

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable Michael G. Nettles, Circuit Court Judge

KELVIN EUGENE COHEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000408

APPENDIX

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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF GENERAL SESSIONS

The State,
-vs-
Kelvin Eugene Cohen,
Defendant.

TRANSCRIPT OF RECORD
2015-GS-42-3501-3503
December 13, 2016
Spartanburg, South Carolina

B E F O R E:

HONORABLE J. DERHAM COLE, JUDGE

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

JENNIFER A.J. JORDAN, ESQUIRE
Attorney for the State

MATTHEW WILLIAM SHEALY, ESQUIRE
Attorney for the Defendant

Linda D. Moffitt
Circuit Court Reporter

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No sworn testimony.

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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1 (Proceedings December 13, 2016)

2 (Photographs marked State's Exhibit No. 1.)

3 MS. JORDAN: Your Honor, before the Court is Kelvin
4 Eugene Cohen.

5 He stands before the Court on three indictments. They
6 have all been true billed. We recently amended the
7 indictment for habitual traffic offender to change one word
8 to make it correspond directly with the statute.

9 The habitual traffic offender causing death is under
10 2015-GS-42-3502; the failure to stop for a blue light
11 second offense is under 2015-GS-42-3503; and the hit and
12 run, leaving the scene with a death, is 2015-GS-42-3501.

13 He is pleading guilty today represented by his
14 attorney, Matt Shealy. The negotiated sentence between the
15 state and the defense is for 20 years suspended to ten
16 years and probation to follow concurrent.

17 THE COURT: You are Kelvin Eugene Cohen.

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Mr. Shealy is your lawyer.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: I have before me three indictments.

22 Indictment 2015-3501 charges you with hit and run
23 involving a death.

24 Indictment 2015-3502 charges you with violation of the
25 Habitual Traffic Offender Act involving death.

1 And 2015-3503 charges you with failing to stop when
2 signaled by a blue light or siren or both second or
3 subsequent offense.

4 Do you understand those charges?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you wish to enter pleas of guilty or
7 not guilty?

8 (Pause for defendant to confer with counsel.)

9 MR. SHEALY: Your Honor, if I may have just a second.

10 MS. JORDAN: Your Honor, we're ready to pick a jury if
11 needed. I have my witnesses sitting in the courtroom and
12 upstairs.

13 THE COURT: Okay.

14 (Pause for defendant to confer with counsel.)

15 THE COURT: We don't have the jury here now. I
16 understood this was a guilty plea.

17 MS. JORDAN: Yes, sir. I did too.

18 MR. SHEALY: That was my understanding too, Judge,
19 but...

20 MS. JORDAN: Your Honor, he appears to have made some
21 indication that he wants to fire Mr. Shealy. Could we hash
22 that out right now?

23 THE COURT: We've a lot of things to hash out.

24 Mr. Cohen, come back around.

25 (Pause.)

1 THE COURT: Mr. Cohen, Mr. Shealy represents you?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You know what you're charged with.

4 Hit and run resulting in death carries a potential
5 sentence of up to 20 years in jail; failing to stop when
6 signaled to do so second or subsequent offense carries an
7 additional potential sentence of up to five years in jail;
8 and violation of the Habitual Traffic Offender Act
9 resulting or involving a death carries a potential sentence
10 of also 20 -- excuse me -- that carries up to 20 years in
11 jail. Hit and run involving death carries up to 25 years
12 in jail.

13 So you could get -- if found guilty of these offenses
14 you can get 25 years on the hit-and-run death, 20 years on
15 the habitual-offender death and five years on the failing
16 to stop second or subsequent offense.

17 According to these documents Mr. Shealy has managed to
18 get the state to agree to a negotiated sentence which would
19 appear to put you in jail for a period of ten years.

20 Do you understand that if you don't go forward today
21 with a guilty plea and you come back tomorrow the jury is
22 going to be selected? And you won't have another
23 opportunity to negotiate this sentence, because if you come
24 back tomorrow and we pick a jury, I'm not going along with
25 any agreement between the state and the -- and your lawyer.

1 Do you understand?

2 You'll have a trial. And if you are convicted I'll
3 decide what the sentence is. They won't have any input in
4 it. Do you understand?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Now, do you want to talk to Mr. Shealy
7 about the deal that he has gotten the state to agree to on
8 your behalf --

9 THE DEFENDANT: I would like to talk to you.

10 THE COURT: -- or do you want to go forward with the
11 jury trial?

12 THE DEFENDANT: Can I ask you a question, sir?

13 THE COURT: Well, sure.

14 THE DEFENDANT: would the -- would the facts be
15 presented to you of how all of this occurred? Because I
16 was the victim from the beginning.

17 THE COURT: Okay. So you're not guilty of anything?

18 THE DEFENDANT: I don't feel like I am. I am asking
19 you a question here.

20 THE COURT: All right.

21 THE DEFENDANT: would the facts be presented to you?
22 Because every time I came in front of you for a bond
23 reduction she don't present the facts to you. But she
24 presented them to Judge Couch, but she don't present them
25 to you.

1 THE COURT: Okay. Well, I don't know what the facts
2 are. You see, that's what the jury is for.

3 In other words, if you want to plead guilty, then you
4 can tell me anything you want to during that process.

5 If you don't want to plead guilty the facts are
6 presented to the jury, not to me. I mean, I'll be here, of
7 course. But the jury will decide what the facts are based
8 upon the evidence.

9 But what I'm trying to impress upon you is if you have
10 a jury trial and if a jury finds you guilty of these
11 charges, what they have agreed to will not be something
12 that I'm interested in listening to. I won't care what
13 their recommendations are. I'll make the decision on the
14 sentence.

15 Right now your lawyer and the solicitor have worked
16 out an agreement apparently. I assume that you were
17 involved in that, in those discussions. Were you?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Okay. So they've worked out an agreement,
20 and it's a negotiated agreement.

21 So either I have to go along with it or I just refuse
22 to take your guilty plea. But if I do take your guilty
23 plea, then I have to go along with their agreement.

24 However, if you don't want to plead guilty and you
25 want to have a jury trial, you have every right to do so.

1 And the jury will be here in the morning. And if you want
2 to have a jury trial, we'll have a jury trial, but just
3 understand if we do have a jury trial and if you are
4 convicted their agreement is gone. There is no agreement
5 as far as the sentence goes. Do I make myself clear?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Okay. Do you want to talk to Mr. Shealy
8 some more?

9 THE DEFENDANT: I want to talk to my family. I'll let
10 my family decide what they want me to do.

11 THE COURT: Well, you can talk to your family about
12 it, I guess, but you understand they can't make that
13 decision because they don't suffer the consequence of it.

14 THE DEFENDANT: It's -- it's different when you're not
15 doing the time by yourself, Your Honor.

16 THE COURT: Well, they're not going to be doing any
17 time with you.

18 THE DEFENDANT: Can I ask my family about it?

19 THE COURT: Have the family -- has his family been in
20 on these discussions?

21 MR. SHEALY: I have spoken with them, Your Honor. I
22 spoke to them at length. They --

23 THE COURT: Well, here's the situation, Mr. Cohen.

24 You're in custody, and I don't have control over that
25 custody situation. If the officers are willing for you and

1 Mr. Shealy and your family to talk, then that suits me
2 fine. But you're not in my custody, and so I don't control
3 that situation.

4 What have y'all been doing about that?

5 MR. SHEALY: I was talking to them, basically.

6 THE COURT: I know.

7 MR. SHEALY: Then as to -- I can ask officer Lindley
8 if he'll let them.

9 THE COURT: What do y'all ordinarily do?

10 THE OFFICER: That will be fine.

11 THE COURT: I mean, it's your -- I mean, it's in your
12 discretion, you know, so I will leave that up to y'all.

13 You can talk to the -- to the officers and see what
14 they can agree to. But, anyway, I'm happy for you to talk
15 to your family. But you have got to make the decision, as
16 I say, because, you know, they're going to leave here today
17 and they'll leave here tomorrow too if they come tomorrow.

18 Okay. All right. We'll take a short break and let
19 you talk to Mr. Shealy some more.

20 MS. JORDAN: Thank you, Your Honor.

21 (Whereupon, a recess was taken.)

22 THE COURT: All right, Mr. Cohen.

23 We're back here on Kelvin Eugene Cohen. Have you had
24 plenty of time now to talk with your family and Mr. Shealy
25 about your decision?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And what did you decide to do?

3 THE DEFENDANT: Alford plea.

4 THE COURT: All right. Well, you understand that's a
5 guilty plea. It just means you're not admitting the facts
6 as stated necessarily by the prosecutor. But if I accept
7 your plea, even though you -- even though you deny the
8 facts or even though you have a defense that you give up,
9 that you allow me to sentence you just as if you had
10 admitted your guilt or just as if a jury had found you
11 guilty. Do you understand?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. Indictment 2015-3501 charges
14 you with hit and run involving a death, which, as I have
15 stated earlier, carries up to 25 years in jail and a fine
16 of \$25,000.

17 Did Mr. Shealy go over that indictment with you and
18 explain to you what the state has to prove before you can
19 be found guilty of it?

20 THE DEFENDANT: I'm really not sure.

21 THE COURT: Sir?

22 (Pause for defendant to confer with counsel.)

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Well, do you understand what that is? The
25 state claims on June the 6th of 2015 you did wilfully and

1 unlawfully violate a certain statutory provision, that you
2 were a driver of a vehicle that was involved in an accident
3 which resulted in a death to Quincy Campbell and that you
4 left the scene of that accident and failed to stop at the
5 scene as you were required to do.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And Mr. Shealy has explained that to you?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And has he explained to you that if you
10 are found guilty of that that you could receive a sentence
11 of 25 years in jail?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And did you tell him everything you know
14 about the facts that relate to that charge?

15 THE DEFENDANT: Me?

16 THE COURT: Did you tell your lawyer everything you
17 know about these allegations that they make against you?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And after y'all discussed it did you
20 determine whether or not you had a defense to that charge?
21 And a defense would be some reason why you should not be
22 found guilty of it.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you have a defense to it?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand that when you plead
2 guilty you give up your right to assert that defense?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Is that what you want to do?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. Indictment 2015-3502 charges
7 you with violation of the Habitual Traffic Offender Act.

8 The state alleges on June the 8th of 2015 you drove a
9 motor vehicle after you had been declared to be an habitual
10 offender and that you violated some other statutory
11 provision or duty imposed upon you by law and it resulted
12 in the death of Quincy Campbell.

13 Violation of the Habitual Traffic Offender Act which
14 results in a death to someone also carries a potential
15 sentence of up to 20 years in jail and a fine of \$10,000.

16 Did Mr. Shealy explain that charge to you?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand it?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Did you tell him everything you know about
21 the allegations made against you in that indictment?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Did y'all discuss whether or not you had a
24 defense to that charge?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you?

2 THE DEFENDANT: I really don't know on that one, sir.

3 THE COURT: You're not sure on that one.

4 THE DEFENDANT: I am habitual offender.

5 THE COURT: All right. And -- and you were driving a
6 vehicle in violation of the Habitual Offender Act?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And it did end up resulting in a death to
9 someone?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: In other words, the use of the vehicle.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you know of any defense he has to that,
14 Mr. Shealy?

15 MR. SHEALY: No, Your Honor, I don't.

16 THE COURT: All right. So you're going to plead
17 guilty to that charge?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right. And Indictment 2015-3503
20 charges you with failing to stop when signaled to do so by
21 a law enforcement officer using a blue light or siren.

22 Did Mr. Shealy explain to you what -- what has to be
23 established in order for you to be found guilty of that
24 charge?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand it?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Did you -- and did he tell you you could
4 receive up to five years in jail for that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And did you tell him everything you know
7 about the facts that relate to that charge?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Did y'all determine whether or not you had
10 a defense to it?

11 THE DEFENDANT: Don't, sir.

12 THE COURT: You do not?

13 THE DEFENDANT: No, sir.

14 THE COURT: So, and you want plead guilty to it?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right. Did Mr. Shealy explain to you
17 each of the constitutional rights that you have that you
18 have to give up if you want to plead guilty to a charge?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Did he explain to you that you have the
21 right to remain silent?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Did he explain to you that you have a
24 right to confront and to examine any witness in court that
25 would offer evidence against you?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Did he explain to you that you have a
3 right to have a jury trial and for a jury to decide whether
4 or not you're guilty of any crime the state claims you
5 committed?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And did he go over those rights with you
8 in detail?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you understand them?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And understanding those rights, do you
13 wish to give them up in order to plead guilty?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Has anybody promised you anything that
16 caused you to make that decision?

17 THE DEFENDANT: No, sir.

18 THE COURT: Well, they did agree to a negotiated
19 sentence, did they not?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Would you have pled guilty if they had not
22 agreed to that or made that agreement?

23 THE DEFENDANT: No, sir.

24 THE COURT: All right. So that's something they
25 promised you that induced your decision to plead guilty,

1 true?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And what did they promise you? What did
4 you understand the agreement was?

5 THE DEFENDANT: Zero to 20 suspended to ten, probation
6 following.

7 THE COURT: Twenty suspended to ten followed by
8 probation?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And that would be on the hit-and-run
11 indictment and on the habitual-offender indictment? And
12 then a 5-year concurrent sentence on the failure-to-stop
13 indictment?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Other than that have you been promised
16 anything?

17 THE DEFENDANT: No, sir.

18 THE COURT: Has anybody threatened you?

19 THE DEFENDANT: No, sir.

20 THE COURT: Has anybody coerced you?

21 THE DEFENDANT: No, sir.

22 THE COURT: Has anybody forced you?

23 THE DEFENDANT: No, sir.

24 THE COURT: Has anybody pressured you in any way that
25 resulted in your decision to plead guilty to these charges?

1 THE DEFENDANT: No, sir.

2 THE COURT: Are you pleading guilty freely and
3 voluntarily?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: It was your decision?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: You're satisfied with it?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: You're 31 years old.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: How far did you go in school?

12 THE DEFENDANT: Tenth grade, sir. I'm currently now
13 in the G.E.D. program at the county, and I have work keys.

14 THE COURT: All right. And how long have you been in
15 the county?

16 THE DEFENDANT: Right at 17 months or something like
17 that.

18 THE COURT: Since you were arrested on these charges?

19 MR. SHEALY: Since he was arraigned. He was
20 arraigned, Your Honor --

21 THE DEFENDANT: August 6th of last year.

22 MR. SHEALY: -- August of -- August the 6th of 2015.

23 THE COURT: And you've been in custody since that day?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Are you married?

1 THE DEFENDANT: Engaged.

2 THE COURT: Who are you engaged to?

3 THE DEFENDANT: Cynthia Lynch.

4 THE COURT: How long have y'all been engaged?

5 THE DEFENDANT: Like right at two years now.

6 THE COURT: Two years. When is the wedding date?

7 THE DEFENDANT: I guess when I get out of jail now.

8 THE COURT: Well, I know, but before you went to jail
9 did y'all have a wedding date?

10 THE DEFENDANT: No. We was still planning it, sir.

11 THE COURT: You were still planning it. Do you have
12 children?

13 THE DEFENDANT: I have a step-daughter.

14 THE COURT: All right. What kind of work have you
15 done?

16 THE DEFENDANT: I was doing janitorial work.

17 THE COURT: For who?

18 THE DEFENDANT: Jana King.

19 THE COURT: And have you ever been treated for any
20 type of substance abuse or addiction?

21 THE DEFENDANT: No, sir.

22 THE COURT: Do you suffer from an addiction to any
23 type of drug?

24 THE DEFENDANT: No, sir.

25 THE COURT: Have you ever been treated for any type of

1 mental illness or emotional disturbance?

2 THE DEFENDANT: When I was younger.

3 THE COURT: What were you treated for?

4 THE DEFENDANT: I really don't remember, sir. My
5 mother had me go to mental health.

6 THE COURT: Spartanburg Area Mental Health?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And what kind of treatment did they
9 provide?

10 THE DEFENDANT: I really don't remember.

11 THE COURT: You don't remember?

12 THE DEFENDANT: That's been some years ago.

13 THE COURT: All right. Well, have you had any
14 difficulty with that condition in recent history?

15 THE DEFENDANT: No, sir.

16 THE COURT: Okay. The solicitor is going to tell me
17 about the facts that relate to each of the charges. You
18 listen to what she tells me, because when she's through I'm
19 going to ask you if you agree or disagree with her version.
20 Okay?

21 THE DEFENDANT: Yes, sir.

22 MS. JORDAN: Thank you, Your Honor.

23 Before I forget, I'm going to put on the record the
24 defendant had been previously declared an habitual traffic
25 offender by the department of motor vehicles for a period

1 of April the 21st of 2011 through 2016.

2 THE COURT: Do you agree?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay.

5 MS. JORDAN: Your Honor, this all occurred here in
6 Spartanburg County on June the 8th of 2015.

7 The defendant was driving a -- I'll step back a moment
8 there. The victim in this case, Quincy Campbell, was the
9 driver of a white Cadillac. Also seated in that vehicle
10 was Nathaniel Smith who is present in the courtroom today
11 and Ricco Burris. Ricco Burris is at the county detention
12 center awaiting trial on charges connected to this and to
13 other new charges.

14 Your Honor, those three individuals -- two of those
15 individuals, along with Mr. Nathaniel Smith being present
16 there, robbed Kelvin Cohen of drugs and money. That
17 occurred here in Spartanburg County.

18 They made him strip down according to the information
19 that we received to his underwear. The three of them get
20 into the white Cadillac and leave.

21 Your Honor, this defendant, angry at what just
22 happened to him, gets inside of his Ford 500 and starts to
23 follow them.

24 As the Court already knows, he's an habitual traffic
25 offender and is not allowed to drive on the state -- on the

1 roads here in South Carolina, or I guess anywhere.

2 THE COURT: All right. Just a minute.

3 Is she correct so far?

4 THE DEFENDANT: Mostly. I wasn't angry. I just was
5 trying to get the tag number, sir.

6 THE COURT: Okay. Other than -- other than not being
7 angry, is what she told me accurate?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. Ms. Jordan.

10 MS. JORDAN: Thank you, Your Honor.

11 He begins to follow them and to pursue them. Your
12 Honor, this chase comes down Asheville Highway with him
13 behind them.

14 They get onto Hearon Circle at which point James
15 Butler who was present here in the courtroom earlier is
16 just on the middle of a break from his second-shift job and
17 is getting onto Business 85 from Asheville Highway when he
18 hears shots and is passed by the white car and the Ford 500
19 driven by this defendant.

20 Their -- the estimated speed, I believe, of the
21 Cadillac is around 94 miles per hour. This -- there are
22 shots being fired from the white Cadillac back towards the
23 defendant's car. The defendant is ramming the back of the
24 white Cadillac.

25 And if I may approach with State's Exhibit No. 1, the

1 first two photographs are photos from the Ford 500 showing
2 damage to the front from the impact of Mr. Cohen hitting
3 the white Cadillac. The white Cadillac is the last picture
4 in that group, and it shows where it ended up.

5 He's hitting them right after the Hearon Circle exit
6 onto Business 85 heading towards New Cut Road. He hits the
7 white Cadillac. He goes off into the grassy median and
8 hits the little barrier wires that are there and bounces
9 back onto Business 85 and continues down.

10 THE COURT: All right. Hold on.

11 You've heard what she said.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you agree or disagree?

14 THE DEFENDANT: Agree.

15 THE COURT: All right.

16 MS. JORDAN: The white Cadillac, once he hits it, goes
17 flying off and careening to the right. It goes off
18 Business 85, across the grassy area, underneath the fence
19 between the frontage road and 85, over Buffington Road --
20 or I call it the frontage road -- onto the property where
21 Burke Foods is located, barely misses a pole and slams into
22 a tree in a kudzu area. That's the picture the Court has
23 of the back of State's Exhibit No. 1 that I'd like to admit
24 into the record.

25 Your Honor, at the same time that he is correcting

1 from where he has gone off the road -- Brad James is a
2 deputy with the Spartanburg County Sheriff's Department, is
3 coming the opposite way on Business 85. He never sees the
4 white vehicle. He just sees Mr. Cohen driving and thinks
5 that he's encountered an impaired driver.

6 He turns around, gets back -- gets up to New Cut Road
7 where the defendant has exited Business 85 and starts to
8 follow him at that point.

9 He activates his blue lights and sirens and gets
10 behind him. This -- at this point in time Mr. Cohen
11 doesn't stop. He didn't stop after the white Cadillac went
12 off the side of the road. He doesn't stop when Brad James
13 gets behind him at New Cut Road and activates his lights
14 and sirens.

15 He goes for 5.6 miles, a little over five minutes.
16 Certain times the speed is in excess of 70 miles per hour.
17 He basically goes from New Cut Road to Newman, and then
18 from Newman to Sibley Street, to Hayne Street, Seminole
19 Drive, Center Street, Lassiter.

20 He does kind of like a loop around back to Sibley,
21 gets back onto New Cut Road or gets back onto Howard
22 Street.

23 At one point in time he is coming up to VCOM where
24 College Street and Howard Street intersect. He goes off
25 the road, jumps the curb, hits part of a tree right there

1 at VCOM and then gets back onto the road and keeps
2 traveling.

3 He eventually ends up back on Howard Street heading
4 towards the sheriff's department.

5 THE COURT: Stop right there.

6 Is she right so far?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Okay.

9 MS. JORDAN: Your Honor, his car, due to the damage
10 from the impact with the white Cadillac or the impact from
11 the guardrail or the impact from the tree, starts to run
12 hot.

13 And you can see it smoking in Deputy James' in-car
14 video. And eventually he basically just runs out of steam
15 at the U.P.S. on Howard Street. At the U.P.S. on Howard
16 Street he is taken into custody by multiple officers who at
17 that point have joined in the chase.

18 Quincy Campbell died on the scene. We -- we do -- Dr.
19 Wren, I believe, would have testified that it would have
20 been an immediate death.

21 Your Honor, the injuries that he suffered were blunt
22 trauma with lacerations and abrasions to the head and body.
23 He had a fracture of his vertebra at T4 that extended to
24 the spinal column and bilateral rib fractures.

25 THE COURT: Do you agree?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay.

3 MS. JORDAN: Your Honor, all that occurred here in
4 Spartanburg County.

5 The defendant has a prior, in fact, two prior failure
6 to stops. That would make this one a second, or I guess
7 second is the highest level that you can have. And I
8 believe I've hit all of the elements of the crimes.

9 THE COURT: Okay. You've heard what she told me. You
10 said you agree with it. Do you still want to plead guilty
11 as you've indicated?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. I'll accept your pleas and
14 hear from you and Mr. Shealy.

15 MR. SHEALY: Thank you, Your Honor.

16 As you've heard, my client is 31 years old. He does
17 have a step-daughter. His step-daughter was dating
18 Nathaniel Smith in this particular case.

19 My client wishes that I emphasize the fact that he was
20 robbed in the -- the front of their mobile home, and he was
21 endeavoring -- he actually says in his audio statement that
22 when he got behind them he figured that they would get
23 pulled over on Asheville Highway, but, ultimately, they
24 weren't, unfortunately.

25 He tells me they had taken his phones and he couldn't

1 call 9-1-1. I believe some other people did, ultimately,
2 call 9-1-1.

3 So he was following them. Again, they did start
4 shooting behind their vehicle at Mr. Cohen. Mr. Smith
5 admits that they were all shooting at my client. There are
6 a number of bullet holes actually in the back of the
7 Cadillac, because while they were shooting at my client
8 they were apparently not too good at it, so they were
9 shooting their own vehicle.

10 The impact wasn't a very high rate of speed. Again,
11 that wasn't -- my client wasn't driving their car. They
12 were never being away from my client. And when he was
13 being shot at he did hit them.

14 Now, it would have been our contention that that's
15 fairly accidental. I mean, he was hunched over behind,
16 but, ultimately, I'm not entirely sure if that fixes the
17 problem of this death having occurred and the accident
18 occurring while he was declared an habitual traffic
19 offender.

20 As for the leaving the scene with a death, I think we
21 did have a defense to that. If they're shooting at you, I
22 don't think you're required to stop and render aid. He's
23 waiving that defense in order to plead guilty.

24 Hit and run is a difficult-to-get-your-head-around
25 apparently statute. It doesn't require that you stop and

1 talk to the police. It requires that you stop and render
2 aid to the person who is attending the vehicle, as well as
3 report certain information to the person who is attending
4 the vehicle.

5 Again, if the people attending the vehicle are
6 shooting at you, I don't think that you're necessarily
7 guilty of that.

8 Having said that, again, he was charged with habitual
9 traffic offender. He's receiving a fairly substantial
10 benefit in this negotiated plea, so he has chosen to take
11 that, to accept that rather substantial benefit.

12 There are also some issues as to the way that the
13 car -- there's some questions as to why the car didn't
14 brake, although I believe that might would have been
15 explained by Dr. Wren saying there was an immediate death
16 and so the driver wouldn't have been able to brake. But
17 that would have been one of my client's contentions.

18 There would also have been some contentions about
19 whether Mr. Campbell had been actually shot in the back,
20 because Mr. Burris appears to have been shot during this
21 car accident. And my client would have -- we would have
22 strenuously argued that that was an alternative cause of
23 death. I don't think that Dr. Wren would have agreed,
24 obviously, but that would have been one of our arguments.

25 But, again, he's waiving these arguments and stands

1 before the court to plead guilty under North Carolina vs.
2 Alford.

3 Judge, he has been in jail now for right at 17 months.
4 I've explained to him that I think he'll get credit for
5 that time. That's generally the way the statute says he
6 gets credit for that time, generally.

7 He also has two days in on the underlying charges. He
8 was initially charged with habitual traffic offender and
9 failure to stop for a blue light. He made a \$28,000 bond.
10 There were some other charges -- carjacking -- that are, I
11 believe, being nolle prossed. There simply wasn't a
12 carjacking.

13 The person who owned the vehicle my client was in
14 initially reported it as a carjacking, but, ultimately, I
15 think we would have been able to prove comprehensively that
16 my client had permission to use that vehicle or, well, my
17 client's friend had permission to -- had dominion and
18 control over the vehicle and allowed my client to use it
19 for this particular purpose.

20 So, Judge, we would ask that you impose the negotiated
21 sentence in this case. As you've heard, Ms. Lynch is his
22 fiancé. She's in the courtroom. His father was here
23 earlier. He is not here right now. But I have spoken with
24 him about this deal earlier.

25 So, Judge, we would ask that you impose the negotiated

1 sentence. Thank you.

2 THE COURT: All right. Mr. Cohen, anything you want
3 to add to what your lawyer has told me?

4 THE DEFENDANT: I wasn't trying to kill nobody. I was
5 just trying to get the tag number. That's it.

6 I apologize to the family and to the Court on my
7 behalf. I really didn't feel like I was really trying to
8 do anything to hurt anybody. I was just trying to do the
9 right thing and get the tag number. That's it.

10 THE COURT: All right. On Indictment 2015-3502,
11 that's the indictment for violation of the Habitual Traffic
12 Offender Act resulting or involving a death, sentence of
13 the Court is you be confined to the Department of
14 Corrections for a period of 20 years.

15 suspended upon the service of ten. Probation for
16 five. Credit for any time he's entitled to pursuant to
17 24-13-40.

18 Indictment 2015-3501, hit and run, ten years
19 concurrent. Credit for jail time.

20 Indictment 2015-3503, failing to stop, five years
21 concurrent. Credit for jail time.

22 MS. JORDAN: Thank you, Your Honor.

23 END OF REQUESTED TRANSCRIPT OF RECORD
24
25

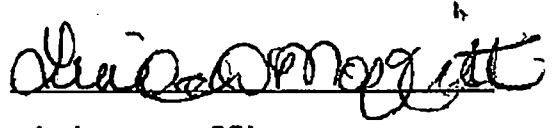
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 13th day of December 2016.

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

November 25, 2017



Linda D. Moffitt
Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Full name and prison number (if any) of Applicant.)
 Kelvin Eugene Cohen)
 v.)
 State of South Carolina)

IN THE COURT OF COMMON PLEAS

2017-CP-42-418

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Tyger River 200 Prison Rd, Enoree, SC 29335
2. Name and location of Court which imposed sentence Gen. Sessions / Spartanburg
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2015-GS-4203501 / Hit & run w/ death
 - (b) 2015-GS-4203502 / Habitual Offender Causing death Susp.
 - (c) 2015-GS-4203503 / Failure to stop
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 12-13-16 / 20 yrs sup to 10 yrs & 5 yrs probatio-
 - (b) 12-13-16 / 20 yrs sup. to 10 yrs & 5 yrs probatio-

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 H. JUDGE
 CLERK

(c) 12/13/16 / 5 yrs all concurrent

6. Check whether a finding of guilty was made:

(a) after a plea of guilty 1

(b) after a plea of not guilty _____

(c) after a plea of ~~nolo contendere~~ Alford

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

N/A

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

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

i. N

ii. _____

iii. A

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

i. N

ii. _____

iii. A

(c) the date of each such result:

i. U

ii. _____

iii. A

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

i. U

ii. _____

iii. A

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

(a) N

(b) _____

(c) A

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

2017 NOV -7 AM 9:41
M. HOPE BLACKLEY

- (a) Ineffective Assistance of Counsel
- (b) Guilty plea was not voluntarily nor intelligently made
- (c) _____

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

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

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

(a) the specific nature thereof:

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

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

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

(c) the disposition thereof:

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

2011 NOV -7 AM 9:41
M. HOPE BLACKLEY

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. A

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

i. N/A

ii. _____

iii. _____

iv. A

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?

N/A

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. A

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

i. N/A

ii. _____

iii. A

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) See 10 (a) Applicant first time presenting ground.

(b) See 10 (b) " " " " "

(c) _____

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

2017 NOV -7 AM 9:41
M. HOWE D. ACKLEY

- (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? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

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. Matthew W. Shealy 306 N. Church St. Ste 3000 Spartanburg
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Pre & Sentencing
 - ii. _____
 - iii. _____

M. HOPE BLACKBURN
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19. State clearly the relief you seek in filing this application: my whole negotiated & promised plea and any other relief that I may be entitled to

20. Are you now under sentence from any other court that you have not challenged?
NO

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Spartanburg)
Kevin Cohen)

I, Kevin Cohen, 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.

Kevin Cohen

SWORN to and subscribed before me this 19th
day of Oct., 2017.

Paul Peter Cook (L.S.)
Notary Public

My Commission Expires: Dec. 10, 2024

2017 NOV -7 AM 9:42
M. HOPE GLASCKLEY

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

Kevin Cohen

I, Kevin Cohen, 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.

Kevin Cohen
Applicant

SWORN to and affirmed and subscribed before me this
19th day of Oct, 2017

Paul Dennis Creed
Notary Public

My Commission Expires: Dec 10, 2024

2017 NOV -7 AM 9:42
I. HOPE ELACKLEY

Clerk of Ct. M. Hope Blackley
P.O. Box 3483
Spartanburg, SC 29304-3483

DATE: 10-19-17

Dear Hon. Clerk of Ct.

Please find enclosed for filing my
PCR form and grounds.

Would you be so kind as to forward
the Atty Gen office a filed copy
and me one back please.

Thanking you in advance, I am

2017 NOV -7 AM 9:42
M. HOPE BLACKLEY

Sincerely

cc: Personal file

Kevin [unclear]

INEFFECTIVE ASSISTANCE OF COUNSEL

(1) Counsel, Matthew W. Shoaly acts and or omissions including but not limited to - failed to enforce the whole "negotiated promised plea agreement, for all charges to be non-violent and 65%.

Which I had "detrimentally" relied on all charges being non-violent and 65%.

2017 NOV - 7 AM 9:42

M. HOPE BLACKBERRY

(2) Counsel, further failed to properly research and investigate my facts, the laws surrounding the State's case

SEE: Ard v Cotoe 642 SE2d 590

Pelzer v State 672 SE2d 790

(3) Nor did counsel hire his own
Dr. to review the med. reports.
per 17-3-50 or 17-27-60

Here, counsel had a **DUTY** to
enforce the whole "negotiated" provisional
plea agreement. And, to conduct a
reasonable investigation, as guaranteed
by the 6th and 14th Amend. per the
U.S. and S.C. Const. Article 1 Sec
3 and Sec 14 Also see Strickland v
Washington 104 S.Ct. 2052 and Hill v
Lockhart 474 U.S. 52

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M. HOPE BLANKLEY

GUILTY PLEA "WAS NOT" VOLUNTARILY NOR
INTELLIGENTLY MADE

(1) My plea was not voluntarily nor intelligently made, due to my arguments. SEE: Pittman v State 524 SE2d 623; Hill v Cockhart 106 S. Ct. 366

Thus I should be allowed to enforce the whole "negotiated promised plea agreement."

And or, allowed to depart from the alleged truth of my statements I made during my plea. Because I would not have pled if it was

not for counsel's Shealy unprofessional errors SEE: Hill v Lockhart 106 S.Ct. 366; Crawford v U.S. 519 F2d 317; Edmonds v Lewis 546 F2d 566; Hughey v State 177 SE2d 533; Holte v State 485 SE2d 367; Roscoe v State 546 SE2d 417

(2) I further argue that any grounds set out in this original application, expressly argued or not, is subject to amendments per. S.C. Code Ann § 17-27-90. Also see S.C.R. Civil P. Rule 71.1 (d) Thereby, I am to a **FULL** and **FAIR** PCR evidentiary hearing

PROOF OF SERVICE

I Kevin Cohen hereby certify that I have served the below Hon. Clerk of Court. my form 5 / P.C.R. By placing the above said into the Tiger River Cour. Inst. mail room on this 19 day of 10 - 19 - 17 to be placed in the U.S. mail w/ postage prepaid.

SWORN to before me this 19th day of Oct. 2017

Clerk of Ct.
M. Hope Blackley
P.O. Box 3483
Spartanburg SC 29304-3483

Paul Allen
Notary Public

Kevin Cohen

My Commission Expires Dec. 10, 2024

2017 NOV - 7 AM 9:42
M. HOPE BLACKLEY

cc: Personal file

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Kelvin Eugene Cohen, #314256,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2017-CP-42-4118

**RETURN AND PARTIAL
MOTION TO DISMISS**

Respondent, making its Return to the application for Post-Conviction Relief ("PCR") filed on November 7, 2017, would respectfully show this Court:

I.

Applicant is presently incarcerated pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2015, the Spartanburg County Grand Jury indicted Applicant for hit and run causing death (2015-GS-42-3501), habitual traffic offender ("HTO") causing death (2015-GS-42-3502)¹, and failure to stop motor vehicle when signaled by officer (2015-GS-42-3503).

The charges resulted from an incident on June 8, 2015, in which Applicant was robbed of drugs and money by two men, Campbell and Burris. As the men fled in a white Cadillac, Applicant chased them in a Ford 500. A bystander witnessed the Cadillac being chased at around 94 miles per hour and shots being fired from the Cadillac back toward Applicant's vehicle as Applicant's is ramming his vehicle into the back of the Cadillac. Applicant's vehicle hit the Cadillac causing it to careen off the road and slam into a tree. Campbell died on the scene.

A law enforcement officer saw Applicant's vehicle as Applicant tried to regain control of his

¹ He was later re-indicted for the same offense in December 2015.

vehicle and believed the vehicle was being operated by an impaired driver. The officer activated his blue lights and sirens in order to stop Applicant's vehicle, however, Applicant did not stop for 5.6 miles, traveling in excess of 70 miles per hour at times. The officer's in-dash camera recorded the chase. After the collision with the Cadillac, a guardrail, and a tree, Applicant's vehicle broke down and officers took him into custody. (Tr. pp. 21-25).

Matthew W. Shealy, Esquire, represented Applicant. Assistant Solicitor Jennifer A.J. Jordan represented the State. On December 13, 2016, Applicant pled guilty as indicted to HTO and failure to stop and pled *nolo contendere* pursuant to N.C. v. Alford to the hit and run charge before the Honorable J. Derham Cole. Pursuant to a negotiation between Applicant and the State, Judge Cole sentenced Applicant to imprisonment for concurrent terms of ten years for the hit and run, twenty years suspended upon the service of ten years and five years' probation for HTO and five years for failure to stop. Applicant did not appeal his convictions or sentences.

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

II.

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

1. Ineffective Assistance of Counsel
 - a. Counsel "failed to enforce the whole "negotiated" promised plea agreement for all charges to be non-violent and 65%, which I had detrimentally relied on all charges being non-violent and 65%."
 - b. "Counsel further failed to properly research and investigate facts, the laws surrounding the State's case."

- c. Counsel failed to "hire his own Dr. to review the med. reports per 17-3-50 or 17-27-60."
- 2. Involuntary guilty plea
 - a. "My plea was not voluntarily nor intelligently made, due to my agreements. Thus, I should be allowed to enforce the whole negotiated promised plea agreement and or allowed to depart from the alleged truth of my statements I made during my plea because I would not have pled if it was not for counsel's ... unprofessional errors."

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at

118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel may raise a question of fact that is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also asserts his plea was involuntary. In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S.

759, 770 (1970). Rather, “whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.” *Id.* at 771.

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both.” *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, “[a] guilty plea is a solemn, judicial admission of the truth of the charges” against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Dalton*, at 137–38, 654 S.E.2d at 874 (citing *Blackledge v. Allison*, 431 U.S. 63 (1977)). Therefore, admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” *Id.* (citing *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976)). “In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing.” *Id.* at 138–39, 654 S.E.2d at 874 (citing *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

Respondent submits the record fully supports the knowing and voluntary nature of

Applicant's plea. However, allegations regarding the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a), SCRPC. All claims should be made well in advance of the evidentiary hearing. If Applicant has is represented by an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits, witnesses, and materials used to produce potential expert witness testimony be provided to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VI.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel and involuntary guilty plea. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VIII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of counsel and involuntary guilty plea.

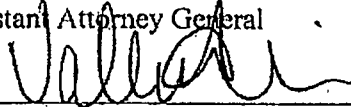
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

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I-N-D-E-X

WITNESSES:	DIRECT	CROSS	RE-DIRECT	RE-CROSS
Kelvin Cohen				
By Ms. Ross	10			
By Ms. Giovanoli		16		
Matthew Shealy				
By Ms. Giovanoli	18			
By Ms. Ross		27		

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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(NO EXHIBITS)

1 MS. GIOVANOLI - May it please the Court.

2 THE COURT - Yes, ma'am.

3 MS. GIOVANOLI - Kelvin Cohen vs. The State of
4 South Carolina, Docket Number 2017-CP-42-4118. We're
5 before the Court on an application for post-conviction
6 relief filed November 7th, 2017. In August of 2015
7 applicant was indicted for hit and run causing death,
8 habitual traffic offender causing death and a failure to
9 stop the motor vehicle when signaled by an officer.
10 Charges resulted from an incident on June 8th, 2015 in
11 which applicant was robbed of drugs and money by two men,
12 Campbell and Burris (phonetic). As the men fled in a white
13 Cadillac, applicant chased them in four or five hundred
14 (sic). Bystander witnessed the Cadillac being chased at
15 around 94 miles per hour and shots being fired from the
16 Cadillac back toward applicant's vehicle as applicant was
17 ramming his vehicle into the back of Cadillac. Applicant's
18 vehicle hit the Cadillac causing it to careen off the road
19 and slam into a tree. Campbell, one of the passengers,
20 died on the scene. Law enforcement officers saw
21 applicant's vehicle as applicant tried to regain control of
22 his vehicle, and they believed the vehicle was being
23 operated by an impaired driver, so the officer activated
24 his blue-lights and sirens in order to stop applicant's
25 vehicle, however, applicant did not stop for about

1 approximately six miles traveling in excess of 70 miles per
2 hour at times. The officer's in-dash camera recorded the
3 chase. After the collision with the Cadillac, the guard
4 rail and a tree, applicant's vehicle broke down and
5 officers took him into custody. Matt Shealy represented
6 him, and on December 13th, 2016, he pled guilty as indicted
7 to the habitual traffic offender and failure to stop, and
8 he pled no contest pursuant to North Carolina v. Alford to
9 the hit and run charge before The Honorable J. Derham Cole.
10 Pursuant to a negotiated -- a negotiated sentence between
11 applicant and The State, Judge Cole sentenced applicant to
12 imprisonment for current terms of ten years for the hit and
13 run, 20 years suspended upon the service of ten years and
14 five years probation for the HTO and five years for the
15 failure to stop, all to run concurrent. Applicant did not
16 appeal his convictions or his sentences. He did file a PCR
17 application alleging ineffective assistance of counsel,
18 specifically, that -- well, I'll actually let Ms. Ross
19 delineate those allegations.

20 THE COURT - Let's do that. Yes.

21 MS. ROSS - Judge, his allegations, as I
22 understand them, were failing to investigate, prepare for
23 trial or get a doctor testimony about the cause of death
24 for one of the victims, and that he was misadvised that the
25 charges were parolable; they're, in fact, non-parolable,

1 non-violent offenses, which is confusing. Again, it's the
2 -- he's assuming that violent means 85 percent and non-
3 violent means 65 percent, when, in fact, violent/non-
4 violent does not affect parole eligibility like that. It's
5 controlled by another statute. That's -- that's his
6 argument, that the plea was not knowingly and voluntarily
7 made.

8 THE COURT - What is your understanding of the law
9 in regard to whether or not you -- there was an obligation
10 on behalf of the defense lawyer to advise them with regard
11 to parolability?

12 MS. ROSS - I understand ---

13 THE COURT - Because the law -- because the law at
14 one time was such that you did not have to do it, but if
15 you did it, you need to it right.

16 MS. ROSS - Right, that as a collateral
17 consequence that if you chose to endeavor to advise, you
18 had to give the correct advice.

19 THE COURT - Right.

20 MS. ROSS - I understand that. I would argue that
21 because the time someone serves in prison is so fundamental
22 to their sentence, it would go -- it would be similar to
23 their alien status. For instance, the Supreme Court ---

1 THE COURT - That -- but you agree that's not
2 really the state of the law, that you ought to advise with
3 regard to parolability.

4 MS. ROSS - Um, I -- I believe that the state of
5 the law is that if you endeavor to advise or you suggest --
6 -

7 THE COURT - Right.

8 MS. ROSS - --- something to your client, that has
9 to be correct.

10 THE COURT - That's -- all right.

11 MS. ROSS - That ---

12 THE COURT - But you're saying that -- that as a
13 practical matter it should be that you advise them about
14 parole eligibility.

15 MS. ROSS - Well, and -- the case name escapes me
16 -- the Supreme Court case that says that whether someone
17 can be deported is not a collateral consequence, because
18 that's so fundamental to what someone's pleading to -- to
19 their life, and I would argue that parole eligibility, in
20 fact, is as well.

21 THE COURT - But -- the Court has essentially said
22 differently.

23 MS. ROSS - Correct.

24 THE COURT - Okay, so -- all right.

1 MS. ROSS - Correct. And I'm extending it under
2 that Supreme Court case to ---

3 THE COURT - But I never have understand that the
4 85 percent rule is governed by the violent/non-violent
5 thing. I thought it had to do -- there's some exceptions
6 but, essentially -- I mean there are a few exceptions, but,
7 essentially, if it's over 20 years, then it's 85 percent
8 rule, but there are some that are less than that that are
9 85 percent rule, but it's -- it's government by a different
10 statute.

11 MS. ROSS - It is governed by a different statute,
12 but many clients are told at the jail and told by everybody
13 that non-violent means parole eligible.

14 THE COURT - Right.

15 MS. ROSS - I've got one case unpublished, Your
16 Honor, State vs. Dean, for what it's worth, that addresses
17 this.

18 THE COURT - Unpublished means it's worthless,
19 doesn't it, but ---

20 MS. ROSS - Yes, it does, but the -- it does.

21 THE COURT - --- the reasoning ---

22 MS. ROSS - A Judge ---

23 THE COURT - --- might apply.

24 MS. ROSS - And in here it's just about, you know,
25 being misinformed on parole eligibility.

1 THE COURT - Okay. And that -- that's,
2 essentially, what we said ---

3 MS. ROSS - Yes.

4 THE COURT - --- originally is the misinformation
5 is still a problem.

6 MS. ROSS - Yes.

7 THE COURT - Is that what you're contending in
8 this case? I don't want to fast-forward.

9 MS. ROSS - We are, and also, he is telling me --
10 and I was confused by it -- on his habitual offender with
11 great bodily injury, I believe it was ten suspended -- or
12 20 suspended to ten and probation, and the other was just a
13 straight ten concurrent. He's alleging the straight ten
14 concurrent is not following the negotiated sentence, which,
15 in fact, it isn't, so in my opinion it's beneficial to him,
16 but, in fact, it was not a negotiated sentence, so he'll
17 explain that allegation, and I'll call him to the stand.

18 THE COURT - You may call your witness.

19 MS. ROSS - Mr. Kelvin Cohen.

20 THE COURT - Yes, sir, would you please come --
21 come around.

22 KELVIN COHEN, AFTER BEING FIRST DULY SWORN,
23 TESTIFIES AS FOLLOWS -

24 THE COURT - Have a seat in the witness chair, and
25 watch your step.

1 (WHEREUPON, WITNESS COMPLIES)

2 THE COURT - Pull up real close to that
3 microphone, speak loudly, clearly and slowly in order that
4 we can hear everything that you have to say.

5 And, Ms. Ross, you're recognized.

6 MS. ROSS - Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MS. ROSS -

9 Q Mr. Cohen, I guess to start with, how far did you go
10 in school?

11 A Tenth grade.

12 Q Do you have any legal training?

13 A As in ---

14 Q Do you -- are you a lawyer, or do you ---

15 A No, ma'am.

16 Q Okay. And in this case explain the background. You
17 were robbed. Correct?

18 A Yes, I was robbed in my -- I was robbed in the
19 backseat of a car.

20 Q At gunpoint?

21 A Yes, ma'am. I was put out of the car. I went in my
22 house. I came back out from my house. They ran out from
23 behind my trailer, and they stripped me naked and robbed me
24 again. And then they put the other guy in the car at
25 gunpoint; I'm thinking they kidnapping him, but allegedly

1 at the same time, he was -- he was in on -- he set it up.
2 I jumped in the car and chased them. And when we jumped on
3 85, they started shooting at me, and I hit the back of
4 their car. I don't feel like I had the right to stay on no
5 scene and people shooting at me.

6 Q And, um, when you were chasing the other car, you
7 thought someone had been kidnapped, your friend had been
8 kidnapped in that car.

9 A Yes, I thought they had kidnapped Nathaniel Jerome
10 (phonetic) Smith.

11 Q And they had stripped you during this robbery?

12 A Yes, ma'am.

13 Q Now, -- so you would've been well within your rights
14 to pull out a gun and shoot them.

15 A I don't know about that, ma'am.

16 Q A standing your ground when they're robbing you.
17 Right?

18 A Yes.

19 Q Now, you pled guilty to these charges. Why did you
20 plead guilty?

21 A I pled guilty to the charges, because from my
22 understanding, the hit and run was supposed to be 20
23 suspended to ten with five years followed behind it. The
24 habitual offender supposed to be 20 suspended to ten with
25 five years running behind it, and the failure to stop for a

1 blue-light supposed to been to five years concurrent with
2 everything, everything ran together, and ---

3 Q All right.

4 A --- and the boxes on the sentencing papers is checked
5 non-violent.

6 Q Okay, and why does it matter to you that the boxes on
7 the sentencing sheets are checked non-violent?

8 A That's what I was expecting to do.

9 Q Now, when you say that's you were expecting to get, --
10 -

11 A Yes, ma'am.

12 Q --- what do you mean?

13 A As in 20 suspended to ten would be non-violent. If I
14 violate the five years probation, I would be putting the 20
15 back on the table if I violate.

16 Q Okay. And, um, by expecting to get, how did you not
17 get that?

18 A Because on the hit and run it just says -- on the
19 sentencing paper it says it's a straight ten and that --
20 they saying that's violent, but the classification worker
21 telling me to get amended order sentence showing on page 17
22 that it says the 20 suspended to ten was for the hit and
23 run and the habitual offender, but then it go into page 30
24 it says that the hit and run is a ten years sentence. It
25 changed at the end. How? I don't now; but it started on

1 16, the Judge asked me was I promised anything; I told him
2 no. He stopped me and told me that I was; that's part of
3 the negotiated sentence, therefore, I don't have what --
4 what was negotiated.

5 Q All right. And your case worker said that would be
6 better for you, to get what was negotiated?

7 A No, I -- yeah, I feel like I -- it would be better. I
8 would do -- I would do five years off of the ten and come
9 home with five years probation. If I -- If I violate, that
10 would be putting the 20 back on the table; I could get it
11 remanded and then I also have a -- a twenty five thousand
12 dollar fine to pay. If I do eight and a half off the ten
13 that they saying is violent and come home with two years of
14 supervision, that's ten and a half years, and I still got
15 to pay money? I work PI, and I can't even pay the money
16 now.

17 Q So under -- with your understanding, you were
18 understanding that both of them were non-violent.

19 A Yes, ma'am.

20 Q And, um, as non-violent, what did you think your
21 parole eligibility was?

22 A Uh, ---

23 Q You understand what I'm asking?

24 A No, -- to a certain extent I do.

25 Q Okay. Did you think you could get parole or not?

1 A I thought I would be able to have parole.

2 Q So you thought they were parole eligible?

3 A Yes, ma'am.

4 Q Did your lawyer ever tell you that they were not
5 parole eligible?

6 A No, he told me that it was non-violent, but then he
7 wrote me -- sent me a letter since I been incarcerated
8 saying that he misled me, that he went off the sentencing
9 sheet because it was checked, he say -- but then he turned
10 around and tried to say that I would do 85 percent of the
11 time. Okay, now that may be the case; there is another
12 violent 85, but this -- in the computer they just saying
13 it's a violent 85.

14 Q Okay.

15 A But the -- the 20 suspended to ten is non-violent, but
16 both of them is with a death; I don't understand it.

17 Q So both of them were originally checked non-violent.

18 A Yes, ma'am.

19 Q And, um -- and before, you said you got a letter that
20 85 percent was mentioned by your lawyer, but before that
21 letter, before you pled guilty, did you know it was ---

22 A No, ma'am.

23 Q What did you think it was?

24 A I thought it was non-violent.

25 Q And why'd you think that?

1 A Because that's what was checked on my paper in the --
2 the -- the sentence was suspended, and they was saying that
3 if I violate, I would be putting 20 back on the table if I
4 violate the five years probation.

5 Q Did your lawyer tell you anything about parole
6 eligibility?

7 A No, he didn't say nothing about no parole eligibility,
8 but I'm -- only thing he did say was he told me and my
9 wife, my fiance, that I would have five years paperwork,
10 and if I violate the five years, I would be putting the 20
11 back on the table.

12 Q Okay.

13 A So, therefore, I'm -- I'm assuming that everything was
14 going to be non-violent, because that's what was checked on
15 the paper, and ---

16 Q Okay.

17 A --- you can't -- you can't give a suspended sentence
18 on a violent charge, which they do, but they not supposed
19 to.

20 Q Okay. Is there anything else you want to put on the
21 record for your PCR?

22 A No, ma'am. I really don't want -- I'm not really
23 trying -- I'm not here to open the whole case. I just want
24 an amended order on the sentence from where they saying on

1 page 17, the 20 suspended to ten was for the hit and run
2 with death and the habitual offender for that.

3 MS. ROSS - Okay. Nothing further.

4 THE COURT - Cross examination.

5 CROSS EXAMINATION

6 BY MS. GIOVANOLI -

7 Q You were testifying you were robbed by the other guys.

8 A Yes, ma'am.

9 Q What did they robbed me of?

10 A They robbed me of money and some drugs.

11 Q So were you engaging in a drug deal whenever they
12 robbed you?

13 A No. They -- that what they was trying to say, but I
14 was at my house. I wouldn't sell no drugs at my house.
15 They would have already been at my house when I had -- I
16 came and left three times and they was there. The guy that
17 set it up, he was -- he was going with my step-daughter,
18 and he had his friends rob me, but other than that, I don't
19 sell no -- I wouldn't do no drug deal at my house.

20 Q And so after you hit their car, you didn't stop
21 because they -- they had been shooting at you. Right?

22 A Yes, ma'am.

23 Q But you had been chasing them while they were shooting
24 at you.

KELVIN COHEN - CROSS BY MS. GIOVANOLI

17

1 A I -- when the shooting started, we was on 85. If I
2 stopped in the middle of 85, that give them a stainless
3 steel target to hit or I can get ran over by a 18-wheeler
4 or something. I kept going.

5 Q Okay, where did the chase start? It didn't start on
6 I-85. Is that ---

7 A It started on Herron Circle, but they didn't start
8 shooting til we got right there when you jump on 85 at --
9 where the McDonalds at Herron Circle, that's where we
10 jumped on 85 and that's when the shooting started.

11 MS. GIOVANOLI - Okay, I have no further
12 questions. Thank you.

13 THE COURT - Any re-direct?

14 MS. ROSS - No, Your Honor.

15 THE COURT - You may step down. Thank you, sir.

16 You may call your next witness.

17 MS. ROSS - That's the applicant's case, Your
18 Honor.

19 THE COURT - Ms. Giovanoli?

20 MS. GIOVANOLI - We would call Mr. Matthew Shealy.

21 THE COURT - Mr. Shealy, please come forward.

22 (WHEREUPON, MR. SHEALY COMPLIES)

23 MATTHEW SHEALY, AFTER BEING FIRST DULY SWORN,

24 TESTIFIES AS FOLLOWS -

1 THE COURT - Have a seat in the witness chair;
2 watch your step. Pull up real close to that microphone and
3 speak loudly, clearly and slowly. Start with your full
4 name and spell that last one.

5 MR. SHEALY - All right. Judge, my name is
6 Matthew Shealy. Last name is spelled S-h-e-a-l-y.

7 DIRECT EXAMINATION

8 BY MS. GIOVANOLI -

9 Q Good morning, Mr. Shealy.

10 A Good morning.

11 Q How long have you been practicing criminal law?

12 A Roughly ten years now.

13 Q And you -- were you with the public defender's office
14 at the time of this case?

15 A I was.

16 Q And was that your first job right out of law school?

17 A It was.

18 Q And now what do you do?

19 A Now I'm a private attorney in an office across the
20 street.

21 Q Okay. So you heard a little bit about the testimony.
22 I think the ultimate issue here is with regard to any
23 conversations regarding parole eligibility. Did you ever
24 discuss parole eligibility with applicant?

25 A I did.

1 Q Okay, and what was your advice to him?

2 A Okay, um, what -- normally -- what I normally do -- I
3 came into this case a little bit late. Another member of
4 my office, Paul Neely, had the case first. So usually what
5 I do is -- the first thing that I do is I talk to them
6 about what they're charged with, what it carries, if it's a
7 violent offense, non-violent offense, whether it's no
8 parole, because those are two different things, and I
9 usually have a sheet that I write up -- unfortunately, I
10 couldn't find that sheet in here in my file -- but what I -
11 - we did go over those things prior to actually going to
12 trial. We worked the case up; we got it ready for trial; I
13 had placed it in a notebook. He had wanted a cap of five.
14 Ultimately, they weren't willing to do that, then there was
15 a lot of negotiating on the day of trial. When we
16 should've been picking a jury, they were making us offers,
17 and we were making counter offers and things like that. I
18 did tell him they were both non-violent offenses, which is
19 incorrect, one of them was a violent offense. But, again,
20 violent does not mean no parole. What violent does is if
21 you have been convicted -- if you get convicted of a
22 violent offense and then are in the future convicted of
23 another violent offense, then you are not eligible for
24 parole on that second violent offense. I don't believe he
25 had been convicted of any violent offenses, but in any

1 event, I told him that what matters really is that this
2 carries more than 20 years, and the thing that carry -- a
3 crime that carried more than 20 years is a no-parole
4 offense. What that means is you got to do 85 percent of
5 any sentence that you get. You also once you get out of
6 jail, have to do two years of community supervision. I
7 think it's important to explain that to them so that they
8 can know that they're going to be on community supervision,
9 which is similar to probation, but a little bit stricter,
10 and if you violate your community supervision, then you go
11 back to jail, generally, for ten months, you come out, you
12 got another two years of community supervision to do until
13 you've served your -- the entirety of your sentence. So we
14 went over those things. I mean I -- I admit, I told him
15 that it was a non-violent offense, that one of these was a
16 violent offense. It was marked on -- checked on the
17 sentencing sheet wrong. I think all three of us, myself,
18 Ms. Jordan and I don't even know that the Judge discussed
19 that it was a violent offense, but we certainly talked
20 about no parole; I remember that particularly because of
21 the conversation regarding community supervision, and there
22 were some issues with split sentences in those kinds of
23 cases, because if you complete your community supervision,
24 it's unclear that you're going to actually have to do the

1 probation. I know the law seems to be a little unclear
2 there.

3 Q Okay, so you heard the applicant's testimony with
4 regard to what the negotiations were, the 20 suspended to
5 ten. Were both supposed to be 20 suspended to ten?

6 A Yes. I mean the sentence should've been 20 suspended
7 to ten. I didn't object, because I didn't think it hurt
8 him. I mean I -- generally speaking, 20 suspended to ten
9 is better than ten, or is worse, excuse me, is worse than
10 ten is what I mean or is what I meant to say.

11 Q Okay.

12 A I mean you would prefer to have a straight ten year
13 sentence than a 20 year suspended to ten year sentence.

14 Q So the sentence was an error but a benefit to the
15 applicant.

16 A That was my opinion and so I -- again is why I didn't
17 object.

18 Q And did that -- that change in the sentence affect
19 whether it was violent or non-violent?

20 A No.

21 Q Okay, you said you were ready for trial in this case?

22 A Yes, ma'am.

23 Q There were two separate charges, the HTO with the
24 death and then also the -- what was the second one?

1 A There was a hit and run with death; there's also a
2 failure to stop.

3 Q Okay, and what was your theory going into trial? What
4 was your strategy?

5 A Well, I mean our strategy was to try to make everyone
6 feel sympathy for Mr. Cohen, because I -- I mean -- well, I
7 don't know that there is a legal right to chase somebody
8 down in these circumstances; I think it's understandable.
9 He was robbed of his money; he was also robbed of basically
10 his livelihood. He was going to have a problem making his
11 rent, so they were going to put him out. He has children.
12 We would've made a pretty big deal out of all of that, that
13 it's an understandable reaction to follow them. Now, the -
14 - the idea of kidnapping, that they kidnapped Mr. Smith,
15 that wasn't in our conversations. It seemed -- I mean --
16 otherwise we would've crafted our strategy a little bit
17 differently. My understanding from Mr. Cohen was that Mr.
18 Smith's involvement in this robbery was pretty clear to Mr.
19 Cohen earlier than what he has just testified to, so it --
20 it would've been -- it was obvious at the time of the
21 actual robbery that he had been set up by Mr. Smith, so he
22 was not really motivated by fear for Mr. Smith's safety,
23 because if he had been, that would've been wonderful,
24 because that would've given us a better strategy at trial.
25 We could've really played that up, as well.

1 Q So the version of events he said here was not the same
2 that he told you.

3 A It's slightly different, because again, that would've
4 been wonderful for us to argue that he was acting in
5 defense of others. We really wanted to have a self defense
6 kind of stand-your-ground argument here, but once he got
7 into the car and started chasing, you don't really have
8 that right or at least I'm unaware of any legally
9 cognizable right to chase them. We may have had a problem
10 with when his car hit the other car saying that he was
11 concerned about the person in the backseat and you're
12 ramming the vehicle at 95 miles an hour, but our defense to
13 that -- or our argument to that would've been he was being
14 shot at, and while we would've had some issues with the gun
15 shots, there is a bystander who says that she heard gun --
16 or he heard gunshots, they took primer, they took gunshot
17 residue from the hands of the various individuals involved;
18 they did not find any gunshot residue, and that would've
19 been brought before us, but we could've argued again, that
20 in the process of rescuing them from the car, that there
21 was -- that it somehow got washed off or something.

22 Gunshot residue is notoriously transient, so ---

23 Q Do you remember in your review of the discovery how
24 far of a chase this was?

1 A It was pretty -- well, -- it was substantial in that
2 it -- I believe it went down an actual highway onto -- I
3 can't remember exactly where on the actual highway it
4 begins, because if it's off in a neighborhood. It takes a
5 little while for Mr. Cohen to get a vehicle. An initial --
6 the initial allegation was that he carjacked that vehicle.
7 That charge went away, and we were able to show that he had
8 not actually carjacked; he had actually had a friend pay
9 for the use of that vehicle at some point in -- in the
10 past. They had chased him through the neighborhood or he
11 chased them through the neighborhood onto actual highway
12 which leads to Herron Circle, and then it may have been at
13 best two miles, maybe a mile down business 85 where the
14 accident occurred and the car comes flying off the overpass
15 into a -- basically into the parking lot of a business.
16 The car rams into a number of trees, and I've forgotten the
17 name of the business -- I believe it was on Buffington
18 Road, but there were a number of pictures of that.

19 Q Okay, and so there's been an allegation that you
20 failed to investigate. It sounds like you were pretty
21 familiar with the discovery. Were you -- this familiar at
22 the time prior to trial?

23 A Yes, ma'am.

24 Q And what other investigation did you do?

1 A Well, we went -- we drove around to see exactly where
2 everything takes place. If I'm going to try a case, I need
3 to have the entire area in my mind, so we drove around; we
4 talked with Mr. Cohen to see about -- particularly I wanted
5 to be able to nail down this carjacking issue. We reviewed
6 the discovery. We had witnesses. I got a list of
7 witnesses from him. To the extent that we could find them
8 -- you know, we did the things that you have to do to be
9 prepared to try a case.

10 Q What about likelihood of conviction? What -- in your
11 opinion, what was the likelihood of conviction?

12 A Well, legally we didn't really have a very good
13 defense; we just didn't. We -- you're not allowed to chase
14 people to try to reclaim your property. Even though it's
15 your rent money, you just don't have a right to do that,
16 um, particularly, not whenever you don't have a driver's
17 license and people die at the end of it. Um, so I don't
18 think we had a very good chance at it, but I'm a public
19 defender, I was a public defender. I try cases for a
20 living. I'm more than happy to try anything I got, and we
21 had -- we had factual reasons why I think a jury may have
22 felt sorry for him, so they may have found him not guilty,
23 but that's a little dicey.

24 Q Okay, and is it true that hit and run with a death
25 comes with a maximum of 25 years?

1 A It does.

2 Q And an HTO with a death comes with a maximum of 20
3 years?

4 A It does.

5 Q And then the failure to stop is five years.

6 A Yes, ma'am.

7 Q And your client obviously was wanting to pursue trial,
8 but prior to trial there was some negotiations going on. I
9 think your testimony was that he wanted five years?

10 A He wanted -- he -- yeah, he told me in my first
11 meeting with him that he would to plead to everything with
12 a cap of five.

13 Q Okay, and what was the State's offer?

14 A I believe they started at 15, um, or some ---

15 Q And then how did you guys get down to 20 suspended to
16 ten?

17 A Um, well, they -- we got -- Mr. Cohen came up to
18 eight, I believe; they came to ten. I took that to Mr.
19 Cohen; he didn't want to do it, so I said, fine, we're just
20 going to try the case; we got a little bit heated, and then
21 he wanted to do -- but then he said that he would do an
22 Alford plea to the hit and run, because I think, as we put
23 it on the record, several -- in several different places he
24 was being shot at, he didn't believe that he could've
25 stopped, and I took that to them, that he was willing to do

1 ten but Alford plea on the hit and run and they -- they
2 agreed with that. (Pause) They may have given us the ten,
3 and he wanted the Alford plea, and I took that to the
4 Alford plea (sic). I'm not sure who proposed ten, but
5 that's how we ended up, and then they wanted probation, and
6 so that's where the 20 suspended to ten came from.

7 Q Okay, but the Alford plea was only to the hit and run,
8 because he felt like he shouldn't have had to stop, because
9 he was being shot at.

10 A Correct.

11 MS. GIOVANOLI - Okay. I have no further
12 questions. Thank you very much.

13 THE COURT - Yes, ma'am.

14 CROSS EXAMINATION

15 BY MS. ROSS -

16 Q So your testimony is that you did discuss parole
17 eligibility or that you did not?

18 A That we discussed the -- yeah, that it was a no parole
19 offense, so the 85 percent issue.

20 Q Okay.

21 A We also discussed whether it was violent or non-
22 violent, but again, I explained how violent worked, what
23 violent means.

24 Q All right. And both the sentencing sheets were
25 checked non-violent or all three.

1 A Correct.

2 Q And in one of them, for the hit and run with death,
3 that -- that is incorrect. It's truly a violent charge.

4 A Correct.

5 MS. ROSS - All right, I've got no further
6 questions.

7 THE COURT - You may step down.

8 MR. SHEALY - Thank you.

9 THE COURT - You may call your next witness.

10 MS. GIOVANOLI - The State has no further
11 witnesses.

12 THE COURT - Ms. Ross, be glad to hear from you.

13 MS. ROSS - Judge, in talking to my client, prior
14 to speaking to him today, I didn't have a full grasp of
15 what his argument was. I thought he wanted a full PCR
16 hearing, that he'd be put back in the position before the
17 plea. His testimony was that he wants his sentence
18 adjusted. My concern is that that may not be in his best
19 interest, but his case worker told him it was. The
20 negotiated sentence was for the 20 suspended to ten that's
21 clear in the transcript. That was not followed in the case
22 of the hit and run. We'd argue that that should've been
23 followed as a negotiated sentence, however, I'd ask some
24 leave to research that further, but I believe changing that

1 would be of a detriment to Mr. Cohen, and I -- I'm -- would
2 not ask you to do that at this time.

3 THE COURT - Well, what -- well, let me ask you
4 specifically, what do you want me to do?

5 MS. ROSS - What -- do ---

6 THE COURT - What is your request of me?

7 MS. ROSS - Well, ---

8 THE COURT - What relief do you want?

9 MS. ROSS - He wants his sentence amended to what
10 he feels was the negotiated sentence.

11 THE COURT - I don't believe that I'm -- that's
12 within my province to do that. I think that's,
13 specifically, precluded from -- in the post-conviction
14 relief statute. What does -- let's see -- I bet you, Ms.
15 Giovanoli, has something to say about that.

16 MS. GIOVANOLI - I don't know that it's,
17 specifically, precluded in the PCR statute. I think that
18 there's a way around it. If he can establish that his plea
19 was involuntary because it was based on negotiation that
20 was made between his attorney and the State and the
21 negotiation wasn't followed and there's an error in the
22 sentencing document, I think that can be corrected on a
23 PCR, and the testimony here is pretty much undisputed that
24 it was a negotiated 20 suspended to ten, but I'm in
25 agreement with Ms. Ross and Mr. Shealy that that ---

1 THE COURT - Only relief that I can give is just
2 to grant a new trial.

3 MS. GIOVANOLI - That would be correct. If his
4 plea was involuntary, if you were to find his plea was
5 involuntary based on -- that it wasn't pursuant to the
6 negotiations, then he would have to go back and there would
7 be nothing requiring the State to offer this negotiated
8 sentence again.

9 THE COURT - He could be -- he would be -- that's
10 right. All right, well, that begs the question, Ms. Ross,
11 what -- what's -- I'm going to give you an opportunity to
12 discuss it with your client. I think those are my options.
13 I don't believe that I can change the sentencing sheet, nor
14 can I change the sentence. I can vacate it, but I can't
15 change it.

16 MS. ROSS - Okay. I think there are -- there are
17 some -- some situations where you can go back for just re-
18 sentencing, remand for re-sentencing in light of a law not
19 being followed. Let me -- can I just have a second to
20 discuss ---

21 THE COURT - Sure.

22 (WHEREUPON, DISCUSSION IS HELD BETWEEN MS. ROSS
23 AND MR. COHEN OUT OF THE HEARING OF EVERYONE WHICH WAS NOT
24 REPORTED.)

1 MS. ROSS - Okay. He's saying he's not trying to
2 open up the whole case, Your Honor, so ---

3 THE COURT - Well, I want to hear from you. Is
4 there some law that says that I can change the sentence or
5 some case that you have or some argument that I can do
6 that?

7 MS. ROSS - Well, I know and it's State v. Clark
8 as far as I'm terrible with cases -- where it -- if someone
9 is told -- is not given a plea offer, it's remanded with
10 the specific order to enforce the plea offer for instance,
11 and that is not reopening the whole case where if someone's
12 charged with murder and pleas to voluntary manslaughter but
13 didn't know the plea offer was a certain amount, they're
14 not risking a murder again, it's back to the -- it just
15 goes back for re-sentencing on that, so I know that those -
16 - that there are cases that allow that. I don't have a
17 case right in front of me that addresses that.

18 THE COURT - Ms. Giovanoli, what do you suggest?

19 MS. GIOVANOLI - I have to agree with Your Honor
20 that your authority -- you can vacate the sentence, um, and
21 send it back for a new trial. What happens there I don't
22 think is in -- we would have authority to preside over that
23 portion, so I don't know of any case law that specifically
24 precludes you from sending him back just for a re-
25 sentencing, but I think under the PCR Act on relief and PCR

1 is a new trial which would be vacation of the current
2 sentencing. And I'd like -- I wouldn't mind if I --
3 researching the issue more thoroughly, as well.

4 (WHEREUPON, DISCUSSION IS HELD BETWEEN MR. COHEN
5 AND MS. ROSS OUT OF THE HEARING OF EVERYONE WHICH WAS NOT
6 REPORTED)

7 MS. ROSS - I don't know if you could hear our
8 discussions, Your Honor, but he's saying that -- that
9 simply that the negotiation was not followed, and I know
10 that I have had cases where Judges remanded case -- charges
11 or the whole case to be re-sentenced, but I don't know if
12 that's ---

13 THE COURT - Well, let's just say that -- let's
14 just imagine that I do have the authority to do -- what are
15 you me asking me to do? I mean if -- what -- if you had
16 your rathers, what would you rather me do?

17 MS. ROSS - Um, in my opinion as a lawyer, I
18 believe in his best interest it would be to deny relief,
19 because I am concerned that he doesn't want to go back in
20 the position he was in before the plea and other options --
21 --

22 THE COURT - How about the, um, correct -- the
23 correcting of the irregularity in the sentence?

24 MS. ROSS - I feel that that would ---

25 THE COURT - Adversely ---

1 MS. ROSS - And I'd like to confirm with SCDC that
2 -- their counsel, but my opinion is that would add time --
3 he would do more time if ---

4 THE COURT - Right.

5 MS. ROSS - --- that happened, and I would not ask
6 for that. While he is asking, but I don't believe he
7 understands that, because he's been misadvised by his case
8 worker at SCDC on that.

9 THE COURT - Right. All right.

10 Ms. Giovanoli, I'm going to ask that you prepare
11 an Order denying relief, and I think there can be an
12 acknowledgement in the Order about the predicament that we
13 find ourselves in, that there is an argument that the
14 negotiated plea was not followed to the letter, however, if
15 it were, it would adversely affect the defendant. And I,
16 specifically, find that the plea was voluntary, and I would
17 ask that you set forth in the Order that that plea colloquy
18 as to his acknowledgement of the facts pursuant to the
19 Alford plea and the outright guilty plea. I, specifically,
20 find that the fact that one of the sentencing sheets
21 designates it as a non-violent when it indeed is a violent
22 offense, but with regard to how it affects the defendant
23 concerning this case is of no consequence. I do,
24 specifically, find that trial counsel went over with him
25 the fact that it was a non-parolable offense subject to the

1 85 percent rule and ask that the Order be prepared in that
2 fashion, and it very well might present a very good
3 academic argument before the Court of Appeals, but I think
4 that's the appropriate ruling here today given all of the
5 facts and circumstances.

6 All right, very good. Good luck to you.

7 MS. ROSS - Thank you, Your Honor.

8 MS. GIOVANOLI - Thank you.

9 MR. COHEN - Thank you, Your Honor.

10 (END OF TRANSCRIPT)

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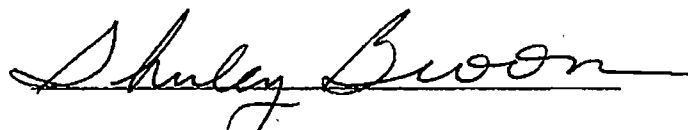
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C E R T I F I C A T E

I, Shirley Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 34 pages is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the proceedings of Kelvin Eugene Cohen vs. State of South Carolina, as taken by me in Court of Common Pleas for the Seventh Judicial Circuit on February 22, 2018, and provided by me this the 30th day of April, 2019.

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



Shirley Broom, CVR-M
Official Court Reporter,
Certified Verbatim Reporter, In and
for the State of South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Kelvin Eugene Cohen, #314256,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2017-CP-42-4118

ORDER OF DISMISSAL
WITH PREJUDICE

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Kelvin Eugene Cohen (Applicant) on November 7, 2017. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 22, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Matthew Shealy, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the PCR application, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently incarcerated pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2015, the Spartanburg County Grand Jury indicted Applicant for hit and run causing death (2015-GS-42-3501), habitual traffic offender ("HTO") causing death (2015-GS-42-3502)¹, and failure to stop motor vehicle when signaled by officer (2015-GS-42-3503).

¹ He was later re-indicted for the same offense in December 2015.

The charges resulted from an incident on June 8, 2015, in which Applicant was robbed of drugs and money by two men, Campbell and Burris. As the men fled in a white Cadillac, Applicant chased them in a Ford 500. A bystander witnessed the Cadillac being chased at around 95 miles per hour and shots being fired from the Cadillac back toward Applicant's vehicle as Applicant's is ramming his vehicle into the back of the Cadillac. Applicant's vehicle hit the Cadillac causing it to careen off the road and slam into a tree. Campbell died on the scene.

A law enforcement officer saw Applicant's vehicle as Applicant tried to regain control of his vehicle and believed the vehicle was being operated by an impaired driver. The officer activated his blue lights and sirens in order to stop Applicant's vehicle, however, Applicant did not stop for 5.0 miles, traveling in excess of 70 miles per hour at times. The officer's in-dash camera recorded the chase. After the collision with the Cadillac, a guardrail, and a tree, Applicant's vehicle broke down and officers took him into custody. (Tr. pp. 21-25).

WESTERN DISTRICT OF NORTH CAROLINA
COUNTY COURT
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Matthew W. Shealy, Esquire, represented Applicant. Assistant Solicitor Jennifer A.J. Jordan represented the State. On December 13, 2016, Applicant pled guilty as indicted to HTO and failure to stop and pled *nolo contendere* pursuant to N.C. v. Alford to the hit and run charge before the Honorable J. Derham Cole. Pursuant to a negotiation between Applicant and the State, Judge Cole sentenced Applicant to imprisonment for concurrent terms of ten years for the hit and run, twenty years suspended upon the service of ten years and five years' probation for HTO and five years for failure to stop. Applicant did not appeal his convictions or sentences.

ALLEGATIONS

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

- I. Ineffective Assistance of Counsel
 - a. Counsel "failed to enforce the whole "negotiated" promised plea

- agreement for all charges to be non-violent and 65%, which I had detrimentally relied on all charges being non-violent and 65%.”
- b. “Counsel further failed to properly research and investigate facts, the laws surrounding the State’s case.”
 - c. Counsel failed to “hire his own Dr. to review the med. reports per 17-3-50 or 17-27-60.”
2. Involuntary guilty plea
 - a. “My plea was not voluntarily nor intelligently made, due to my agreements. Thus, I should be allowed to enforce the whole negotiated promised plea agreement and or allowed to depart from the alleged truth of my statements I made during my plea because I would not have pled if it was not for counsel’s ... unprofessional errors.”

SUMMARY OF PCR HEARING

At the start of the hearing, Applicant delineated the allegations he would be pursuing at the hearing. Those allegations include: Applicant was misadvised regarding whether his charges were parole eligible; Counsel failed to investigate and call an expert doctor to testify as to the cause of death of the victim; and that part of Applicant’s sentence was not part of his plea agreement.

I. Applicant testified to the following:

Applicant testified the victims robbed him at gunpoint of drugs and money while in the back seat of their car. He was able to run away from the car behind a trailer where they caught up with him, stripped off his clothes, and robbed him again. After the victims took off in their car, Applicant chased them in another vehicle. Applicant claimed the victims also robbed his friend, Smith, and he thought they kidnapped him, which is why he chased them. During the chase, the victims began shooting from their car at him, so he hit the back of their vehicle with his. He did not know victim Campbell died, but did not stop because the victims had been shooting at him.

Applicant testified his plea agreement included a twenty year sentence, suspended to ten years and probation for five for both the hit and run charge and the HTO charge. The agreement also included a concurrent five year sentence for failing to stop. However, Applicant testified he was sentenced to only a straight ten years on the hit and run and Counsel did not object to this

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discrepancy. Additionally, Applicant testified he believed he was pleading to all non-violent offenses. Applicant also believed all of his charges were parole eligible charges. Applicant testified Counsel did not advise him regarding parole, but did advise him he was pleading to non-violent crimes. Applicant testified he received a letter from Counsel regarding his mis-advice. Counsel also explained to Applicant that if he violated his probation, the State would put the twenty years back on the table.

II. Counsel testified to the following:

Counsel was an Assistant Public Defender with Spartanburg County at the time he represented Applicant. Counsel is now in private practice. He has been practicing criminal law for approximately ten years. Counsel testified he discussed parole eligibility with Applicant. He explained to him he was pleading to a no-parole offense which would require him to serve eighty-five percent of his sentence before being eligible for supervised release. Applicant also discussed violent versus non-violent categorizations. Counsel explained the two issues, parole and violent classification, are separate and unrelated. Counsel admitted he misadvised Applicant that the hit and run offense was non-violent, and the sentencing sheet was erroneous as well. Counsel admitted he sent a letter to Applicant informing him of this mistake. However, the mistake had no bearing on whether Applicant was parole-eligible or not nor did it affect if Applicant could be released after sixty-five or eighty-five percent service.

Counsel testified he reviewed all of the discovery with Applicant. Counsel also drove to the scene and re-routed the chase. Counsel was prepared for trial and intended to make non-legal arguments to the jury in Applicant's defense. Counsel believed the jury would understand that Applicant did not stop after the accident because the victims had robbed and then shot at Applicant and also that the jury would have some sympathy for Applicant. However, because he did not

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believe there was a defense to the HTO charge, he believed a plea was in Applicant's best interest. Counsel testified he realized during the plea that Applicant was being sentenced to ten straight years as opposed to the negotiated sentence of twenty years suspended to ten years, but did not object because the error was to the benefit of Applicant. Counsel explained a straight ten year sentence would be better than risking violating probation and having a suspended twenty year sentence over his head.

Counsel testified Applicant had never told him about the kidnapping theory regarding Smith. Counsel testified that story was contrary to the story Applicant told him prior to trial. Applicant told Counsel Smith had set him up in the robbery. Based on that information, Counsel does not believe Applicant would have been chasing the victims in an effort to rescue Smith. Counsel testified that had Applicant told him that, it would have helped them at trial. Counsel felt one of the weaknesses in their case was how far Applicant drove chasing the victims and the distance from where they started to where the car was hit was pretty far. Counsel also explained Applicant was originally charged with carjacking, but after Counsel investigated that situation and found out he had permission to take the car, he got the State to dismiss that charge. Counsel reviewed the discovery, drove the route of the chase, and had spoken to witnesses.

After the conclusion of the testimony, Applicant's PCR counsel informed the Court that Applicant wanted his sentencing to be amended to reflect his negotiated sentence, however PCR counsel believed that would not be in Applicant's best interest. She believes his straight ten year sentence is more beneficial than the bargained-for suspended twenty year sentence. This Court informed Applicant's PCR counsel it believes the only relief available is a new trial.

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 had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, [the] burden of proof is on the applicant to prove his allegations by a preponderance of the evidence. Fraser 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 (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. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Misadvice regarding parole eligibility & violent crime categorization

Applicant alleges Counsel misadvised him regarding whether he was pleading to a violent or non-violent offense and because his offense was violent, he will be required to serve at least eighty-five percent of his sentence, rather than sixty-five percent. Classification of crime as violent or non-violent is also a collateral consequence of sentencing and a guilty plea is not rendered involuntary due to counsel's failure to inform defendant of consequences of a violent crime conviction. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997). "Normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea" Griffin v. Martin, 278 S.C. 620, 621, 300 S.E.2d 482, 482-83 (1983) (citing Bell v. North Carolina, 576 F.2d 564 (4th Cir.1978)). However, where an applicant contends that he was "actively misinformed about his parole eligibility," such a claim may be raised in an action for PCR. Id.; Coats v. State, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003). Furthermore, while erroneous parole advice from a judge (or counsel) could conceivably mislead a defendant to his detriment, it would be "wholly impractical" to require the automatic reversal of the guilty plea without "something more." Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205 (1994) *abrogated on unrelated grounds by Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998).

Counsel testified credibly that he gave the correct advice regarding parole eligibility. His testimony that he misadvised Applicant regarding the violent classification of the hit and run charge is also credible. This Court believes Applicant has confused the two issues. Parole eligibility and violent classification are two separate issues. Despite Counsel's error in advising the hit and run

offense was non-violent, Applicant has not proven he has suffered any prejudice as a result of that mis-advice and this Court does not find it reasonably likely that had Counsel given the correct advice, Applicant would not have pled guilty. This Court finds Applicant has failed to prove the "something more" required by Hunter. Applicant did not testify the violent categorization induced him to plead guilty, nor is it reasonable to believe it was the factor that induced his plea, in light of the evidence against him and the circumstances of his case. It is worth noting, a violent classification has no effect on the whether an inmate must serve sixty-five or eighty-five percent of his sentence before early release, as that is determined by parole eligibility. Here, Counsel did not give incorrect advice regarding parole eligibility. This Court finds Counsel was not deficient. This allegation is denied and dismissed.

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 WASHINGTON COUNTY

Failure to investigate and hire expert witness

Applicant failed to present any evidence in support of this allegation. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant has failed to show what beneficial information could have been discovered had Counsel done more investigation. Even so, Counsel testified credibly that not only did her review all of the discovery, he also drove the route, went to the scene, and spoke to witnesses. This Court finds Counsel's investigation was beyond reasonable.

Applicant also alleges Counsel was ineffective for not getting an expert doctor to testify as to the cause of death of the victim. First, this Court notes any claims surrounding the failure to present a witness assumes the testimony from the witness would have been favorable to the defense and therefore affected the outcome of the trial. However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassene v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Applicant failed to produce the testimony of an expert doctor, any prejudice derived from any of Counsel's actions leading to her not testifying is purely speculative. Therefore, Applicant has failed to meet his burden to prove Counsel was ineffective.

II. Involuntary Guilty Plea

Applicant also asserts his plea was involuntary because his sentence was not in accordance with his plea agreement with the State. The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and

defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. at 137-38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent

... depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea.

To the extent Applicant asserts his sentence is not in accordance with the sentence he negotiated with the State, this Court fails to understand why Applicant believes his actual sentence is not more favorable to him than that which he negotiated. Even Counsel testified he did not bring this discrepancy to the Court's attention because the error was beneficial to his client. Upon review of the record and the testimony presented, this Court agrees with Counsel's assertion that the ten year sentence was better than the suspended twenty and it was in Applicant's best interest not to object during the guilty plea to this mistake.

Lastly, although this Court expressed concern with regard the type of relief it can grant during the hearing, this Court is aware that if an error affects only an applicant's sentence and not his plea or trial, remanding for re-sentencing is an acceptable form of relief this Court has the authority to grant. However, this Court does not believe this case warrants a remand for re-sentencing. If the negotiated plea were followed to the letter, it would adversely affect Applicant. Therefore, this Court finds the record reflects Applicant's plea was voluntary.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove

prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

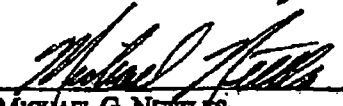
This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

APPELLATE COURT
SOUTH CAROLINA
MAY 8 19

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 4 day of February, 2018.


MICHAEL G. NETTLES
Presiding Judge
Seventh Judicial Circuit


_____, South Carolina

WITNESSES

Spartanburg County Sherriff's Office

ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

JUL 29 2015

Foreperson of Grand Jury
Date:

VERDICT

RECORDED

Foreperson of Petit Jury
Date:

DOCKET NO.

15-GS-42-3501

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

AUG 03 2015

TERM

THE STATE
vs.

Kelvin Eugene Cohen

Indictment for
HIT AND RUN
WITH DEATH

SC Code: 56-5-1210
CDR Code: 2463
Class MIS/C

2015 JUL 31 AM 9:48

M. HEPE DEANLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

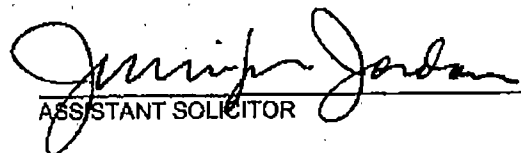
JUL 29 2015

At a Court of General Sessions, convened on _____ the
 Grand Jurors of Spartanburg County present upon their oath:

HIT AND RUN WITH DEATH

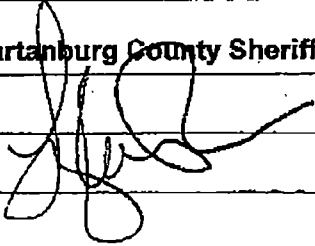
That, Kelvin Eugene Cohen, did in Spartanburg County on or about June 6, 2015, willfully and unlawfully violate the provisions of Section 56-5-1210 of the South Carolina Code of Laws, 1976, as amended, in that he was the driver of a vehicle involved in an accident which resulted in death to Quincy Campbell and he left the scene of the accident by failing to stop at the scene of the accident or stay as close to it as possible and/or until he had fulfilled the requirements of Section 56-5-1230 of the Code of Laws of South Carolina, 1976, as amended in violation of Section 56-5-1210 (A)(3), (B) of the Code of Laws of South Carolina (1976, as amended).

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


 ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

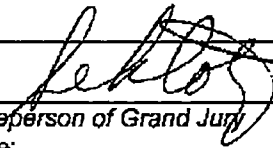


ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

 JUL 29 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO.

15-GS-42-3502

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

AUG 03 2015

TERM

THE STATE

v.

Kelvin Eugene Cohen

Indictment for

**HABITUAL TRAFFIC OFFENDER
CAUSING DEATH**

SC Code: 56-01-1105(B)(2)

CDR Code: 3456

Class FEL/C

2015 JUL 31 AM 9:48

RECORDED & INDEXED

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on JUL 29 2015 the

Grand Jurors of Spartanburg County present upon their oath:

HABITUAL TRAFFIC OFFENDER CAUSING DEATH

That the defendant, Kelvin Eugene Cohen, did in Spartanburg County on or about June 8, 2015, operate a motor vehicle after having been declared an Habitual Offender by The South Carolina Department of Public Safety when his license to drive had been canceled, suspended, or revoked. The Defendant violated the provisions of subsection 56-1-1100 and 56-1-1105 and violated an act forbidden by law or neglected any duty imposed by law in the driving of the vehicle, to-wit:

- (1) Driving Left of Center (Sections 56-5-1810 and 56-5-1880), and/or
- (2) Failure to follow right of way restrictions (Art 17, Section 56) and/or
- (3) Failure of driving on roadway laned for traffic (Section 56-5-1900), and/or
- (4) Failure to maintain proper control of vehicle, and/or
- (5) Driver's failure to exercise due care, and/or
- (6) Driving too fast for conditions (Section 56-5-1520 subsection (a)), and/or
- (7) Restriction on Speeding (Article II, Section 56), and/or
- (8) Failure to maintain a proper lookout for other traffic, and/or
- (9) Reckless Driving (Section 56-5-2920, and/or
- (10) Driving while his Driver's License is suspended (Title 56, Article I), and/or
- (11) Following Vehicle Too Closely (Section 56-05-1930)

which act or neglect proximately caused the death of Quincy Campbell, who died on June 8, 2015 from injuries from this incident, all in violation of §56-1-1100 and 56-1-1105, *THE CODE OF LAWS OF SOUTH CAROLINA, (1976)*, as amended.

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


 ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

Jimmy G. Powers

ARREST WARRANT NUMBER

Direct Indictment (Amended)

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: DEC 09 2015

SENTENCED TO	VERDICT	DR
REPOLE		OR
CAUSE		NI
INDEXED		NI
FILED		OR
SEARCHED		OR
INDEXED		OR
FILED		OR
SEARCHED		OR
INDEXED		OR
FILED		OR

Foreperson of Petit Jury

Date: 12/10/2015

DOCKET NO. 15-35-02-3502

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

DEC 12 2016 TERM

THE STATE

v.

Kelvin Eugene Cohen

Indictment for

HABITUAL TRAFFIC OFFENDER
CAUSING DEATH

SC Code: 56-01-1105(B)(2)

CDR Code: 3456

Class: FEL/C

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

DEC 09 2016

At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

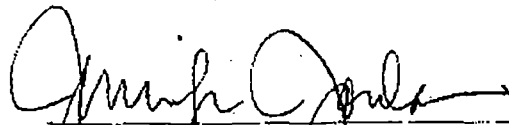
HABITUAL TRAFFIC OFFENDER CAUSING DEATH

That the defendant, Kelvin Eugene Cohen, did in Spartanburg County on or about June 8, 2015, drive a motor vehicle after having been declared an Habitual Offender by The South Carolina Department of Public Safety when his license to drive had been canceled, suspended, or revoked. The Defendant violated the provisions of subsection 56-5-1100 and 56-5-1105 and violated an act forbidden by law or neglected any duty imposed by law in the driving of the vehicle, to-wit:

- (1) Driving Left of Center (Sections 56-5-1810 and 56-5-1880), and/or
- (2) Failure to follow right of way restrictions (Art 17, Section 56) and/or
- (3) Failure of driving on roadway laned for traffic (Section 56-5-1900), and/or
- (4) Failure to maintain proper control of vehicle, and/or
- (5) Driver's failure to exercise due care, and/or
- (6) Driving too fast for conditions (Section 56-5-1520 subsection (a)), and/or
- (7) Restriction on Speeding (Article II, Section 56), and/or
- (8) Failure to maintain a proper lookout for other traffic, and/or
- (9) Reckless Driving (Section 56-5-2920) and/or
- (10) Driving while her Driver's License is suspended (Title 56, Article I)
- (11) Following Vehicle Too Closely (Section 56-5-1930)

which act or neglect proximately caused the death of Quincy Campbell, who died on June 8, 2015 from injuries from this incident, all in violation of §56-5-1100 and 56-5-1105, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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


 ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

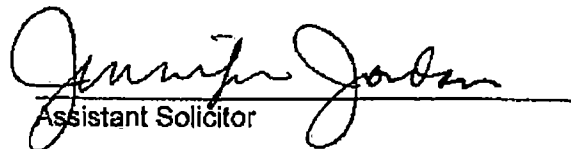
JUL 29 2015

At a Court of General Sessions, convened on _____ the
 Grand Jurors of Spartanburg County present upon their oath:

**FAILURE TO STOP MOTOR VEHICLE WHEN
 SIGNALLED BY A LAW ENFORCEMENT VEHICLE**

That Kelvin Eugene Cohen, did in Spartanburg County on or about June 8, 2015, fail to stop the motor vehicle which he was driving on a road, street, or highway of the State of South Carolina when he was signaled by a law enforcement vehicle by means of a siren or flashing light, in violation of §56-5-750, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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


 Assistant Solicitor