more severe sentence.

Counsel testified he has been practicing law since 1979 and that 10-15% of his current practice is criminal. Counsel testified he has handled Armed Robbery cases before and hundreds of criminal cases. Counsel stated he was appointed to Applicant's case and met several times with Applicant, Applicant's mother and Counsel's investigator. Counsel testified he filed a Rule 5 motion and communicated with the solicitor often. In February 2006, Counsel testified he received and relayed potential plea offers from the State to Applicant. Applicant's case was then placed on the trial docket.



In a memorandum from February 23, 2006, Counsel stated he spoke with Applicant about trial, to which Applicant responded he did not want to pursue a trial but did not want prison time. Counsel advised him that he was, indeed, going to prison because of the charges. With this, Counsel left Applicant a complete copy of the documents. Counsel testified he would have discussed possible defenses with Applicant as three of his co-defendants were caught immediately after the incident and gave statements to law enforcement. Counsel stated Applicant gave a 5-page statement to law enforcement, which Counsel did not feel confident he could successfully challenge. Counsel stated he discussed the potential for a YOA if the solicitor would agree to a strong armed robbery charge because Armed Robbery is not eligible for YOA; however, Counsel testified that a strong armed robbery charge was never an option. Counsel stated Applicant was also charged with two serious charges (ABHAN and possession of a firearm during the commission of a violent crime) because the victim was beaten with a flashlight and the butt of a gun. Applicant was found within a close proximity of the crime scene.

Additionally, Counsel testified that the co-defendants would testify that the armed robbery was Applicant's idea and that Applicant freely admitted his participation in the crime. On these grounds, Counsel stated he did not think he would have standing to challenge the co-defendants' statements. Counsel testified he fully explained Armed Robbery and the elements to Applicant. Counsel also stated he explained that Armed Robbery carried a minimum of ten (10) years and the possible sentencing ranges to Applicant.

Counsel testified he knew the victim, but did not realize it until the day before court. Counsel stated he barely knew the victim and that the victim did not want compassion for Applicant. Counsel also testified he felt prepared, but not confident Applicant could prevail.



Counsel lastly testified that Applicant was "on board" with the guilty plea, that he never threatened Applicant to plead guilty and that it was Applicant's decision to plead guilty in this case.

On cross-examination, Counsel testified that in Applicant's statement to law enforcement, Applicant went into the West Ashley Pawn Shop three times, but was hesitant. Counsel also stated when the victim realized he was being robbed, the victim pulled out a pistol. At that point, Applicant jumped over the counter and grabbed the victim.

Counsel testified there was a transport order for a mental evaluation, but it was not filed until one week after Applicant's plea and was not completed.

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 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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 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 (1985).

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance of counsel in this case. Counsel advised Applicant of all of the charges and the sentences the charges carried. Specifically, Counsel testified he discussed all of the elements of Armed Robbery with Applicant. Counsel testified he discussed the discovery materials with Applicant, including the Applicant's statement to law enforcement and the fact that Applicant's co-defendants were going to testify against Applicant at trial. Counsel also negotiated with the State in Applicant's best interest. Applicant also testified he pled guilty because he did not want to risk a trial and face a thirty (30) year sentence. Applicant also



acknowledges that other charges were dropped in exchange for his plea and that all of the original charges would return if successful in PCR. This Court finds Applicant made the decision to plead guilty on his own accord with the help of learned counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

This Court further finds there was no conflict of interest by Counsel "knowing" the victim in this case. The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id.; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). In this case, Counsel testified he only learned that he "knew" the victim on the day before court, did not know him well and that he was not sympathetic to Applicant's case. In fact, Counsel testified the victim wanted no compassion for Applicant. Therefore, Applicant has failed to prove that there existed an actual conflict that affected Counsel's performance in this case.

This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

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 (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. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

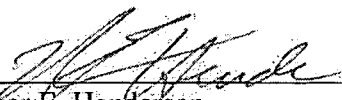
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.



AND IT IS SO ORDERED!

September 18, 2015

Charleston, South Carolina


Roger E. Henderson
Presiding Circuit Court Judge
Ninth Judicial Circuit

2014-CP-10-1684

NW 2004-11-05465

WITNESSES

KEITH HAIR AND/OR

MATT CASEY

HULL, CPD

0426252

ARREST WARRANT NUMBER

H865521

NOVEMBER 24, 2004

ACTION OF GRAND JURY

TRUE BILL

R Rhoades
Foreperson of Grand Jury

APR 11 2005

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2005-GS-10-2169

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

APRIL TERM 2005

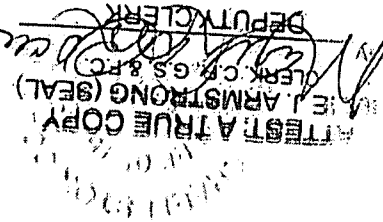
THE STATE

vs.

DARRYL VERNON GRANT

Indictment for

ARMED ROBBERY



FILED
2005 APR 21 AM 11:31
JULIE J. ARMSTRONG
CLERK OF COURT
BY *[Signature]*

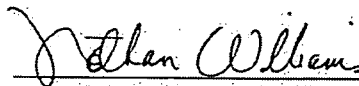
STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

INDICTMENT FOR
 ARMED ROBBERY

At a Court of General Sessions, convened on April 11, 2005 the Grand Jurors of Charleston County present upon their oath:

That Darryl Vernon Grant did in Charleston County on or about November 23, 2004, while armed with a deadly weapon, feloniously take by means of force or intimidation, from the person or presence of James Frisch. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

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


 ASSISTANT SOLICITOR

TEST: A TRUE COPY
 E. J. ARMSTRONG (SEAL)
 CLERK C.P. 2005

 DEPUTY CLERK