

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

KELLY E. BRUTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001739

APPENDIX

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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA	)	
<u>COUNTY OF SPARTANBURG</u>	)	COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA,	)	TRANSCRIPT
PLAINTIFF,	)	OF
VS.	)	RECORD
KELLY EMMANUEL BRUTON,	)	2018-GS-42-160-162
DEFENDANT.	)	

August 7th, 2018
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE GRACE GILCHRIST KNIE, Judge.

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

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I N D E X O F W I T N E S S E S

(WHEREUPON, there were no exhibits marked during this hearing.)

1 P R O C E E D I N G S

2

3 SOLICITOR MCFARLAND: Kelly Bruton.

4 THE COURT: Yes, ma'am.

5 SOLICITOR MCFARLAND: Thank you, Your Honor.

6 Kelly Bruton is here before you with his attorneys,
7 Monier Abusaft, and James Cheek. He's pleading guilty to
8 three indictments.

9 2018-160. That's a true billed indictment for
10 attempted burglary in the first degree.

11 2018-162. That's a true billed indictment for breaking
12 into motor vehicles.

13 And 2018-161. That's a true billed indictment for
14 petty larceny enhanced.

15 Previously, the Defendant, and his counsel, were both
16 served with a Notice of Intent to Seek a Life Sentence.
17 When he enters his plea today, we will be withdrawing that,
18 and there's a recommendation of 15 to 20 years. And, for
19 the charges -- for the breaking into motor vehicles and
20 petty larceny, just concurrent.

21 THE COURT: Is the recommendation of 15 to 20 or
22 negotiated 15 to 20?

23 MR. ABUSAFT: Negotiated.

24 SOLICITOR MCFARLAND: Nego -- it's negotiated, but I
25 believe that it is checked as a recommendation on there, but

1 I can change it.

2 MR. CHEEK: It's a negotiation for 15 to 20.

3 SOLICITOR MCFARLAND: Okay.

4 (WHEREUPON, the Defendant was placed under oath at this
5 time.)

6 THE COURT: Thank you.

7 Counsel, are any of the victims present?

8 SOLICITOR MCFARLAND: No, Your Honor, but I do have a
9 statement from one of the victims to read to the Court at
10 the appropriate time.

11 THE COURT: Okay. Good afternoon, sir. You are Kelly
12 Emmanuel Bruton.

13 Is that correct?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: Okay. Now, Mr. Bruton, I remember your
16 name from yesterday, and, and we, we tried, I think, to
17 include you in a group qualification, and there were some
18 issues. So, I'm just gonna start over with you.

19 Is that okay?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: All right. And I'm assuming that counsel
22 will not object to my requalifying Mr. Bruton since he had
23 some questions yesterday?

24 MR. CHEEK: Without objection, Your Honor.

25 THE COURT: Okay. All right. So, sir, do you

1 understand that the purpose of your being here this
2 afternoon is to enter a guilty plea on the three charges
3 against you?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: And, when you do that, Mr. Bruton, you're
6 waiving very important Constitutional rights.

7 Okay. Not only do you waive your right to have a trial
8 by jury, you also waive your right to confront witnesses
9 against you, and your right to remain silent.

10 Do you understand?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: And, sir, if you were to go forward and
13 have a trial on these charges, the burden of proof would not
14 be on you, and your counsel. The burden of proof is on the
15 State, on the Solicitor, to prove every element of every
16 charge against you beyond a reasonable doubt. You, sir, are
17 presumed to be innocent until proven guilty.

18 Do you understand?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Okay. And, sir, if you were to have a jury
21 trial, every member of the jury would have to say that
22 you're guilty for you to be found guilty.

23 Do you understand that?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: And knowing all of that, Mr. Bruton, do you

1 still wish to go forward this afternoon, and enter a guilty
2 plea on these charges against you?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: All right. I'm gonna go through the
5 indictments now.

6 Okay. Sir, I have three indictments. They are true
7 billed indictments. Indictment Number 2018-GS-42-160, and
8 this is for attempted burglary in the first degree in
9 violation of South Carolina Code Section 16-11-311, and you
10 are pleading as indicted. This is first degree. It carries
11 a penalty, minimum 15 years, maximum life. It is classified
12 as a violent offense.

13 So, Mr. Bruton, do you have any questions with regard
14 to this offense that you're entering your plea to or the
15 potential penalty for this offense?

16 THE DEFENDANT: No, ma'am.

17 THE COURT: Has it been explained to you, by legal
18 counsel, the significance of this being classified as a
19 violent offense?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: Do you have any questions about that?

22 THE DEFENDANT: No, ma'am.

23 THE COURT: All right. Next we have Indictment
24 2018-GS-42-161, and this is an indictment for petty larceny,
25 true billed indictment, in violation of South Carolina Code

1 section 16-13-30, and it is enhanced. The value being
2 \$2,000.00 or less with a potential penalty of zero to ten
3 years.

4 Sir, do you have any questions with regard to this
5 offense of petty or simple larceny enhanced or the potential
6 penalty for this offense?

7 THE DEFENDANT: No, ma'am.

8 THE COURT: And we have Indictment 2018-GS-42-162, and
9 this is a true billed indictment for breaking into a motor
10 vehicle in violation of South Carolina Code Section
11 16-13-160(1)(2)(b) with a potential penalty, sir, of zero to
12 five years.

13 Do you have any questions with regard to this offense
14 or the potential penalty for this offense?

15 THE DEFENDANT: No, ma'am.

16 THE COURT: All right. Sir, do you further understand
17 that, based upon the statements of counsel, that counsel had
18 apparently served you with a Notice to Seek Life.

19 SOLICITOR MCFARLAND: That's correct, Your Honor.

20 THE COURT: And that, in exchange for your plea today
21 on these offenses, they will be withdrawing that request.

22 Do you understand?

23 (WHEREUPON, the Defendant nods affirmatively.)

24 THE COURT: Yes?

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: All right. And, sir, this is coming before
2 me today as a negotiated plea, and what that means is -- or
3 a negotiated sentence, and there is a range of 15 years to
4 20 years that has been negotiated by your lawyers, and I'm
5 sure you've had some input on that.

6 All right?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: And the Solicitor's Office.

9 And do you understand that that's coming -- that this
10 is coming before me today as a negotiated sentence with a
11 range of 15 to 20 years?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: And is that your wish?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: And do you understand, sir, that, if I
16 decide, after hearing the facts of this case, and hearing
17 from your -- from the solicitor, from your lawyers, and from
18 you, that I cannot go along with that, I will simply let you
19 and your lawyers stand down.

20 Do you understand?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: All right. You have any questions about
23 that?

24 THE DEFENDANT: No, ma'am.

25 THE COURT: All right. Has anybody threatened you or

1 coerced you or promised you anything to get you to enter
2 your plea today, and when I'm asking you that, sir, I don't
3 mean the potential sentence. I mean anything outside of
4 that.

5 THE DEFENDANT: No, ma'am.

6 THE COURT: And don't be offended, Mr. Bruton, I ask
7 everybody the next questions.

8 Sir, are you under the influence of alcohol, drugs, or
9 any intoxicant that would impair your judgment?

10 THE DEFENDANT: No, ma'am.

11 THE COURT: Do you suffer from any mental or physical
12 infirmity that would affect your ability to understand what
13 we're doing today?

14 THE DEFENDANT: No, ma'am.

15 THE COURT: Do you take any prescribed medications?

16 THE DEFENDANT: No, ma'am.

17 THE COURT: Are you satisfied with the services of your
18 legal counsel?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: And do you wish to enter your plea at this
21 time?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: And how do plead, sir, guilty or not
24 guilty?

25 THE DEFENDANT: Guilty.

1 THE COURT: And are you doing so as to each indictment?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: And are you doing so freely, knowingly, and
4 voluntarily?

5 THE DEFENDANT: Yes. Yes, ma'am.

6 THE COURT: Lastly, sir, please be advised that, in the
7 event you wish to appeal any aspect of the plea hearing
8 today, you only have ten days to do so in writing to this,
9 to this Court.

10 Do you understand?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: And do you further understand, sir, that
13 there will be a no contact provision between you and the
14 victims involved in, in these charges?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: Does that, in any way, cause you to
17 hesitate to enter your plea today?

18 THE DEFENDANT: No, ma'am.

19 THE COURT: All right. Thank you, Mr. Bruton. I want
20 you to now direct your attention to our assistant solicitor.
21 Yes, ma'am.

22 MR. ABUSAFT: Your Honor, if I may?

23 (WHEREUPON, the Court nods affirmatively.)

24 MR. ABUSAFT: Because of the, the nature of this plea,
25 there's a couple things I'd like to put on the record before

1 he's finished -- finishing -- before he finishes and fully
2 commits to pleading guilty, Your Honor, if that's okay?

3 THE COURT: Counsel, any objection?

4 SOLICITOR MCFARLAND: I don't -- I have no idea what he
5 plans to say. So, I don't.

6 THE COURT: I tell you what?

7 why don't, why don't y'all come up for just one moment.

8 (WHEREUPON, a bench conference was held at this time.)

9 THE COURT: All right. All right. Thank you.

10 All right. Okay. All right. Mr. Abusaft, anything
11 else before -- right now before I hear from the Solicitor?

12 MR. ABUSAFT: No, Your Honor.

13 THE COURT: All right. All right. Mr. Bruton, sir, I
14 want you to direct your attention to our Assistant Solicitor
15 concerning the charges against you.

16 Yes, ma'am.

17 SOLICITOR MCFARLAND: Thank you, Your Honor.

18 As to the petty larceny, on May 3rd, 2017, Officer
19 Hayden with the Greer Police Department responded to [REDACTED]
20 East Fairview Avenue within the city limits of Greer and in
21 Spartanburg County in response to a petit larceny of a UPS
22 package on a back porch. Upon his arrival, he met with the
23 complainant, Manqual Norman, the spouse of the victim,
24 Shameika Norman.

25 Manqual stated that his video surveillance system

1 captured the Defendant, Kelly Bruton, walking past his front
2 yard and into his backyard around noon. The video shows the
3 Defendant stealing items out of his wife's package that had
4 just been delivered to the pack porch. The video shows the
5 Defendant picking up the box, and transferring the items
6 within the box to his plastic bag. The total loss to the
7 victim was \$79.74 for the 17 stolen perfume and lotion
8 items.

9 As to the burglary and breaking into motor vehicles
10 charge, on February 24th, 2017, at 11:57PM, Officer Ruize
11 with the Greer Police Department responded to a residence
12 located at [REDACTED] Oak Street within the city limits of Greer
13 and in Spartanburg County in reference to a burglary in
14 progress.

15 The victim reported that she had just woken up to
16 someone knocking on her door, and that someone got through
17 her 7-foot tall privacy fence, and was in her backyard. She
18 could hear someone attempting to open the bathroom window,
19 which was connected to her bedroom. She then called the
20 police, and ran to her infant's son room to make sure that
21 he was okay.

22 Police arrived on scene minutes later. Upon getting
23 entry to the backyard, Officer Ruize, Ruize found the
24 Defendant, Kelly Bruton, on his hands and knees hiding
25 behind the air conditioning unit, which is in the corner of,

1 of the victim's backyard close to the exit gate. The screen
2 to the bathroom window had been ripped off. Officer Ruize
3 drew his gun, and police detained the Defendant. Upon
4 searching the Defendant, they did find a crack pipe. Police
5 also recovered a package from outside the fence, and the
6 victim stated that it was a package that was in her car.
7 She intended to send it to her mother. It was originally on
8 the passenger seat of her vehicle to be taken to the Post
9 Office.

10 Fingerprints were taken from the vehicle, and from the
11 bathroom window, and both came back as matching the
12 Defendant, Kelly Bruton. The fingerprints from the window
13 show the positioning of the Defendant's hands as he was
14 attempting to lift it open, and he does have a prior record,
15 Your Honor.

16 THE COURT: Okay. All right. First -- all right. Mr.
17 Bruton?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: You heard the facts of, of, of these
20 offenses. Two that happened on February the 4th of 2017,
21 and one that happened on May the 3rd of 2017 by the
22 Solicitor.

23 Solicitor, did that all happen in Spartanburg County?

24 I know you said Greer, but---

25 SOLICITOR MCFARLAND: Greer and in Spartanburg County.

1 THE COURT: Okay.

2 SOLICITOR MCFARLAND: The City of Greer within
3 Spartanburg County.

4 THE COURT: All right. Thank you. And -- all right.
5 So, Mr. Bruton?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: Do you agree that's what happened?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: All right. And, and one more thing, Mr.
10 Bruton, before I hear your criminal history.

11 When I was questioning you about Indictment
12 2018-GS-42-160, I asked you if you understood, this is the
13 burglary or attempted burglary first degree, which carries
14 15 years minimum to life, and I asked you if you understood
15 that was a violent offense.

16 Do you also understand that that is a most serious
17 offense?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: Okay. Counsel, do y'all object to me
20 checking that on the sentencing sheet?

21 MR. CHEEK: Without objection, Your Honor.

22 THE COURT: Counsel.

23 SOLICITOR MCFARLAND: Oh, no objection, Your Honor.

24 THE COURT: All right. Do you have any questions about
25 that, Mr. Bruton?

1 THE DEFENDANT: No, ma'am.

2 THE COURT: You want a moment to talk to your counsel

3 --

4 THE DEFENDANT: No, ma'am.

5 THE COURT: -- about that?

6 You understand it.

7 THE DEFENDANT: (Defendant nods affirmatively.)

8 Yes, ma'am.

9 THE COURT: Yes?

10 THE DEFENDANT: Yes, ma'am.

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

12 All right. So, why don't we now get the criminal
13 history, and then I'll hear from defense counsel.

14 Yes, ma'am.

15 SOLICITOR MCFARLAND: 1990, possession of beer
16 underage, breaking in motor vehicles, assault and battery,
17 and tres -- trespassing, and malicious injury to personal
18 property.

19 1991, trespassing, disorderly conduct, grand larceny,
20 breaking in motor vehicles, and petty larceny.

21 1993, burglary and grand larceny.

22 1995, he has seven convictions for burglary second
23 degree violent, and a probation revocation.

24 1999, he has a grand larceny, and a burglary.

25 In 2000, he has two shopliftings, two assault and

1 batteries, drinking alcohol in public, trespassing, and
2 shoplifting.

3 2001, a malicious injury to property, and a petit
4 larceny.

5 2003, burglary second degree nonviolent, petit larceny,
6 burglary first degree, and grand larceny.

7 2015, breach of peace and assault and battery third
8 degree.

9 2016, failure to appear and shoplifting.

10 And, 2017, a failure to appear, and a violation of
11 county drug paraphernalia ordinance.

12 THE COURT: Okay. Was discovery shared in this matter?

13 SOLICITOR MCFARLAND: Yes, Your Honor.

14 THE COURT: All right. Counsel, did you-all have an
15 opportunity to review the discovery in this case with
16 Mr. Bruton?

17 MR. ABUSAFT: Yes, Your Honor.

18 THE COURT: Okay. Who is going to speak on
19 Mr. Bruton's behalf?

20 MR. ABUSAFT: I will, Your Honor.

21 THE COURT: All right. Yes, sir. Happy to hear from
22 you.

23 MR. ABUSAFT: Your Honor, Mr. Bruton stands here before
24 you asking for mercy. We would ask that you consider the
25 minimum on this recommendation, which is 15 years, Your

1 Honor.

2 There's been a -- Mr. Bruton had a lot of back and
3 forth regarding whether he was gonna go to trial or, trial
4 or not, Your Honor. Reviewing the evidence, there is, there
5 is fingerprints. His fingerprints were on the window of
6 this -- were on the window of this home, Your Honor. It's
7 been Mr. Bruton's position that the back window seal, the
8 back window screen, was already tore out when he got there.

9 Mr. Bruton kind of reminds me, Your Honor, of -- I live
10 on the south side here in Spartanburg, and I see people like
11 Mr. Bruton all the time. They come by your house, and they
12 want to sell you something, or they have a product or
13 something that they want to give you.

14 Your Honor, I think that's why Mr. Bruton has these
15 kind of property crimes on his record. He's kind of -- he's
16 one of those guys. They come by. They knock on your door.
17 They knock on your window trying to get your attention, Your
18 Honor.

19 After going over discovery, Your Honor, it was our
20 opinion that -- it was my opinion, Your Honor, that it was
21 very likely that he would lose at a trial, and he was facing
22 an LWOP. And so that's why we're here today, Your Honor.

23 I would ask you to consider his age in that he is, at
24 this point, almost 50 something years old. That a 15 year
25 sentence almost is a life, a life sentence when considering

1 that people die in the Department of Corrections around 55
2 years old.

3 So, we'd ask you to take that all into consideration
4 with sentencing him, and, hopefully, Your Honor, you will,
5 you will consider that, and that would lead you to going for
6 the minimum on this recommendation because, either way,
7 Mr. Bruton is looking at spending almost the entirety of his
8 life now in the Department of Corrections.

9 THE COURT: Okay. Mr. Cheek.

10 MR. CHEEK: May it please the Court, Your Honor.

11 There are two kinds of people who steal. There are
12 ones who will take your life to get your property from you,
13 and there are those who sneak around and steal hoping to get
14 their property, and give their lives away.

15 I would ask the Court to consider Mr. Kelly Bruton's
16 the second person. He's been sneaking around, going into
17 empty apartments, going into empty houses, and stealing
18 things a lot his life.

19 Your Honor, when you look at the facts of this case,
20 and the Court will hear very soon from the victim, of the
21 fear that she felt, and her fear for the future regarding
22 Mr. Bruton.

23 Your Honor, I bring to the Court's attention a request
24 for mercy in this case for the 15 year sentence, the very
25 minimum sentence, Your Honor, because of what he did. He

1 went in the car. He looked around there. In the report, it
2 says that he had noticed that she and her boyfriend quite
3 often left the house together in a little white car. The
4 white car was gone. Her car was there. It was not locked.
5 He's rummaging around in there and found something and set
6 it out outside the fence.

7 Your Honor, had he had any earthly idea that this --
8 the victim in this case, the female victim, was with her
9 child -- alone in that house with the child, I believe he
10 never would have put her at any physical confrontation, any
11 peril because of what it appears that he did. He took
12 caution, Your Honor, to ring both doorbells. He saw a light
13 on in the bathroom. He starts to go to that entrance
14 because he felt that maybe she was not even there.

15 So, I ask the Court, as the Court considers the
16 sentencing, to look at who he is, the kind of thief that he
17 is, the kind of person that he's been, and now he
18 understands we have Stand Your Ground in South Carolina.
19 Had he gone through that window, and she blown him away, she
20 would of been well in her right to do that regardless what
21 his intentions were.

22 But, Your Honor, he did not intend to cause her any
23 physical confrontation, any physical harm, because he rang
24 both the front doorbell, around to the back doorbell,
25 looked, and went through the window. Decided he would go

1 through the window where there was a light on to facilitate
2 him going and just stealing something.

3 But, Your Honor, I understand the victim's fear. I
4 understand that the Court might have some trepidation about
5 her fear, and what he might do in the future. But, Your
6 Honor, surely he's at his wits end now understanding that
7 his course is run. He is a petty thief. He needs to
8 understand he's a petty thief. He's got no business trying
9 to go in nobody's house to steal anything.

10 I'd ask the Court to look at the petty part of this as
11 opposed to the larger picture, Your Honor, of what he could
12 of been, but he was not a person intending to cause any harm
13 other than to take something of value from her.

14 THE COURT: Okay. And let me, let me just stop one --
15 did you -- counsel, Solicitor, did you want to read
16 something into the record?

17 SOLICITOR MCFARLAND: Yes, Your Honor. If you'd like
18 to accept his plea first, and then I'll read it.

19 THE COURT: Okay. All right. Before I hear from you,
20 Mr. Bruton, I'm going to hear the statement of the -- of one
21 of the victims.

22 Is that right?

23 SOLICITOR MCFARLAND: Just one victim, Your Honor.

24 THE COURT: All right. And so -- all right. Mr.
25 Bruton, I find that there is a factual basis for the plea,

1 sir, and I will accept the plea at this time. But I will
2 hear from you before I issue my sentence.

3 Yes, ma'am.

4 SOLICITOR MCFARLAND: Thank you, Your Honor.

5 The statements from victim, Tabitha Lunsford. She's
6 the victim on the attempted burglary, and the breaking in
7 motor vehicles.

8 The last year of my life has not been how I would of
9 planned it. I always thought that home would be where I
10 could keep my son safe. I no longer feel safe in my home.
11 It now takes an extra \$60.00 a month to give us some peace.
12 Peace in knowing that, had I not been awakened by the sounds
13 of someone attempting to gain entry into my house, I will
14 now be notified by an alarm that will immediately send
15 police.

16 Mr. Bruton was able to tell police the physical
17 appearance of my son's father and his car even though he
18 does not live there. They do not know each other. This
19 tells me that Mr. Bruton has been watching my house or at
20 least been by and taking notice of my house and the
21 surroundings. His listed home address is just three minutes
22 from my house. Knowing that makes me very uneasy.

23 It wasn't myself -- It wasn't just myself that he
24 impacted that night and frightened. My son was there as
25 well, and was only a year old at the time of the attempted

1 break-in. I don't even want to think about what could of
2 happened if he succeeded in getting inside. It's anyone's
3 guess why Mr. Bruton decided on my house or what his
4 intentions were had he gained entry. But I believe his
5 intentions were not good ones, and I would not feel
6 comfortable knowing he wasn't locked behind bars.

7 I do not want to see him affect someone else's life or
8 another family's life the way that he, the way that he is
9 affected mine and my son's. And the victim is respectfully
10 asking Your Honor for the 20 year sentence in the range.

11 THE COURT: Okay. But -- and -- thank you, ma'am.
12 And, again, I wanted to confirm, there is no restitution
13 being sought?

14 SOLICITOR MCFARLAND: No, Your Honor.

15 THE COURT: All right. And, of course, there will be a
16 no contact provision as well.

17 Okay.

18 MR. ABUSAFT: Your Honor?

19 THE COURT: All right.

20 MR. ABUSAFT: Your Honor?

21 THE COURT: So, now, anything else, counsel, before I
22 hear from Mr. Bruton?

23 MR. ABUSAFT: Your Honor, I'd only like to bring to the
24 attention, following that statement by the victim, it's been
25 Mr. Bruton's position that the husband -- he had dealt --

1 previously done some work for the husband. As they said,
2 his house is close by. He has done some lawn work, raking
3 leaves. The husband seems to not remember that, but Mr.
4 Bruton's been adamant.

5 I only say that to address the fact that that's the
6 reason why he would know something about this family. Not
7 that he is done any type of surveillance or something, Your
8 Honor.

9 I just don't think, as Mr. Cheek has pointed out to
10 you, he's just that -- not at that level, Your Honor. I
11 think it is more likely that he had done something, some
12 kind of petty work for this family, that had been forgotten,
13 and that's the reason why he knows something about this
14 family.

15 THE COURT: Okay. All right. Mr. Bruton, is there
16 anything you'd like to tell me, sir?

17 THE DEFENDANT: No, ma'am.

18 THE COURT: And how long have you been in jail,
19 Mr. Bruton?

20 MR. BRUTON: It's---

21 THE COURT: 462 days?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Counsel, is the victim's last name L-U-N-D
24 or L-U-N?

25 I see it spelled two different ways.

1 SOLICITOR MCFARLAND: L-U-N-S-F-O-R-D.

2 THE COURT: Thank you.

3 Okay. With regard to the matter of the State versus
4 Kelly Emmanuel Bruton, and Indictment Number 2018-GS-42-160,
5 burglary in the first degree, it would be the Order of the
6 Court that the Defendant be committed to the State
7 Department of Corrections for 15 years. He will be given
8 credit for time served. He'll have no contact with the
9 victim, Tabitha Lunsford, or -- and/or the victim's family.

10 With regard to Indictment 2018-GS-42-162, as to the
11 offense of breaking into motor vehicle, it would be the
12 Order of the Court that the Defendant be committed to the
13 State Department of Corrections for five years. That is a
14 concurrent sentence.

15 And with regard to Indictment 2018-GS-42-161, for petty
16 or simple larceny with a value of \$2,000 or less, it is the
17 Order of the Court that the Defendant be committed to the
18 State Department of Corrections for ten years, and he will
19 have no contact with the victim, Shameika Norman.

20 Those are concurrent sentences. I accept the
21 negotiations of counsel, and their sentencing range.

22 Good luck to you, Mr. Bruton.

23 THE DEFENDANT: Thank you.

24 MR. CHEEK: Thank you, Your Honor.

25 MR. ABUSAFT: Thank you, Your Honor.

1 SOLICITOR MCFARLAND: Thank you, Your Honor.
2 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *
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C E R T I F I C A T E

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I, Pamela E. Green, 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 the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 7th day of August, 2018.

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

February 25th, 2019



PAMELA E. GREEN, Court Reporter

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Spartanburg
KELLY E. Bruton # 227598

Full name and prison number (if any) of Applicant.

Y.

State of South Carolina

IN THE COURT OF COMMON PLEAS

7019 CP 42 00161

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institution 990 Wisacky Hwy
Bishopville S.C. 29010 F4-2129-A
2. Name and location of Court which imposed sentence Spartanburg County
General Sessions Spartanburg S.C. 29304
3. Name(s) of co-defendant(s) (if any) no
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: 18-6542-0160 18-6542-0160
1st degree Burglary / Attempted Burglary
(a) 1st degree Burglary / Attempted Burglary
(b) Attempted Burglary 1st degree
(c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
(a) 8-7-18
(b) 15 yrs

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No I didn't
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. N/A
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____

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

- (a) Not for Appellate Review
- (b) _____
- (c) _____

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

Ineffective Assistance of Counsel
Double Jeopardy, Sentencing Errors, 6th Amendment
Subject matter Jurisdiction, State Misconduct Presentation
false Evidence in court, Boykin v. Alabama, 1st
Denied Due Process of the law 1st degree Burglary
Attended Burglary

Revised 3/2003

- (a) _____
 (b) _____
 (c) _____
- See Attachment

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

- (a) _____
 (b) _____
 (c) _____
- See Attachment

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/A
 ii. _____
 iii. _____
 iv. _____

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

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

(c) the disposition thereof:

- i. NA
 ii. _____
 iii. _____

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Spartanburg County
2019 JAN 14 AM 10:28

iv. _____

(d) the date of each such disposition:

i. NA

ii. _____

iii. _____

iv. _____

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

i. NA

ii. _____

iii. _____

iv. _____

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

NO ~~they~~ have not (KB)

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

(a) which grounds have been presented:

i. NA

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

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

(a) No ~~they~~ have not (KB)

(b) _____

(c) _____

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

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CLAY COUNTY
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- (a) your arraignment and plea? yes I was
- (b) your trial, if any? no
- (c) your sentencing? yes I was
- (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? NA
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. Mr. Moirer M. Absauf 366 N. Church St. 3000
- ii. Mr. James A. Cheeks Spartanburg SC. 29303
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Plea and Sentence
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
Correct Charged Attempted Burglary (Lesser included offense)
20. Are you now under sentence from any other court that you have not challenged?
NO

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 SPARTANBURG COUNTY
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State Concisely and in the same order the facts which support of the ground.

1. Counsel was Ineffetive for advising client that he would face potential life sentence if he goes to trial, Based on plea counsel erroneous advice Client plea guilty.
2. Counsel was Ineffetive for not move to Quash the Indictment of a 1st degree Burglary. S.C. Code Ann 17-19-90(2003)
3. Counsel was Ineffetive where as Counsel advised client to plea guilty fo the crime Charged in the indictment, But not to a lesser included offense of the Crime charged in the indictment. S.C.App 2002 Circuit Court doesnt have subject matter Jurisdiction to hear a guilty Plea unless
1. There have been indictment which sufficiently state the offense. 2. There has been a waiver of the indictment. 3. The Charged is a lesser included offense of the Crime Charged in the indictment. State v. Bryton, 560 S.E.2d 426 348 S.C. 593 rehearing denied and reversed 583 S.E.2d 1354 S.C. 626
4. Sentenced errors client was sentenced to 15yrs for A 1st degree Burglary when Attempted Burglary carries 10 yrs
S.C. Code Ann. 16-13-170
5. Subject matter Jurisdiction Client is Challenge Indictment The indictment unconstitutional lack specific day, time, finding By the grand Jury which is essential element of the charged
S.C Code Ann 17-19-90(2003)
6. Counsel was Ineffetive for not object to the solicitor read off the vitcm statement when the vitcm wasnt there in court. Review guilty Plea transcript.
7. Counsel was Ineffetive when Client request jury trial But for Counsel errors the result of A trial would have been the diffrent Strickland v. Washington 446 U.S. 668 104 S.ct 2052 80 led 2d 674
8. Counsel was Ineffetive for failure to Investigate Facts of the case, Have done so Counsel would know there was never A 1st degree Burglary Instead A Attempted Burglary.

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

1. Ineffective Assistance of Counsel

2. Sentenced Errors

3. Attempted Burglary 1st degree

4. Subject matter Jurisdiction

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SPRINGFIELD COUNTY
2019 JAN 14 AM 10:28

34 S.C. Code Ann 19-7-60 Process to Compel Attendance of
Criminal Applicant Witness, Subpoena

1. Officer Christian Aguayo-Ruiz
2. Tabitha Lunsford (victim)
3. K-9 FTO Jordan Williams

CLERK OF COURT
SPARTANBURG COUNTY
2019 JAN 14 AM 10:28

WITNESSES

GREER PD

DA 11/11/18

ARREST WARRANT NUMBER

2017A2320500734

ACTION OF GRAND JURY

JAN 11 2018

True Bill

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

18-GS-42-0160

The State of South Carolina

County of Spartanburg

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

JAN 22 2018

TERM

THE STATE

vs.

Kelly Emmanuel Bruton

Indictment for

ATTEMPTED BURGLARY,
FIRST DEGREE

SC Code: 16-11-311 & 16-1-80

CDR Code: 1151

Class

Exbit*

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SPARTANBURG COUNTY
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Exhibit
A

Subject matter Jurisdiction

Exhibit
A

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

JAN 11 2019

At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

ATTEMPTED BURGLARY, FIRST DEGREE

That the Defendant, Kelly Emmanuel Bruton, did in Spartanburg County or about February 24, 2017 willfully and intentionally ~~attempt~~ to enter the dwelling located at [REDACTED] Oak Street, Spartanburg, South Carolina without consent and with the intent to commit a crime therein, and that the defendant did enter the dwelling either:

- (1) the Defendant did enter in the nighttime and/or
- (2) armed with a deadly weapon; and/or
- (3) caused physical injury to any person who is not a participant in the crime; and/or
- (4) uses or threatens the use of a dangerous instrument; and/or
- (5) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearms

in violation of §16-11-311 and 16-1-80, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Indictment must set forth all the ingredients of an offense. See 54 S.C.196 32 SE 298
State v. **BRUTON** (KB)

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

David B. Boyan
DEPUTY SOLICITOR
Asst.

The indictment unconstitutional lack specific Day Time which is essential element of the charge 17-19-90 divest subject matter Jurisdiction.

2019 JAN 11 AM 10:29
CLERK OF COURT
SPARTANBURG COUNTY

Exhibit

B

Exhibit
B

37

Agency I.D.
SC0230300GREER POLICE DEPARTMENT
Supplemental ReportCase Number
17000003720

09/08/2017 Page 1 of 38

☐ Original Report	☐ Status Change	☐ Additional Victims	☐ Additional Stolen Property	Incident Type <u>M047 - Poss Of Drug Paraphernalia</u>			
☒ Supplemental Report	☐ Other Report	☐ Additional Defendants	☐ Additional Recovered Property	Patrol District <u>A2</u> Page <u>1</u> of <u>2</u> Pages			

I.D. OVERFLOW	☐ Complainant	Subject's Name (Last, First, Middle)		Victim Relationship To Subject		Ethnicity	Resident	Race	Sex	Age	Date of Birth	
	☐ Victim	Address		City	State	Zip Code	Patrol District	Day Phone	Evening Phone			
	☐ Subject	Height	Weight	Hair	Eyes	Facial Hair, Scars, Tattoos, Glasses, Clothing, Physical, Possibilities, Etc.						
	☐ Runaway	☐ Wanted	☐ Arrest	☐ Missing	☐ Jail	☐ Other						

☐ Victim No. _____	Visible Injury ☐ Yes ☐ No	Complaint of any Non-Visible Injuries ☐ Yes ☐ No	Victim Using Alcohol ☐ No ☐ Yes ☐ Unk	Two-Man Veh ☐ One Man Veh ☐ ALONE ☐
Explain:		Drugs ☐ No ☐ Yes Type:	Detective ☐ Other ☐ ASSISTED ☐	
Subject No. _____	Using Alcohol ☐ No ☐ Yes ☐ Unk	☐ Arrested on Current Offense		
Using Drugs ☐ No ☐ Yes ☐ Unk	Type: ☐ Cleared By Arrest on Prior Offense			

Arrestee Armed ☐ Yes ☐ No	Weapon Type	☐ On View Arrest	☐ Summoned	☐ Custody
Juvenile Disposition ☐ Handled Released ☐ Referred To Other Authority				
Arrest Location				

Overflow:

Lunsford, Tabitha N:Victim 1 Complainant 1

DL STATE/NUMBER: [REDACTED] DOB: [REDACTED]

Bruton, Kelly Emmanuel:Subject 1

Subject Types: Suspect, Arrest

Physical Description

COAT/JACKET:Red Jacket, TROUSERS:Gray, red striped pants, BUILD:Medium / Average

HAIR/STYLE:Afro, HAIR/LENGTH:Short,

CHARGE: Poss Drug Paraphernalia TICKET #: 20171130001591 BOND AMOUNT: 1087.50

DL STATE/NUMBER: SC/0103559302 DOB: [REDACTED]/1969

Narrative:

On 02-24-2017 I responded to the residence located at [REDACTED] within the city limits of Greer, in reference to a possible burglary in progress.

Upon arrival, I went around the home to make sure no one was around. When I went around the back of the home dispatch stated that the subject was in the back trying to open a bathroom window. The backyard was covered by a 6-7 ft wooden fence. So I grabbed the top of the fence and pulled myself up to get a view and did not see anyone trying to get in by the bathroom window. I then made contact with the complainant, Tabitha Lunsford, through the side door. Once I entered the home I asked Lunsford if I can gain entrance to her back yard and she opened the back door for me. As I stepped out and looked around I found a black male named Kelly Bruton on his hands and knees hiding behind the AC unit. I then drew my gun and gave him verbal commands to get from behind there and get on the ground. Once on the ground I had him get up and face the wall until Officer Heaton arrived to which I holstered my weapon. At that point I placed him under investigative detention and searched him for weapons. While officer Heaton stayed with the subject FTO Williams had also arrived on scene.

I then spoke with the Lunsford and she stated that she woke up to someone knocking on her front and side door. Lunsford explained because it was so late and had recently moved in to the area she called the police. Lunsford stated that she had not known that I had arrived on scene and called dispatch again because she heard someone trying to open her bathroom window

PROPERTY	Status	Property Type	Quantity	Property Make	Color	Description	Serial # / OAN	Value

ADMIN	Subject Identified		Subject Located		☐ Active	☐ Admin Closed	☐ Arrested Under 18	☐ Ex-Cleared Under 18
	☒ Yes ☐ No	☒ Yes ☐ No	☐ Unfounded	☐ Arrested 18 and Over	☐ Ex-Cleared 18 and Over			
	Reason For Exceptional Clearance ☐ Offender Death ☐ No Prosecution ☐ Victim Declines Cooperation ☐ Extradition Denied ☐ Juvenile No Arrest							
	Reporting Officer(s)	Date	Unit/Star#	Approving Officer	Date	Unit/Star#		
AQUAYO-RUIZ, CHRISTIAN	02/25/2017	415 / 00305	ELDRIDGE, MIRON	02/25/2017	308 / 00058			
JORDAN WILLIAMS	02/25/2017	415 / 00000	Follow Up Investigation ☐ Yes ☒ No					

2019 JAN 4 AM 10:09

SPARTANBURG COUNTY

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Exhibit
B

Exhibit B

Agency I.D.
SC0230300GREER POLICE DEPARTMENT
Supplemental ReportCase Number
17000003720

☐ Original Report ☐ Status Change ☐ Additional Victims ☐ Additional Stolen Property Incident Type M047 - Poss Of Drug Paraphernalia																																										
☒ Supplemental Report ☐ Other Report ☐ Additional Defendants ☐ Additional Recovered Property Patrol District A2 Page 2 of 2 Pages																																										
I. D. OVERFLOW	☐ Complainant ☐ Victim ☐ Subject ☐ Runaway ☐ Wanted ☐ Arrest ☐ Missing ☐ Jail ☐ Other																																									
	Subject's Name (Last, First, Middle) _____ Victim Relationship To Subject _____ Ethnicity _____ Residence _____ Race _____ Sex _____ Age _____ Date of Birth _____																																									
	Address _____ City _____ State _____ Zip Code _____ Patrol District _____ Day Phone _____ Evening Phone _____																																									
	Height _____ Weight _____ Hair _____ Eyes _____ Facial Hair, Scars, Tattoos, Glasses, Clothing, Physical, Peculiarities, Etc. _____																																									
	☐ Victim No. _____ ☐ Victim Injury ☐ Yes ☐ No ☐ Complaint of any Non-Violent Injuries ☐ Yes ☐ No ☐ Victim Using Alcohol ☐ No ☐ Yes ☐ Unk ☐ Two-Man Veh ☐ One Man Veh ☐ ALONE ☐ Explain: _____ ☐ Drugs ☐ No ☐ Yes Type: _____ ☐ Detective ☐ Other ☐ ASSISTED ☐																																									
Subject No. _____ Using Alcohol ☐ No ☐ Yes ☐ Unk ☐ Arrested on Current Offense ☐ Using Drugs ☐ No ☐ Yes ☐ Unk Type: _____ ☐ Cleared By Arrest on Prior Offense																																										
Arrestee Armed ☐ Yes ☐ No Weapon Type _____ ☐ On View Arrest ☐ Summoned ☐ Custody																																										
Juvenile Disposition ☐ Handled Released ☐ Referred To Other Authority																																										
Arrest Location _____																																										
NARRATIVE	and that is when I knocked on her door. Lunsford stated that she does not know the subject and never seen him before.																																									
	I then spoke with the subject, Kelly Bruton, and he stated that he knew the ladies husband and that he, Bruton, had come by to let the husband know that he could not find a TV for him. When I asked Bruton why was he hiding Bruton stated that because he knew we were there and would think he was trying to break in to the home. Bruton stated that he did knock on the front and side door and came to the back yard to knock on the back door to see if Lunsford's husband was home.																																									
	While speaking with Bruton FTO Williams found a package outside the fence and asked Lunsford if it belonged to her and she stated yes and that it was originally in the passenger seat of her locked vehicle. Bruton stated that he did not go into her vehicle to take anything. Forensics was called out and looked for fingerprints on the bathroom window and on the vehicle. Then Lunsford's husband Neftali Solis, arrived and stated that he did not know the Bruton and had never asked him for a TV. FTO Williams had Boss search around the home to see if Bruton had tried to get rid of drugs by throwing it over the fence.																																									
	Bruton was searched again and a crack pipe was found on his person. Bruton was then placed under arrest without incident for possession of drug paraphernalia. Ticket number: 20171130001591																																									
	Forensics did find prints and will send me the results and if it matches to Bruton I will get a warrant request for possibly Burglary 1 and Auto breaking. Forensics case number is 17-02-1270.																																									
Written statements were taken from both Solis and Lunsford and a VNI was filled out. Cuffs were fitted and double locked. BWC was activated but died during investigation. Case is cleared by arrest.																																										
PROPERTY	<table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>Status</th> <th>Property Type</th> <th>Quantity</th> <th>Property Make</th> <th>Color</th> <th>Description</th> <th>Serial # / OAN</th> <th>Value</th> </tr> </thead> <tbody> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> </tbody> </table>		Status	Property Type	Quantity	Property Make	Color	Description	Serial # / OAN	Value																																
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ADMIN																																										

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03/19/2018 3 of 11

Deputy Report for Incident 17021270

Page 3 of 5

Narrative

I Deputy Davis did respond to this location to assist Greer PD with an attempted burglary call. Upon my arrival, I did meet with Greer PD Officers. I was advised that they responded to an attempted burglary call and did locate a Kelly Burton in the back yard at this residence. I was advised that they did locate a window with a screen that had been cut. I was advised that they also located an item (item had already been returned) on the ground that had been removed from the victim's vehicle. Greer Officers requested that I process the window where the cut screen was located and also the victim's vehicle. The victim's vehicle was a Chevy SUV (SC [REDACTED]). Digital photographs were taken and entered into Spillman. I did process the window and the vehicle for prints. I did collect a lift from the window and one from the driver's side of the vehicle. The lift cards were turned into AFIS to be checked.

Responsible LEO:

Approved by:

Date

Exbit C

CLERK OF COURT
SPARTANBURG COUNTY
2019 JAN 14 AM 10:29

03/19/18

Exhibit
D

GR17-3720

GREER POLICE DEPARTMENT

Date 2/25/2017

Page No. _____

STATEMENT OF:

Tabitha Lunsford [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Around midnight I awoke from sleep to knocking on one of my doors, either front door or back door, or side door. When the knocking continued I called 911. I was told an officer was coming. I waited in my room. I then heard someone (attempting) to open the bathroom window which is connected to my bedroom. I panicked and ran across the hall into my sons room. I called 911 again to tell them what I heard. I was told by the operator that the officer was already here. I met the officer at the door. The officer came through the house to the backdoor to the backyard. I waited while he searched. I then went in the backyard and saw the bathroom screen to the window was half ripped off. the officer heard ~~a~~ something and told me to get back inside.

2019 JAN 14 AM 10:29
CLERK OF COURT
PATAHANBORD COUNTY

Exhibit E

12/17
ARREST WARRANT
2017A2320500734

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
Greer

THE STATE
against
Kelly Emmanuel Bruton

Address: Lorla Street
Greer, SC 2965-

Phone: SSN: [REDACTED]
Sex: M Race: B Height: 5 11 Weight: 180
DL State: SC DL #: [REDACTED]
DOB: /1969 Agency ORI #: 0230300

Prosecuting Agency: Greer Police Department
Prosecuting Officer: Christian I Aguayo Ruiz - S00252
Offense: Burglary / Burglary (After June 20, 1985) - First degree (ATTEMPTED)
Offense Code: 0079
Code/Ordinance Sec: 16-11-0311

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

The accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)
Signature of Judge
Date:

RETURN
A copy of this arrest warrant was delivered to
defendant Kelly E - Bruton
on 7/3/17 at 0815
J. Shull [Signature]
Signature of Constable or Endorser Officer

RETURN WARRANT TO:
City Of Greer
100 South Main Street
Greer, SC 29650

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Exhibit E

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
Greer

AFFIDAVIT
ORIGINAL
S.C. Attorney General
April 21, 2008
SCCA 618

Personally appeared before me the affiant Christian I Aguayo Ruiz who
being duly sworn deposes and says that defendant Kelly Emmanuel Bruton
did within this county and state on or about 2/24/2017 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Greer)
in the following particulars:
DESCRIPTION OF OFFENSE: Burglary / Burglary (After June 20, 1985) - First degree (ATTEMPTED)

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

BASED ON THE AFFIANT'S INVESTIGATION, THE DEFENDANT NAMED WITHIN COMMITTED THE OFFENSE OF
ATTEMPTED BURGLARY 1ST DEGREE IN THAT HE FORCED OPEN A WINDOW INTO THE VICTIM'S RESIDENCE AT
THE POLICE ARRIVED PREVENTING ENTRY. THE OPEN WINDOW WAS ON THE BACK OF THE
RESIDENCE INSIDE A COMPLETELY FENCED YARD. THE DEFENDANT'S FINGERPRINTS WERE IDENTIFIED ON THE
WINDOW. THIS INCIDENT DID OCCUR AT NIGHT, AND THE DEFENDANT HAS MORE THAN 2 BURGLARY
CONVICTIONS. THIS OFFENSE OCCURRED WITHIN THE CITY LIMITS OF GREER, AND IN THE COUNTY OF
SPARTANBURG, S.C.

Signature of Affiant [Signature]

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
Greer

Affiant's Address 102 South Main Street
Greer, SC 29650-
Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OR THE
It appearing from the above affidavit that there are reasonable grounds to believe that
on or about 2/24/2017 defendant Kelly Emmanuel Bruton
did violate the criminal laws of the State of South Carolina (or ordinance of
☐ County/ ☒ Municipality of Greer

DESCRIPTION OF OFFENSE: Burglary / Burglary (After June 20, 1985) - First degree (ATTEMPTED)
Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me
on 7/1/2017

Signature of Issuing Judge (L.S.)
Anne Pitts
Judge Code: 8233

Judge's Address 100 South Main St.
Greer, SC 29650-
Judge's Telephone (864)848-5374

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

Exhibit E

1

STATE OF SOUTH CAROLINA

County of Spartanburg

VERIFICATION

I, Kelly, 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.

Kelly Bruton

SWORN to and subscribed before me this 8
day of Jan, 2019.

Debra Eastwood (L.S.)
Notary Public

My Commission Expires: 3/3/2021

CLERK OF COURT
SPARTANBURG COUNTY
2019 JAN 14 AM 10:29

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

I, Kelly 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.

Kelly Bruton
Applicant

SWORN or affirmed to and subscribed before me this
8 day of Jan, 2019.

Dana Eastudy
Notary Public

My Commission Expires: 3/3/2020

CLERK OF COURT
SPARTANBURG COUNTY
2019 JAN 14 AM 10:29

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Kelly E. Bruton,	)	Case No.: 2019-CP-42-00161
S.C.D.C. No. 227598,	)	
	)	
Applicant,	)	
	)	RETURN AND MOTION TO DISMISS
v.	)	(Counsel Appointed)
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

In response to the application for post-conviction relief filed by Kelly E. Bruton (Applicant) on January 14, 2019, Respondent would show this Court:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the January 22, 2018, term of the Spartanburg County Grand Jury for attempted burglary, first degree (2018-GS-42-00160), petit larceny (2018-GS-42-00161), and breaking into a motor vehicle (2018-GS-42-00162). Monier Mufid Abusaft, Esq. and James A. Cheek, Esq. represented Applicant. Elizabeth McFarland, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On August 7, 2018, Applicant pled guilty as indicted. Accepting terms negotiated between Applicant and the State, the Honorable Grace Gilchrist Knie sentenced Applicant to imprisonment for concurrent terms of 15 years for attempted burglary, 10 years for petit larceny, and 5 years for breaking into a motor vehicle. Applicant did not appeal his plea or sentence.

CLERK OF COURT
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II. STATEMENT OF THE FACTS

The underlying facts of the crime(s) for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

As to the [petit] larceny, on May 3rd, 2017, Officer Hayden with the Greer Police Department responded to 410 East Fairview Avenue within the city limits of Greer and in Spartanburg County in response to a petit larceny of a UPS package on a back porch. Upon his arrival, he met with the complainant, Manqual Norman, the spouse of the victim, Shameika Norman.

Manqual stated that his video surveillance system captured the Defendant, Kelly Bruton, walking past his front yard and into his backyard around noon. The video shows the Defendant stealing items out of his wife's package that had just been delivered to the [back] porch. The video shows the Defendant picking up the box, and transferring the items within the box to his plastic bag. The total loss to the victim was \$79.74 for the 17 stolen perfume and lotion items.

As to the burglary and breaking into motor vehicles charge, on February 24th, 2017, at 11:57 PM, Officer Ruize with the Greer Police Department responded to a residence located at [REDACTED] Oak Street within the city limits of Greer and in Spartanburg County in reference to a burglary in progress.

The victim reported that she had just woken up to someone knocking on her door, and that someone got through her 7-foot tall privacy fence, and was in her backyard. She could hear someone attempting to open the bathroom window, which was connected to her bedroom. She then called the police, and ran to her infant's son room to make sure that he was okay.

Police arrived on scene minutes later. Upon getting entry to the backyard, Officer Ruize, Ruize found the Defendant, Kelly Bruton, on his hands and knees hiding behind the air conditioning unit, which is in the corner of, of the victim's backyard close to the exit gate. The screen to the bathroom window had been ripped off. Officer Ruize drew his gun, and police detained the Defendant. Upon searching the Defendant, they did find a crack pipe. Police also recovered a package from outside the fence, and the victim stated that it was a package from outside the fence, and the victim stated that it was a package that was in her car. She intended to send it to her mother. It was originally on the passenger seat of her vehicle to be taken to the Post Office.

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CLERK OF COURT
SPARTANBURG COUNTY
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Fingerprints were taken from the vehicle, and from the bathroom window, and both came back as matching the Defendant, Kelly Bruton. The fingerprints from the window show the positioning of the Defendant's hands as he was attempting to lift it open, and he does have a prior record, Your Honor.

(Tr. 11-13). Upon inquiry by the Court, Applicant confirmed the above articulated facts. (Tr. 13-14).

III. CURRENT APPLICATION

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

1. "Ineffective Assistance of Counsel"

- a. "Counsel was ineffective for advising client that he would face potential life sentence if he goes to trial, based on plea counsel erroneous advice client plea guilty"
- b. "Counsel was ineffective for not move to quash the indictment of a 1st degree burglary. S.C. Code Ann. 17-19-90 (2003)"
- c. "Counsel was ineffective where as counsel advised client to plea guilty to the crime charged in the indictment, but not to a lesser included offense of the crime charged in the indictment."
- d. "Counsel was ineffective for not object[ing] to the Solicitor read off the [victim] statement when the [victim] wasn't there in court. Review guilty plea transcript"
- e. "Counsel was ineffective when client request jury trial but for Counsel error the result of a trial would have been different"
- f. "Counsel was ineffective for failure to investigate facts of the case, have one so Counsel would know there was never a 1st degree Burglary instead a attempted burglary."

2. "Subject Matter Jurisdiction"

- a. "Circuit Court doesn't have subject matter jurisdiction unless 1. There have been indictment which sufficiently state the offense, 2. There has been a waiver of the indictment, 3. The charged is a lesser included offense of the crime charged in the indictment." Applicant thereafter cites to State v. Knuckles, 348 S.C. 593, 560 S.E.2d 426 (Ct. App. 2002) reversed by 354 S.C. 626, 583 S.E.2d 51 (2003).¹

¹ Applicant cites the case as State v. Bruton, but the reporter citations both pertain to Knuckles.

- b. "Subject matter Jurisdiction Client is Challenge Indictment The indictment unconstitutional lack specific day, time, finding By the grand Jury which is essential element of the charged S.C. Code Ann. 17-19-90 (2003)."
3. "Sentencing Errors"
 - a. "Client was sentenced to 15 years for a 1st degree burglary when attempted burglary carries 10 yrs S.C. Code Ann. 16-13-170"

Applicant requests relief as follows:

- "Correct Charged Attempted Burglary (Lesser Included Offense)"

Applicant also demands service of process upon:

1. "Officer Christian Aguayo-Ruiz;"
2. "Tabitha Lunsford (Victim);"
3. And "K-9 FTO Jordan Williams."

Attached to and incorporated herein 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 current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

IV. RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

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. Because there is no question of law or fact to necessitate a hearing, Respondent requests the Court issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.² See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no

² A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

need to develop facts and the applicant is not entitled to relief). Respondent moves for summary dismissal for the following reasons:

Ineffective Assistance of Plea Counsel, Generally

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, 686 (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. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; 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). 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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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, 59 (1985).

Misadvice as to Potential for Life Sentence

Applicant alleges Counsel misadvised him that if he were convicted at trial, he could receive a sentence of life without parole. The Clerk's Records include and indicate an LWOP notice pursuant to S.C. Code Ann. § 17-25-45 filed March 14, 2018, addressed to Applicant and his then-counsel, Richard Welchel, Esq. That notice asserts that LWOP would have been appropriate in light of prior convictions for burglary, second degree, violent (1995-GS-42-05159) and burglary, first degree (2001-GS-42-02306). Additionally, burglary, first degree is a felony punishable by life imprisonment. S.C. Code Ann. § 16-11-311(B); see also State v. Heid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) ("A person guilty of attempt is punishable as if he had committed the underlying offense."). Therefore, the record conclusively demonstrates that any advice by Counsel informing Applicant of the possibility of an LWOP sentence was accurate. Accordingly, Applicant cannot meet his burden of showing any deficiency by way of this allegation, and the ground should be summarily dismissed.

Failure to Quash Indictment

Applicant alleges Counsel was ineffective in failing to quash the indictment for burglary, first degree. South Carolina law provides that:

Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20. In the context of an indictment for burglary or attempted burglary in the first degree, “it is not necessary in charging night burglary to aver the particular hour of the night; it is sufficient to aver that the crime was committed in the nighttime.” State v. Staggers, 338 S.C. 53, 525 S.E.2d 260 (Ct. App. 1999).

The indictment for attempted burglary, first degree, provides the date and location of the offense and thereafter charges the crime substantially in the language of the statute, further providing the statutes violated by the conduct alleged. The indictment avers, in part, that the crime was committed in the nighttime. The indictment was valid, and Counsel had no basis on which to object. Therefore, the record conclusively refutes this allegation, and the ground should be summarily dismissed.

Failure to Advise to Plead to Lesser-Included Offense

Applicant alleges Counsel was ineffective in failing to advise him to plead to a lesser-included offense of burglary, first degree. There is no constitutional right to a plea bargain. Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). It thus follows that there is no right to plead to a lesser-included offense in lieu of the greater offense. There is no evidence in the record to show any offer to a lesser-included offense was ever extended. Accordingly, Applicant has failed to make a *prima facie* showing that he is entitled to relief by way of this allegation, and the ground should be summarily dismissed.

Failure to Object to Recitation of Victim’s Statement

Applicant alleges Counsel was ineffective in failing to object to the State’s recitation of a written statement from victim Tabitha Lunsford. The United States Constitution erects no *per se* bar against the admission of victim impact evidence during sentencing proceedings. Payne v. Tennessee, 501 U.S. 808, 825 (1991) (“Victim impact evidence is simply another form or

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SARASOTA COUNTY

method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.”); see also Stone v. State, 419 S.C. 370, 381-82, 798 S.E.2d 561, 567 (2017) (citing in part to, and explaining Payne). South Carolina law provides that “[t]he circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing.” S.C. Code Ann. § 16-3-1550(F); see also State v. Hill, 331 S.C. 94, 104-05, 501 S.E.2d 122, 127-28 (1998) (explaining the statute and Payne and how statements are permitted in non-capital and capital cases).

Applicant waived his right to confront the witnesses against him as part of his plea. (Tr. 5, ll. 7-11). The State subsequently read into the record Lunsford’s statement during the plea proceeding. (Tr. 21-22). Applicant had, and now has, *no right* to confront the Victim as to the statement submitted to the plea court at the time of his plea and sentencing. Thus, Counsel had no basis for objection. Applicant’s motivation by way of this allegation, as evidenced by his demand Lunsford be subpoenaed, is nothing more than a shameless attempt to further harass Lunsford. Applicant cannot show deficiency of counsel by way of this allegation, and the ground should be summarily dismissed.³

2018 MAR 25 AM 11:29
SPARTANBURG COUNTY
CIRCUIT COURT

Client’s Request for a Jury Trial

Applicant alleges Counsel was ineffective because Applicant requested a jury trial. Respondent is unable to liberally construe this ground in a fashion so as to provide a more cognizable claim for relief. Applicant was advised of his rights to a jury trial and waived them. (Tr. 5-6). Applicant has failed to make a *prima facie* showing that he is entitled to relief by way of this allegation, and thus it should be summarily dismissed.

³ The State further gives notice of its intention to fight any attempt to subpoena the victim for any potential future PCR hearing.

Failure to Investigate

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997)); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 385, 388, 540 (1995)).

Applicant asserts Counsel would have discovered he merely attempted a burglary had he investigated the case, rather than facts sufficient to show a first-degree burglary. As previously indicated, a “person guilty of attempt is punishable as if he had committed the underlying offense.” Reid, 393 S.C. at 329, 713 S.E.2d at 276. The “investigation” insisted upon would not have changed anything. Applicant was advised of the fact that he was pleading guilty to attempted burglary in the first degree during his plea proceeding. (Tr. 3, ll. 6-14; Tr. 6, ll. 6-22; Tr. 14, ll. 9-18). Both Counsel and Applicant were aware that Applicant was charged with attempting the burglary; there was nothing further to investigate on that point. The record conclusively refutes any merit to this allegation. Applicant cannot meet his burden of showing any deficiency of Counsel, and thus this ground should be summarily dismissed.

Conclusion and Action Requested

Applicant can satisfy neither requirement of the Hill test. In addition to the record's refutation of each of the allegations as set forth above, Applicant indicates no desire in a new trial in his request for relief, such that he cannot show prejudice under Hill. Therefore, barring any possible amendments by and through appointed counsel, Respondent moves for summary dismissal of the allegations of ineffective assistance of counsel.

V. RESPONSE TO ALLEGATION REGARDING SUBJECT MATTER JURISDICTION

Applicant's allegations regarding jurisdiction are without merit. "Circuit courts obviously have subject matter jurisdiction to try criminal matters." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). In any event, as explained in the prior section, the indictment for attempted burglary, first degree, is facially valid and no basis for challenge to it exists. Therefore, Applicant's allegations regarding jurisdiction, and every part of the application based thereupon, should be summarily dismissed.

VI. RESPONSE TO ALLEGATION OF AN ILLEGAL SENTENCE

Applicant's allegation that he was sentenced in excess of the statutory maximum without merit as a matter of law. Applicant erroneously cites to S.C. Code Ann. § 16-13-10 as the basis for his claim of an illegal sentence; that code section pertains to entering a house with the intent to commit a crime *without breaking*, and is not the crime for which Applicant was indicted. Applicant was indicted and pled guilty to attempted burglary, first degree, under S.C. Code Ann. §§ 16-11-311 (burglary) and 16-1-80 (attempt). Attempted burglary, first degree is punishable by up to life incarceration, and by no less than 15 years. Applicant was sentenced to the minimum for attempted burglary, first degree. Applicant is mistaken in his claim, and this allegation should be summarily dismissed.

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CLERK OF COURT
SPARTANBURG COUNTY

VII. GENERAL DENIAL

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

VIII. CONCLUSION

WHEREFORE, Respondent moves to summarily dismiss the application because the record conclusively refutes each of the allegations of ineffective assistance of counsel, and because the allegations that the plea court lacked subject matter jurisdiction and that the sentence is illegal are without merit as a matter of law.

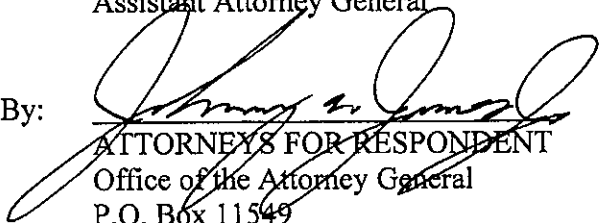
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

2019 MAR 25 AM 11:29
CLERK OF COURT
SPARTANBURG COUNTY

20 Mar., 2019

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

KELLY E. BRUTON,

Applicant,

vs

STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS

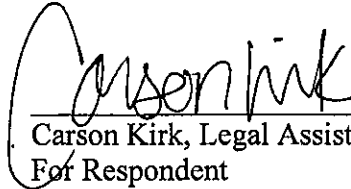
2019-CP-42-0161

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid

Kelly E. Bruton, #227598
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010

DATED this 20th day of March, 2019.



Carson Kirk, Legal Assistant
For Respondent

2019 MAR 25 3:11:29
CLERK OF COURT
SPARTANBURG COUNTY

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 Kelly Emmanuel Bruton,)
5 Applicant,) TRANSCRIPT OF RECORD
6 -vs-) 2019-CP-42-0161
7 The State.) July 15, 2019
8) Spartanburg, South Carolina
9
10

11 B E F O R E:

12 HONORABLE J. DERHAM COLE, JUDGE
13

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

15 RODNEY W. RICHEY, ESQUIRE
16 Attorney for the Applicant

17 BRIANNA L. SCHILL, ESQUIRE
18 Attorney for the State
19
20

21 Linda D. Moffitt
22 Circuit Court Reporter
23
24
25

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APPELLATE DEFENSE

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WITNESSES

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KELLY EMMANUEL BRUTON (AW)

Direct examination by Mr. Richey

4

Cross-examination by Ms. Schill

MONIER M. ABUSAFT (AW)

Direct examination by Mr. Richey

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Cross-examination by Ms. Schill

No exhibits entered into evidence.

1 MS. SCHILL: May it please the Court.

2 The next case is Kelly Emmanuel Bruton vs. the State
3 of South Carolina, case 2019-CP-42-00161.

4 Applicant is confined to the South Carolina Department
5 of Corrections pursuant to orders of commitment of the
6 Spartanburg County Clerk of Court.

7 Applicant was indicted at the January 2018 term of the
8 Spartanburg County Grand Jury for attempted burglary first
9 degree, petty larceny and breaking into a motor vehicle.

10 Monier Abusoft, Esquire, and James A. Cheek, Esquire,
11 represented applicant. Elizabeth McFarland of the Seventh
12 Circuit Solicitor's Office prosecuted the case.

13 On August 7th of 2018 applicant pled guilty as
14 indicted accepting terms negotiated between applicant and
15 the state. The Honorable Grace Knie sentenced applicant to
16 imprisonment for concurrent terms of 15 years for attempted
17 burglary, ten years for petty larceny and five years for
18 breaking into a motor vehicle.

19 Applicant did not appeal his plea or sentence.

20 Applicant filed this timely P.C.R. application on
21 January 14th of 2019 asserting various claims of
22 ineffective assistance of counsel, subject matter
23 jurisdiction and improper sentencing.

24 On March 25th of 2019 respondent filed its return and
25 motion to dismiss applicant's application. By email dated

Kelly Emmanuel Bruton
Direct examination by Mr. Richey

1 July 11th of 2019 our office received notice that applicant
2 intends to go forward only as to one claim of
3 ineffective -- for ineffective assistance of counsel for
4 failure to investigate; and therefore the state would like
5 to go forward with an evidentiary hearing on that case or
6 on that claim.

7 Applicant is present today and represented by Rodney
8 Richey.

9 THE COURT: Mr. Richey.

10 MR. RICHEY: Thank you, Your Honor. That's a correct
11 statement on the issues, and at this time we'd call
12 Mr. Bruton.

13 KELLY EMMANUEL BRUTON, having
14 been first duly sworn, testified as follows:

15 DIRECT EXAMINATION BY MR. RICHEY

16 Q State your name, please.

17 A Kelly Bruton.

18 Q Now, Mr. Bruton, are you incarcerated in the
19 Department of Corrections?

20 A Yes, sir.

21 Q And what are you incarcerated for?

22 A For attempted burglary first degree.

23 Q And were you convicted in Spartanburg County?

24 A Yes, sir.

25 Q Okay. And you -- who represented you on those

Kelly Emmanuel Bruton
Direct examination by Mr. Richey

1 charges?

2 A Mr. Cheeks and Monier -- Mr. Monier. Mr. Cheeks and
3 Mr. Monier.

4 Q Okay. And you believe they did not properly represent
5 you, is that correct?

6 A Yes, sir.

7 Q And you believe that they failed to investigate your
8 case, is that correct?

9 A Yes, sir.

10 Q And just -- I'm going to be real brief about the
11 facts.

12 This is supposedly an attempted burglary where you did
13 not get in the house, correct?

14 A Right.

15 Q And you were found somewhere near the scene, is that
16 correct?

17 A Correct.

18 Q And the location of the place, do you believe that if
19 counsel had done a proper investigation he could have
20 assisted you?

21 A Had counsel did a proper investigation they would have
22 seen there wasn't never no burglary.

23 Q And it was attempted burglary, correct?

24 A Correct.

25 Q And was there any relationship between you and the

Kelly Emmanuel Bruton
Direct examination by Mr. Richey

1 people who actually was at the house?

2 A well, I used to do work for them people.

3 Q Okay. So they knew you.

4 A Yes, sir.

5 Q And do you believe that that would have helped your
6 case, mitigate your case some?

7 A Yes, sir.

8 Q Did you talk to your lawyers about that?

9 A well, yes. I had told them. I had talked to them
10 about it, yes, sir.

11 Q And you had told them, hey, I knew the people,
12 correct?

13 A Yes, sir.

14 Q And what was your purpose of being there?

15 A I was -- I was going to sell them some stuff and
16 they -- and they wasn't nobody there. So I -- I hit on
17 the -- I hit on the door, knocked on the door to see if
18 nobody's at home.

19 Q And when you knocked on the door, was there an answer
20 to it?

21 A well, when -- when the light came on I -- I had -- I
22 had seen somebody coming -- coming -- coming to the door.
23 So I ran around to the back to let them know I was out
24 there.

25 Q And -- and when you had previously been at the home of

Kelly Emmanuel Bruton
Direct examination by Mr. Richey

1 these folks, residents, you -- you knew who lived there,
2 correct?

3 A Yes, sir.

4 Q And -- and they didn't have any problem with you while
5 you were working there, correct?

6 A No. Well, when -- when -- when -- when the police got
7 there, he came through the house, came to the back door and
8 found me in the back yard.

9 Q And so you were still there. You didn't, like, run.

10 A No. I didn't run or nothing.

11 Q Because in your mind you did not have any chance to
12 break in the house.

13 A No, sir.

14 Q Okay. And so actually the attempted burglary was
15 because you never got in the house or anything, correct?

16 A No, no, sir. I never did.

17 Q And did you have discussions with your lawyer about
18 investigating your case?

19 A Well, I had -- I had. And they had told me that they
20 were going to do that, but they never did.

21 Q And what exactly did you want them to do?

22 A Well, I mean, I wanted them to get -- to get me the
23 time that -- well -- well, the time I was going to get. I
24 wanted to get the time that I was going to get for that but
25 not for what I didn't do.

Kelly Emmanuel Bruton
Cross-examination by Ms. Schill

1 Q Okay. And what you're saying is that you believe that
2 you were -- you were sentenced as though you done an actual
3 burglary first and got in the house.

4 A Correct.

5 Q And we've talked about the attempt statute and all of
6 that, correct?

7 A Yes, sir.

8 Q So you understand how all of that works, correct?

9 A Yes, sir.

10 Q But you just believe had the facts been presented a
11 little bit differently that you wouldn't have gotten
12 sentenced for actually going in a house.

13 A Right.

14 Q And you discussed that with your lawyers.

15 A Yes, sir.

16 Q Thank you. Answer any questions the attorney general
17 will have for you.

18 CROSS-EXAMINATION

19 BY MS. SCHILL

20 Q Hi. Sir, how are you doing?

21 A I'm doing all right.

22 Q How many times did you meet with Mr. Abusoft prior to
23 your guilty plea?

24 A Give or take, about three or -- about three times.

25 Q Okay. What about Mr. Cheek?

Kelly Emmanuel Bruton
Cross-examination by Ms. Schill

1 A Well, that was the first time I met with him, that
2 time to go to court.

3 Q Okay. Did Mr. Abusaft review discovery with you, any
4 documents?

5 A No.

6 Q Do you recall there being fingerprints of yours found
7 on about the window of the home?

8 A Yes.

9 Q Okay. So Mr. Abusaft or Mr. Cheek did not review any
10 documents pertaining to that?

11 A Well, they didn't show -- they didn't show me none of
12 that.

13 Q Okay. What about any video, any home video from --

14 A No.

15 Q -- the U.P.S. package that you were found with?

16 A Excuse me?

17 Q The U.P.S. package you were found with. Was there any
18 video regarding that?

19 A No. I never -- I never seen nern, but I know what you
20 talking about.

21 Q Okay. So I just want to go over a little bit about
22 what your explanation was for being on the property. So is
23 it your testimony that you were selling items to the owners
24 of the home? Is that what you're testifying?

25 A I was -- I was coming -- I was coming to their home to

Kelly Emmanuel Bruton
Cross-examination by Ms. Schill

1 sell them -- sell them some stuff that I had.

2 Q Okay. So were they aware that you were coming, or
3 were you just knocking on the door?

4 A No. I was -- I had -- I had to be in the area and
5 I -- I stopped by there.

6 Q Okay. Did you only go to their home to sell items or
7 were you kind of knocking on doors around the neighborhood?

8 A Well, I was going to different doors, people's doors,
9 that I know.

10 Q Okay. Of people that you know?

11 A Yes, ma'am.

12 Q Okay. So was there a need to be around the bathroom
13 window in order to sell the items that you were selling?

14 A Because I -- I see -- I had seen the light come on in
15 the back, and I ran around to the back to -- not to let
16 them know I was out there and...

17 Q Okay. So it's your position that you were standing by
18 the bathroom window, touching the bathroom window to let
19 them know that you were --

20 A No. I was -- I was knocking on the window. I was
21 knocking on the window because I seen the light come on,
22 and I ran around to the back. And I -- when I knocked on
23 the window I didn't realize -- I didn't realize that --
24 that she was -- wasn't nobody -- wasn't nobody. I didn't
25 realize she was in there really, and so I just knocked on.

Kelly Emmanuel Bruton
Cross-examination by Ms. Schill

1 But I had knocked on the doors, all four doors, of that.

2 Q So is it your testimony that you did not attempt to
3 open the window?

4 A No. I -- I did not -- I didn't have no intention of
5 opening the window.

6 Q Okay. Do you recall being found hiding between or
7 around the air conditioning unit?

8 A No. I wasn't -- I wasn't hiding. When the -- when
9 the police came through the door, the front door, and came
10 through the back, he found me out there in the yard. And
11 he just -- he told me to put my hands behind my back, and
12 that was it, and put the handcuffs on me, and that was it.
13 But I never was hiding.

14 Q So are you saying you were in just an open area of the
15 back yard that's fenced in?

16 A Yeah. It's fenced in. It's a -- it's a -- it's
17 fenced in, and I was back there in the back.

18 Q Do you recall telling the judge at your guilty-plea
19 hearing that you agreed with the solicitor's version of the
20 facts?

21 A I can't recall but I -- it was -- it was something
22 like that, but I believe because they had handed down on me
23 what they had handed down, was a -- a life sentence they
24 ever had handed down. But that's the reason why I did
25 that.

Kelly Emmanuel Bruton
Cross-examination by Ms. Schill

1 Q Okay. But you recall -- do you recall the solicitor
2 stating the facts of the events that occurred for the Court
3 during your guilty-plea hearing?

4 A Uh-uh.

5 Q No.

6 A No.

7 MS. SCHILL: Beg the Court's indulgence, Your Honor.

8 (Pause.)

9 Q Would it help you if I handed you a copy of your
10 transcript and had you look at your transcript?

11 A Yes.

12 Q Okay. I'm going start by turning to page 13. I'm
13 sorry. Page 11. Page 11, line 17, is where solicitor
14 McFarland started going over the facts of your case, and
15 it's around page 13 if you want to take a look at that and
16 see if that refreshes your recollection.

17 A Excuse me. Why -- I -- I want to know what -- what
18 this -- I wasn't coming here for this right here.

19 Q I'm sorry? Do you agree that this is a transcript
20 from your guilty-plea hearing --

21 A Yes, ma'am.

22 Q -- on August 7th of 2018?

23 A Right.

24 Q Okay. So would you agree that this reflects what was
25 said at your guilty-plea hearing?

Kelly Emmanuel Bruton
Cross-examination by Ms. Schill

1 A Oh, yeah, of course. Of course this -- this was my --
2 this was one of my -- my cousin, yes, yes, ma'am.

3 Q Okay. This is your guilty-plea hearing, correct?

4 A Yes, ma'am.

5 Q Okay. Yes. So I don't -- take a look at pages 11
6 through 13 just to look at the facts and then -- and then
7 let's see here.

8 Then the judge asks you if you agree with those facts,
9 on specifically at page 14, lines four through six. Four
10 through eight. Excuse me. And the Court asked, "Do you
11 agree that's what happened?" What did you respond with?

12 A "Yes."

13 Q Okay. Do you recall telling the judge at your
14 guilty-plea hearing that no promises were made to you in
15 exchange for your guilty plea?

16 A Yes.

17 Q Do you recall telling the judge that you were not
18 threatened or coerced into pleading -- pleading guilty?

19 A I -- I don't -- I don't recall that.

20 Q Okay. Let me go to page eight beginning at the very
21 end, line 25.

22 Court says, "Anybody threatened you or coerced you or
23 promised anything to get you to enter your plea today?"

24 And you responded on line five.

25 A Yes.

Kelly Emmanuel Bruton
Cross-examination by Ms. Schill

1 Q You said -- what did you say on line five?

2 A Oh, "I am sure." Line five? You said what?

3 Q Page nine, line five.

4 A Oh, page nine. I'm on eight.

5 Q I'm sorry.

6 A "No, ma'am."

7 Q Okay. Do you remember giving up your constitutional
8 rights at your plea hearing?

9 A No.

10 Q You don't recall that?

11 A No.

12 Q We're going to go back to page five starting on line
13 five.

14 Court says, "when you do that, Mr. Bruton, you're
15 waiving very important constitutional rights. Not only do
16 you waive your right to have a trial by jury. You also
17 waive your right to confront witnesses against and your
18 right to remain silent. Do you understand?"

19 A Okay.

20 Q And line 11, you respond with?

21 A "Yes."

22 Q Okay.

23 A Okay.

24 Q Do you recall telling the judge that you're satisfied
25 with your representation?

Kelly Emmanuel Bruton
Cross-examination by Ms. Schill

1 A Yes, ma'am.

2 Q Do you recall telling the judge that you were freely
3 and voluntarily pleading guilty?

4 A Yes.

5 Q Do you recall telling the judge that you do not have
6 any questions regarding the sentences for which you are
7 pleading guilty?

8 A Yes.

9 Q Okay.

10 MS. SCHILL: Beg the Court's indulgence, Your Honor.
11 (Pause.)

12 Q Do you recall what time the alleged -- the attempted
13 burglary occurred?

14 A No.

15 Q What time it was?

16 A No.

17 Q Okay. Do you recall it being nighttime?

18 A No.

19 Q No. Okay.

20 MS. SCHILL: Beg the Court's indulgence, Your Honor.
21 (Pause.)

22 Q I'm just going to have you turn to page 12 of your
23 transcript. On line ten it says, "On February 24th of 2017
24 at 11:57 p.m." Does that refresh your recollection?

25 A I mean, that's -- that's what he said. I don't know

Monier M. Abusaft
Direct examination by Mr. Richey

1 what time it was.

2 Q But you just testified that you agreed to those facts,
3 correct?

4 A Right, right.

5 Q So you acknowledge that you agreed to the solicitor's
6 version of the facts at your guilty-plea hearing, correct?

7 A Okay.

8 Q Okay.

9 MS. SCHILL: No further questions, Your Honor.

10 MR. RICHEY: No further questions.

11 We call Mr. Abusaft.

12 MONIER M. ABUSAFT, having been
13 first duly sworn, testified as follows:

14 DIRECT EXAMINATION BY MR. RICHEY

15 Q Sir, will you state your name, please?

16 A Monier Abusaft.

17 Q And, sir, do you recall representing Mr. Bruton?

18 A Yes.

19 Q And on the charges that were articulated to the Court
20 earlier?

21 A Yes, sir.

22 Q Okay. And you know there's a claim that --
23 Mr. Cheeks, James Cheeks, represented him also, is that
24 correct?

25 A Yes.

Monier M. Abusoft
Direct examination by Mr. Richey

1 Q And-but was your duties primarily the representation
2 and Mr. Cheeks helped you at trial, or was there a trial?
3 I'll put it that way.

4 A There was not a trial.

5 Q At the plea.

6 A Yes. Mr. Cheeks -- Mr. Cheek became involved before
7 the plea.

8 Q So you would be the lawyer that would have done any
9 investigation or talked to him primarily about the case, is
10 that correct?

11 A Yes.

12 Q And you heard there was a case -- that you failed to
13 investigate his case. And that centers around the
14 relationship that he had with these people at this home.
15 Do you understand what I'm saying, the question?

16 A No.

17 Q Well, let me say this.

18 Did you -- can you tell me your investigation into the
19 case, what type investigation you done?

20 A Sir, I remember going out to the scene, I believe. It
21 has been awhile ago, but I believe I went out to the scene.
22 But most of my -- there was not much to investigate
23 independently.

24 Mr. Bruton gave me -- it was mostly about dealing with
25 the objective evidence such as the handprint on the window.

Monier M. Abusoft
Direct examination by Mr. Richey

1 They record the video recording of Mr. Bruton's stealing
2 packages off the porch from these people.

3 Q And there was -- I think there was no issue of whether
4 he went in the home, is that correct? It was basically he
5 was outside of the home the entire time, correct?

6 A Yes.

7 Q Okay. And -- and do you believe that that fact helped
8 him during sentencing, that he did not go in the house?

9 A It was an attempted burglary, so I think as part of
10 the crime it was known that he did not go into the house.
11 I mean, it was -- that -- that was not a fact hidden from
12 the judge.

13 Q And so you believe that you done an adequate
14 investigation on this case.

15 A Yes.

16 Q And that -- and that anything that was favorable to
17 him, you uncovered it -- or you uncovered it, correct?

18 A Yes.

19 Q And there was not an issue -- let me rephrase that.
20 You had enough time to speak with him, correct?

21 A Yes. I spoke to him on multiple occasions at length
22 mostly centered around his belief that because he didn't go
23 in the house he basically wasn't -- he wasn't guilty of a
24 crime. And so I spent at length talking to him about that
25 that was not the current state of the law.

Monier M. Abusoft
Cross-examination by Ms. Schill

1 Q You talked to him about attempt and all of that stuff
2 and attempt in terms of punishment, all of that, correct?

3 A Yes. At length.

4 Q And that was -- and that was -- that was a major issue
5 in him understanding his case?

6 A It was. It was a major issue.

7 Q Thank you. Answer any questions the attorney general
8 has.

9 CROSS-EXAMINATION

10 BY MS. SCHILL

11 Q Hi. Mr. Abusoft, how are you doing?

12 A Fine.

13 Q Thanks for being here. I just have a few questions.
14 How long have you been practicing law?

15 A Five years.

16 Q Okay. How much of that has been criminal law?

17 A I clerked here at the trial court for Mark Hayes
18 most -- well, doing both civil and criminal. I was at the
19 Supreme Court for a clerk for Costa Pleicones where we
20 reviewed a multitude of cases including criminal work.

21 And then after that I was at the York County Public
22 Defender's Office doing all -- all but for a very short
23 while general sessions work.

24 And I've been here in Spartanburg County, so, Public
25 Defender's Office since then doing all general sessions

Monier M. Abusoft
Cross-examination by Ms. Schill

1 criminal work.

2 Q Okay. So if you'd estimate how long you've been at
3 the P.D.'s office.

4 A Between the two offices probably three years.

5 Q Okay. Just so it's clear for the record, you were
6 appointed the case.

7 A Yes.

8 Q Okay. Do you recall the facts about this case?

9 A Yes.

10 Q Do you -- give a brief summary of those facts for us.

11 A Mr. Bruton went over to a couple's home. He -- his
12 handprint was found, basically a full palm print found, on
13 the back window at trial we thought we would have to deal
14 with. The palm print looked as if someone was trying to
15 lift, press up against and lift, the back window up.

16 He then went around to the front door, banged on the
17 door, startled the wife who had her child in the home alone.

18 He also went inside a vehicle that was parked at the
19 home.

20 Police were called. Mr. Bruton was found in the back,
21 what the government would have suggested hiding behind an
22 A.C. unit that was pulled out.

23 At some -- at some time before this he had went onto
24 their porch and taken boxes that were left there by a
25 delivery service, which was caught on tape by a

Monier M. Abusoft
Cross-examination by Ms. Schill

1 neighborhood's video camera.

2 Q Okay. I'm sorry. Were you going to say something
3 else?

4 A No. I think that's largely what happened.

5 Q Okay. Did you discuss the applicant's version of the
6 facts with him? Did he give you a different story?

7 A Yes. He gave me -- his story revolved around that he
8 was going to sell some items. And I can't remember. His
9 version of the facts were kind of incoherent, were always
10 incoherent.

11 He started off -- somehow he started off in the back
12 and, I don't know, was trying to get somebody, was trying
13 to -- I mean, he had seen the woman in the back, so he was
14 trying to get her attention. That's why his palm print was
15 on the window.

16 Then he went to the front. And at this point I've
17 forgotten why he was then hiding behind an A.C. unit. And
18 there was never a really understandable version of why he
19 was -- he had been in their home.

20 Q Did you review discovery with applicant?

21 A Yes. I did multiple times.

22 Q What discovery did you have at that point?

23 A I had everything that I believed there was to have.

24 I know I went over discovery with him a lot because
25 that was -- that was the -- we were planning on going to

Monier M. Abusoft
Cross-examination by Ms. Schill

1 trial. Basically, all the way up until the plea I was
2 expecting to go to trial. And I went over the facts with
3 him, and the evidence, because it was -- you had to explain
4 how you have a full handprint on the back window and you
5 weren't trying to get in the window.

6 You know, I had -- you know, we had to -- explain to me
7 why -- why are you -- why -- is there physical evidence of
8 you being in these people's car. So that was most of our
9 conversation spent going over discovery to try to explain
10 away these things that we were going to have a position at
11 trial.

12 Q Okay. Did you have a conversation with him regarding
13 the consequences and advantages and disadvantages of
14 pleading guilty versus going to trial?

15 A Absolutely, I did. I had that conversation with him
16 multiple times because if I -- my recollection is that he
17 was noticed for life without -- without the possibility of
18 parole.

19 He took the position that he just was not pleading
20 guilty, he didn't go in that house.

21 So I -- so early on I told him I think this is the
22 wrong decision but, you know, I'm a trial lawyer and if you
23 want to try the case, I'll give you the best trial that you
24 can possibly have. So I went forward.

25 And then I believe he spoke to Mr. Cheek and then he

Monier M. Abusoft
Cross-examination by Ms. Schill

1 had a -- he had a U-turn, a change of heart. And I spoke
2 with him again about the consequences of the plea and what
3 he would -- what he was protecting himself from by not going
4 to trial.

5 Q Okay. So I just want to verify. So did -- did the
6 applicant say pretty much from the beginning that he was
7 selling items there and he was -- you know, thought he had
8 some sort of defense based on that?

9 A Yes.

10 Q Okay. So did he ever tell you prior to pleading
11 guilty I don't want to plead guilty because I want to go to
12 trial and pursue this defense?

13 A From the beginning he wanted to go to trial, and then
14 he -- and then I think he spoke with Mr. Cheek and had --
15 and told him. I don't know. I wasn't a part of that
16 original conversation but I got -- I did tell him from the
17 very beginning it was my position that he was -- he was
18 going to lose his case.

19 And then he spoke with Mr. Cheek, and I think Mr. Cheek
20 had also told him that. I can't -- that would -- that's my
21 impression. And then he wanted to go, and then he wanted to
22 plead very much so.

23 Q Okay. Do you think it was in the applicant's best
24 interest to plead guilty?

25 A Yes.

Monier M. Abusoft
Cross-examination by Ms. Schill

1 Q If applicant had still wanted to go to trial, what
2 would you have done?

3 A We would have went to trial.

4 Q Okay.

5 MS. SCHILL: Beg the Court's indulgence, Your Honor.

6 (Pause.)

7 Q Did the applicant ever tell you that he had a
8 preexisting relationship with the people who lived in that
9 home?

10 A Yes.

11 Q Okay. What was the relationship?

12 A He -- I believe that what he told me was that he had
13 done some lawn work for them in the past.

14 Q Okay. Was this one occasion or many occasions?

15 A I believe it was one or two occasions, something like
16 that. I think I alluded to it in the mitigating -- when I
17 was talking to the judge.

18 It wasn't like there was a continuing commercial
19 relationship, but I believe on one or two occasions he
20 claimed that he had done work for them.

21 Q Okay. So, but then on the night in question he was
22 claiming to sell items, nothing related to landscaping or
23 anything like that.

24 A Yes.

25 Q Okay.

Monier M. Abusoft
Cross-examination by Ms. Schill

1 MS. SCHILL: Beg the Court's indulgence, Your Honor.

2 (Pause.)

3 Q Did you ever speak to the victims in this case?

4 A No.

5 Q Why not?

6 A I took -- I took his -- I took his factual position.
7 I believe I tried to, and as I always do, but usually
8 getting ahold of the victims before trial is a difficult
9 thing. They've usually been instructed by the solicitor's
10 office that they don't have to speak with me.

11 So, but I believe I -- I believe I tried but I -- it
12 wasn't overly important in my mind because I took him at his
13 word and I was going to bring out at trial didn't he -- he
14 worked for you, didn't he, and we would -- we would have saw
15 where that went. But, no, I did not speak with them before
16 trial.

17 Q Okay. Just to clarify. What do you mean by you
18 tried? Did you call and leave messages or did you call and
19 not leave messages? What was your attempts?

20 A I believe I would have went through and tried to find
21 any contact information for the victims. That is -- that
22 is my regular practice to see if there are any documents,
23 has it been left in the discovery. Oftentimes that
24 information is scrubbed out of the discovery by the
25 solicitor's office. But, as I said, I went by -- I did go

Monier M. Abusaft
Cross-examination by Ms. Schill

1 out to the scene. I can't say a hundred percent if I
2 called them, but I believe -- I believe I did try to call
3 them. I know I did not get in touch with them.

4 Q Okay. You mentioned earlier and just now that you had
5 went back to the scene. So you went back to their home.
6 Is that -- are you testifying that you attempted to contact
7 them there as well?

8 A I can't remember. I can't remember if I went and
9 banged on their door or not. Yeah. I can't say if I
10 banged on the door or not.

11 Q Okay.

12 MS. SCHILL: No further questions, Your Honor.

13 MR. RICHEY: No other questions.

14 THE COURT: Step down.

15 MR. RICHEY: We've got no other witnesses.

16 MS. SCHILL: Your Honor, the state would like to call
17 James A. Cheek.

18 MR. RICHEY: Judge, at this point I'm going to object
19 to this witness testifying.

20 I don't believe -- before we get started, I don't
21 believe the state can lay a proper foundation that his
22 testimony goes towards the issue in this case. The issue
23 in the case is failure to investigate.

24 It's my understanding that Mr. Abusaft done all the
25 investigation. I don't believe the state can lay a proper

1 foundation for the admissibility of his testimony.

2 THE COURT: Well, we'll see if they can.

3 MR. RICHEY: Thank you, Your Honor.

4 MS. SCHILL: I'm sorry, Your Honor?

5 THE COURT: He's objecting to him testifying --

6 MS. SCHILL: Yes.

7 THE COURT: -- because he says that the only
8 allegation the applicant is presenting is a failure to
9 investigate and that the only person that would have been
10 obligated to do that investigation was Mr. Abusoft.

11 However, as I understand it, Mr. Cheek was
12 representing him at the time of the entry of the plea?

13 MS. SCHILL: Correct, Your Honor.

14 THE COURT: So I'm assuming he'd have the same
15 obligation, wouldn't he?

16 MS. SCHILL: We were just planning to -- it was just
17 going to be brief. So Mr. Abusoft made a comment about
18 Mr. Cheek having a conversation with applicant that
19 essentially made, persuaded applicant to plead guilty as
20 opposed to going to trial, so.

21 THE COURT: Okay. Certainly.

22

23

24

25

James A. Cheek
Direct examination by Ms. Schill

1 JAMES A. CHEEK, having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MS. SCHILL

4 Q Mr. Cheek, thanks for being here. This is just going
5 to be brief. I just wanted to ask you.

6 You just heard Mr. Abusoft testify about a
7 conversation you had with the applicant and that previously
8 the applicant had wanted to proceed to a trial and then he
9 spoke with you and wanted to plead guilty.

10 Could you just tell me a little bit about that
11 conversation and what you had told the applicant?

12 A First of all, my name is James Cheek. I'm an attorney
13 with the Spartanburg County Public Defender's Office. I've
14 been there now 15 years.

15 My job with the public defender's office is to assist
16 the other attorneys who are labeled the trial attorneys with
17 moving forward with their cases in the event that the client
18 indicates any desire to enter a guilty plea.

19 I do investigations into the situation, find out where
20 we are with the moving towards any kind of plea offers in
21 the case and if the client is comfortable with moving
22 forward with the plea as opposed to going to trial. Then I
23 become actively involved.

24 Structurally, the courthouse has what is known as a
25 jail holding room right next to the court area, the general

James A. Cheek
Direct examination by Ms. Schill

1 sessions area.

2 There are usually a number of clients in there, both
3 our clients and other clients. And although we tell people
4 that they should not discuss their case with other inmates,
5 on the day of Mr. Kelly Bruton's being seated in the jail
6 room he was discussing his case with other inmates in
7 there, and I listened. I didn't interfere with him. I
8 didn't interrupt him.

9 And finally I said I need to talk with you because
10 you're talking too much. And he asked me why. I said
11 because you said some things that even I'm sitting here
12 listening, you're contradicting yourself and we need to get
13 in contact with Mr. Abusoft because you're contradicting
14 yourself because you're saying some things that only makes
15 sense to a fool and you cannot say these kind of things in
16 a courtroom.

17 And I went and found the solicitor. I got the file.
18 I looked through it myself. I read the statements.

19 Mr. Kelly Bruton was telling people he used to work
20 for those people. Well, when you read the incident report,
21 as you investigate the case, you see that the people had
22 not lived there long enough for him to have been raking
23 leaves when he said he was raking leaves on these people's
24 yard. They hadn't been there for a fall season.

25 In addition to that, he knew the kind of car that the

James A. Cheek
Direct examination by Ms. Schill

1 male partner drove, the white car. well, he said his only
2 contact was with that person..

3 He goes over there at night to see the person he'd
4 been dealing with because he'd never met the woman who
5 lived in the house. Really didn't understand she lived
6 there.

7 He saw the white car was gone and he went over there
8 and he knocked on the door. He looked in the window. He
9 ran to the other door.

10 I asked him. I said if you're going to -- let me talk
11 to you. I took him aside to another room. I said,
12 "Mr. Bruton, from what you're telling these dudes in here,
13 if you went over there to sell them some things, where were
14 the things that you took over there to sell?" He had no
15 answer.

16 And I asked him also if you knew the man drove that
17 car, why would you go over there at night to talk to him to
18 sell him something when his car was not there. He had no
19 answer.

20 And I told him then I needed to get Mr. Abusaft over
21 here, I need to go to the solicitor, you will be looking at
22 life, you will be served with a life notice, do you know
23 how long you're going to live. He said no. I said you're
24 right, because you would not outlive a life sentence, this
25 is serious business, we need to look at this whole

James A. Cheek
Direct examination by Ms. Schill

1 situation.

2 So I went and got the solicitor's file. I came back.
3 I anticipated Mr. Abusaft coming to the courthouse. I went
4 through all of the reports with him, all the statements.

5 I asked him who knocks on a window with their palms.
6 Nobody. I told him that's not really anything women do and
7 certainly anything men do. It's very feminine to be
8 pecking on a window if you're trying to get somebody's
9 attention, and what would be pecking on a window.

10 He seemed to start opening his mind up and start
11 understanding that this is not something to be played with,
12 this is his life.

13 I explained it to him and asked him to sit down. I
14 went through his rights with him, his constitutional
15 rights.

16 I went through him -- with him the facts of the case,
17 what his testimony would have been, and as well as his
18 criminal history, and asked him if he was certain if he
19 wanted to go to trial. He said no.

20 We came in for the plea. Mr. Abusaft spoke. There
21 was some concerns that Mr. Abusaft had about some things
22 being in writing, he wanted to introduce some things in
23 writing to make sure he understood.

24 I don't know if that was necessary. We approached the
25 Court and we went back and continued with the plea. And in

James A. Cheek
Direct examination by Ms. Schill

1 our mitigation we went over everything. I explained what I
2 thought the involvement was, the contemplation of our
3 client, what his experience had been in working and living
4 in the community and what I thought he was as far as any
5 continued danger to the community, especially with the kind
6 of facts that I learned the prior cases had been he pled
7 guilty to.

8 Given those circumstances, the judge gave him the
9 least possible sentence in the case, which is 15 years. He
10 could not get anything less than that. He wanted something
11 less than that, because he also had some concerns and
12 advice from other inmates that he had not really been
13 originally charged with a life-notice situation.

14 He wanted to try to go back to a burglary in the
15 second degree, which may have saved him a little time. But
16 the state was adamant they were not going to do it. I
17 talked to Ms. Bozarth. She was not going to reduce it to
18 anything less than that.

19 Q Okay.

20 MS. SCHILL: No further questions, Your Honor.

21 MR. RICHEY: No questions.

22 THE WITNESS: Thank you.

23 THE COURT: Step down.

24 MS. SCHILL: Nothing further from the state.

25 THE COURT: Anything else?

1 MR. RICHEY: Nothing, Your Honor.

2 THE COURT: All right. I'll review the transcript and
3 issue an order.

4 END OF REQUESTED TRANSCRIPT OF RECORD

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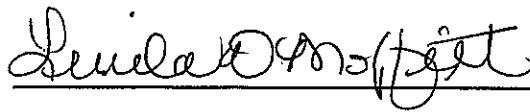
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CERTIFICATE

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 Common Pleas Court for Spartanburg County, South Carolina, on the 15th day of July 2019.

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

November 9, 2019

A handwritten signature in cursive script, reading "Linda D. Moffitt", is written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Kelly E. Bruton,
S.C.D.C. No. 227598,

Case No.: 2019-CP-42-00161

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of Applicant's post-conviction relief (PCR) application filed January 14, 2019. Respondent made its return and motion to dismiss March 20, 2019. On May 14, 2019, the Honorable Grace G. Knie issued a Conditional Order of Dismissal. On June 14, 2019, Judge Knie issued an Order to Vacate Conditional Order of Dismissal due to the fact that Judge Knie presided over Applicant's plea hearing. An evidentiary hearing on the matter was convened on July 15, 2019, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Brianna L. Schill, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Monier M. Abusaft and James A. Cheek, Esquires, Applicant's plea counsels (collectively Counsel(s)), testified for the State. For the reasoning below, this Court now denies and dismisses the application with prejudice.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted on the January 2018 term of the Spartanburg County Grand Jury for attempted burglary, first degree (2018-GS-

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42-00160), petit larceny (2018-GS-42-00161), and breaking into a motor vehicle (2018-GS-42-00162). Monier M. Abusoft, Esq. and James A. Cheek, Esq. represented Applicant. Elizabeth McFarland, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On August 7, 2018, Applicant pled guilty as indicted. Accepting terms negotiated between Applicant and the State, the Honorable Grace Gilchrist Knie sentenced Applicant to imprisonment for concurrent terms of fifteen years for attempted burglary, ten years for petit larceny, and five years for breaking into a motor vehicle. Applicant did not appeal his plea or sentence.

II. SUMMARY OF FACTS ADDUCED AT APPLICANT'S GUILTY PLEA HEARING

The underlying facts of the crimes for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

As to the [petit] larceny, on May 3rd, 2017, Officer Hayden with the Greer Police Department responded to [REDACTED] East Fairview Avenue within the city limits of Greer and in Spartanburg County in response to a petit larceny of a UPS package on a back porch. Upon his arrival, he met with the complainant, Manqual Norman, the spouse of the victim, Shameika Norman.

Manqual stated that his video surveillance system captured the Defendant, Kelly Bruton, walking past his front yard and into his backyard around noon. The video shows the Defendant stealing items out of his wife's package that had just been delivered to the [back] porch. The video shows the Defendant picking up the box, and transferring the items within the box to his plastic bag. The total loss to the victim was \$79.74 for the 17 stolen perfume and lotion items.

As to the burglary and breaking into motor vehicles charge, on February 24th, 2017, at 11:57 PM, Officer Ruize with the Greer Police Department responded to a residence located at [REDACTED] Oak Street within the city limits of Greer in Spartanburg County in reference to a burglary in progress.

The victim reported that she had just woken up to someone knocking on her door, and that someone got through her 7-foot tall privacy fence, and was in her backyard. She could hear someone attempting to open the bathroom window, which was connected to her bedroom. She then called the police, and ran to her infant's son room to make sure that he was okay.

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Police arrived on scene minutes later. Upon getting entry to the backyard, Officer Ruize, Ruize found the Defendant, Kelly Bruton, on his hands and knees hiding behind the air conditioning unit, which is in the corner of, of the victim's backyard close to the exit gate. The screen to the bathroom window had been ripped off. Officer Ruize drew his gun, and police detained the Defendant. Upon searching the Defendant, they did find a crack pipe. Police also recovered a package from outside the fence, and the victim stated that it was a package from outside the fence, and the victim stated that it was a package that was in her car. She intended to send it to her mother. It was originally on the passenger seat of her vehicle to be taken to the Post Office.

Fingerprints were taken from the vehicle, and from the bathroom window, and both came back as matching the Defendant, Kelly Bruton. The fingerprints from the window show the positioning of the Defendant's hands as he was attempting to lift it open, and he does have a prior record, Your Honor.

(Tr. 11-13). Upon inquiry by the Court, Applicant confirmed the above articulated facts. (Tr. 13-14).

III. ALLEGATIONS

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

1. "Ineffective Assistance of Counsel"
 - a. "Counsel was ineffective for advising client that he would face potential life sentence if he goes to trial, based on plea counsel erroneous advice client plea guilty"
 - b. "Counsel was ineffective for not move to quash the indictment of a 1st degree burglary. S.C. Code Ann. 17-19-90 (2003)"
 - c. "Counsel was ineffective where as counsel advised client to plea guilty to the crime charged in the indictment, but not to a lesser included offense of the crime charged in the indictment."
 - d. "Counsel was ineffective for not object[ing] to the Solicitor read off the [victim] statement when the [victim] wasn't there in court. Review guilty plea transcript."
 - e. "Counsel was ineffective when client request jury trial but for Counsel error, the result of a trial would have been different"
 - f. "Counsel was ineffective for failure to investigate facts of the case. Counsel would know there was never a 1st degree Burglary instead attempted burglary."
2. "Subject Matter Jurisdiction"

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- a. "Circuit Court doesn't have subject matter jurisdiction unless 1. There have been indictment which sufficiently state the offense, 2. There has been a waiver of the indictment, 3. The charged is a lesser included offense of the crime charged in the indictment." Applicant thereafter cites to State v. Knuckles, 348 S.C. 593, 560 S.E.2d 426 (Ct. App. 2002) reversed by 354 S.C. 626, 583 S.E.2d 51 (2003).¹

At the outset of the evidentiary hearing, Respondent indicated PCR counsel previously notified Respondent that Applicant would be amending his allegations to include only an allegation for failure to investigate. PCR counsel confirmed Applicant would be only going forward on a failure to investigate claim.

IV. TESTIMONY

a. *Applicant's Testimony*

Applicant testified Cheek and Abusoft represented him in this case. Applicant testified he believes Cheek and Abusoft failed to investigate his case, particularly his first-degree burglary charge. Applicant testified this case arises out of an incident in which he was found somewhere near the scene of an alleged attempted burglary. Applicant testified if Cheek and Abusoft properly investigated his case, they would have determined there was never a burglary.

Applicant testified he used to work for the homeowners that were allegedly burglarized, and that they did not have any problems with Applicant when he worked for them. Applicant believes this preexisting relationship would have helped his case and helped him in mitigation. Applicant claimed his purpose for being at the house that night was to sell them "some stuff." Applicant testified he knocked on the front door, but realized no one was home. However, Applicant also testified a light came on within the home so he ran to the back of the house to tell them he was out there.

¹ Applicant cites the case as State v. Bruton, but the reporter citations both pertain to Knuckles.

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Applicant testified when the police arrived at the house, officers found him in the backyard. Applicant denied he ran from police. Applicant testified he did not intend to break into the house. Applicant testified he discussed investigating the crime with Cheek and Abusaft, but that they did not investigate. Applicant further testified he believed he faced a sentence that was consistent with first-degree burglary as if he had actually entered the home. Applicant testified if the facts had been presented differently, he would have received a lower sentence.

On cross-examination, Applicant testified he met with Abusaft about three times prior to his plea. Applicant testified he met with Cheek for the first time on the day of his guilty plea hearing. Applicant testified Abusaft did not review discovery with him. Applicant recalled the existence of handprint and video evidence, but denied either Abusaft or Cheeks reviewed this evidence with him.

Applicant testified he went to the house to sell the owners "stuff." Applicant testified the homeowners did not know ahead of time that he was coming, but that he was just in the area and stopped by. Applicant testified he also went to other houses to sell items that day. Applicant reiterated that he ran to the back of the home after he saw light turn on from inside the home. Applicant testified he knocked on the bathroom door window at the back of the home to let the owners know he was there. Applicant testified he had no intentions to open the window. Applicant denied hiding behind the air conditioning unit when police officers arrived at the scene. Applicant testified police officers found him in the open backyard.

Applicant was provided with a copy of his guilty plea transcript. Applicant confirmed the transcript he was given was the transcript from his guilty plea hearing. Applicant testified the transcript accurately reflects what was said at his guilty plea hearing. Applicant testified, according to the transcript, he agreed with the Assistant Solicitor's version of the facts of his guilty

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plea hearing. Applicant testified he recalled telling the judge that no promises were made in exchange for his guilty plea. After reviewing the transcript once again, Applicant testified he told the plea court he was not threatened or coerced into pleading guilty. After reviewing the plea transcript, Applicant testified he gave up his constitutional rights at his plea hearing. Applicant recalled telling the plea court he was satisfied with his representation from Cheek and Abusaft. Applicant recalled telling the plea court he was pleading freely and voluntarily. Applicant recalled telling the judge he did not have any questions about the offenses to which he was pleading guilty. Applicant testified he did not recall the incident occurring at nighttime. Applicant testified the plea transcript indicated the incident occurred at night time, but that he still could not specifically recall that the incident occurred at nighttime.

b. Abusaft's Testimony

Abusaft testified he visited the scene of the incident, but otherwise there was not much to investigate. Abusaft testified the case was mostly about dealing with objective evidence including the handprint evidence and the video footage of Applicant stealing packages from the porch. Abusaft testified it is his usual business practice to attempt to find contact information for the victims and contact them. Abusaft testified he likely attempted to do so in this case, but could not recall specifically. Abusaft testified it is usually hard for defense counsel to successfully contact victims because the Solicitor's Office advises them not to answer calls from defense counsel. Abusaft testified he believes he attempted to make contact with the homeowners when he went to visit the scene. Abusaft testified there was no dispute as to whether Applicant went to the house. Abusaft testified he believed he performed an adequate investigation. Abusaft testified he had enough time to speak with Applicant regarding his case. Abusaft testified he spoke to Applicant on multiple occasions about Applicant's belief that he was not guilty of the crime because he did

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not go into the house. Abusaft said he spent a lot of time explaining to Applicant that his belief was not legally correct. Abusaft testified he spent a lot of time discussing possible punishments with Applicant as punishment was the major issue he was having with understanding his case.

On cross-examination, Abusaft testified he has been practicing law for five years, with three years at the public defender's office. Abusaft testified he was appointed to Applicant's case. Abusaft testified he and Applicant discussed Applicant's version of the facts. Abusaft testified Applicant's version revolved around his claim that he was going to sell items to the homeowners. Abusaft testified Applicant's version of the facts was always incoherent.

Abusaft testified he reviewed the discovery many times because he and Applicant were planning to go to trial up until the plea hearing. Abusaft testified he reviewed the evidence with Applicant because he had to explain to Applicant that a full handprint was found on the back window, which contradicted Applicant's assertion that he merely knocked on the window. Abusaft testified he discussed with Applicant the advantages and disadvantages of going to trial versus accepting a plea offer. Abusaft testified Applicant initially took the position that he was not going to plead guilty because he did not go into the house. Abusaft testified he advised Applicant he felt that was the wrong decision, but that if Applicant wanted to go to trial, he would give Applicant the best possible trial he could. Abusaft testified Applicant then spoke with Cheek and had a change of heart.

Abusaft testified he believed it was in his best interest to plead guilty. Applicant testified had Applicant ultimately wanted to go to trial, he would have taken his case to trial.

c. Cheek's Testimony

Cheek testified part of his job is to help the trial attorney if their client wants to plead guilty. Cheek testified he investigates into which plea offers are available. Cheek testified that while

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being held in the jail holding room, Applicant was discussing his case with other inmates although they are told not to. Cheek testified he told Applicant to talk to him, not other detainees, because he was talking too much and he was contradicting himself.

Cheek testified he initially found the Solicitor on the case, got the case file, and read through it. Cheek testified Applicant maintained he used to work for the homeowners. Cheek testified the owners of the home had not been there long enough for Applicant to have been working for them doing lawn work.

Cheek testified he asked Applicant what items he was allegedly selling the owners of the home that day, but Applicant had no answer. Cheek testified he was concerned because entire palm prints were found on the windows, and no one knocks on windows with their entire palm.

Cheek testified he reviewed Applicant's constitutional rights, the facts of the case, Applicant's criminal history, and what Applicant's testimony would have been at trial. Cheek testified Applicant ultimately decided not go to trial. Cheek testified given Applicant circumstances, including Applicant's criminal history, the judge gave him the lowest sentence he could.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the relevant portions of the record and has heard the testimony and arguments presented at the PCR hearing. This Court also had before it the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application, the State's Return, and the plea transcript. This Court has reviewed the plea court record and has heard the testimony of both Applicant and Counsels. The Court finds Counsels' testimony on these issues to be credible, and Applicant's testimony is not credible. This Court has therefore weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as

required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. A PCR applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. 300 S.C. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

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Issue #1: Failure to Investigate Applicant's Case

Applicant alleges Cheeks and Abusoft were ineffective because they did not properly investigate Applicant's case. This Court disagrees and finds Cheeks and Abusoft provided effective assistance in this case.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). 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), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

This Court finds credible Abusoft's testimony that he was primarily responsible for conducting the majority of the investigation for Applicant's case. This Court further finds credible Abusoft's testimony that he went to the scene of the incident. Abusoft reviewed the video footage and handprint evidence. Abusoft's usual business practice to attempt to find contact information for the victims and contact them. Abusoft attempted to make contact with the homeowners when he went to visit the scene. Abusoft also attempted to contact the homeowners by other means. This Court finds credible Abusoft's testimony that he performed an adequate investigation.

Additionally, this Court finds credible Cheek's testimony that part of his duty was to help the

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trial attorney if their client wants to plead guilty. Cheek investigated into which plea offers are available. This Court further finds credible Cheek's testimony that he reviewed Applicant's case file and discussed Applicant's case with him several times.

Moreover, to the extent Applicant argues that he should have received a lower sentence because he did not ultimately go inside the house, and that Abusafi and Cheeks failed to investigate this claim, this Court disagrees. A "person guilty of attempt is punishable as if he had committed the underlying offense." Reid, 393 S.C. at 329, 713 S.E.2d at 276. The "investigation" insisted upon would not have changed anything. Applicant was advised of the fact that he was pleading guilty to attempted burglary in the first degree during his plea proceeding. (Tr. 3, ll. 6-14; Tr. 6, ll. 6-22; Tr. 14, ll. 9-18). Both Counsels and Applicant were aware that Applicant was charged with attempting the burglary; there was nothing further to investigate on that point. The record conclusively refutes any merit to this allegation. Applicant cannot meet his burden of showing any deficiency of Counsels. Accordingly, this Court finds neither Cheek nor Abusafi were deficient, and dismisses and denies this Application with prejudice.

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VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED.

9/20, 2019.


J. DERHAM COLE
Presiding Circuit Court Judge
Seventh Judicial Circuit

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E-258838

FORM 1 (12/87)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Spartanburg)

INDICTMENT FOR BURGLARY
 (DWELLING)

At a Court of General Sessions, convened on NOV 09 1995
 the Grand Jurors of Spartanburg County present upon their oath:

COUNT ONE — BURGLARY IN THE FIRST DEGREE

(DWELLING)

That Kelly Emmanuel Bruton
 did in Spartanburg County on or about August 29, 1995
 willfully and unlawfully enter the dwelling of Linda Carol Benson
 without consent and with the intent to commit a crime therein and the defendant did enter
the dwelling of Linda Carol Benson, [REDACTED] East Arlington Avenue, Greer,
South Carolina, in that the defendant having two (2) prior convictions of
Burglary.

COUNT TWO — BURGLARY IN THE SECOND DEGREE

(DWELLING)

That _____
 did in _____ County on or about _____
 willfully and unlawfully enter the dwelling of _____
 without consent and with the intent to commit a crime therein.

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

[Signature]
 SOLICITOR

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 M. HOPE BLANCHARD

RECORDED

WITNESSES

Perry Bowens

Greer Police Dept.

101 W. Poinsett St.

Greer, S.C. 29650

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURES

ARREST WARRANT
G7048771 ASSESSMENT AND
M.C. CARD MADE

8. TRAFFIC VIOLATIONS COPY

Computer

Computer

ACTION OF GRAND JURY

Keith Waddell

Foreperson of Grand Jury

Date: 8-23-01

VERDICT

Tina P. A.

Foreperson of Petit Jury

Date:

DOCKET NO. 01-GS-42-2306

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

AUG 27 2001

TERM

THE STATE

vs.

Kelly Emmanuel Bruton

Indictment for

BURGLARY, FIRST DEGREE
(Dwelling)

SC Code: 16-11-0311

CDR Code: 0079

Class: FEL/EXM (V)

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

Defendant

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

Defendant

Witness:

C.C.C. PLS. AND G.S.

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M. HOPE BLACKLEY
SPARTANBURG COUNTY

A CERTIFIED COPY

M. Hope Blackley
CLERK OF COURT

SPARTANBURG COUNTY

BY: *C. Bale* D.C.

DATED 2/23/16

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

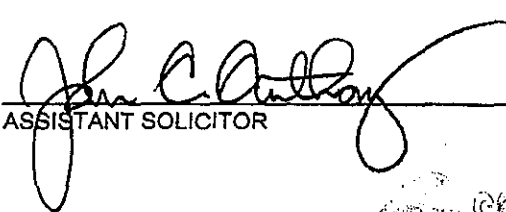
At a Court of General Sessions, convened on AUG 23 2001, the Grand Jurors of
 Spartanburg County present upon their oath:

BURGLARY, FIRST DEGREE**(DWELLING)**

The Defendant, Kelly Emmanuel Bruton, did in Spartanburg County, on
 or about February 22, 2001, wilfully and unlawfully enter the dwelling
 located at [REDACTED] Will Street, Greer, South Carolina without consent and with
 the intent to commit a crime therein, and the Defendant did enter in the
 nighttime, in violation of Section 16-11-311, Code of Laws of South
 Carolina (1976, as amended).

2001 MAR 14 AM 10:53
 CLERK OF COURT
 SPARTANBURG COUNTY
 AL HOPE BLANCHETT

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


 ASSISTANT SOLICITOR

SCANNED

WITNESSES

Perry Boweris

Greer Police Dept.

101 W. Poinsett St.

2. REPORT ENDED
Greer, S.C. 29650

3. CARD FILED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND

ARREST WARRANT NUMBER

G704877 TRAFFIC VIOLATIONS COPY

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 8-23-01

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

01-GS-42-2309

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE

VS.

Kelly Emmanuel Bruton

Indictment for

**BURGLARY, FIRST DEGREE
(Dwelling)**

SC Code: 16-11-0311

CDR Code: 0079

Class: FEL/EXM (V)

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

Defendant

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

Defendant

Witness:

C.C.C. PLS. AND G.S.

A CERTIFIED COPY

CLERK OF COURT

SPARTANBURG COUNTY

BY: C. Doerle D.C.

DATED 2/23/18

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

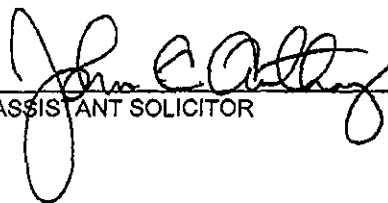
At a Court of General Sessions, convened on AUG 23 2001, the Grand Jurors of Spartanburg County present upon their oath:

BURGLARY, FIRST DEGREE**(DWELLING)**

The Defendant, Kelly Emmanuel Bruton, did in Spartanburg County, on or about March 9, 2001, wilfully and unlawfully enter the dwelling located at [REDACTED] East Bearden Avenue, Greer, South Carolina without consent and with the intent to commit a crime therein, and the Defendant did enter in the nighttime, in violation of Section 16-11-311, Code of Laws of South Carolina (1976, as amended).

2018 MAR 14 AM 10:53
 N. HOPE BLACKLEY
 CLERK

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


 ASSISTANT SOLICITOR

1. SENTENCE **Computer**
2. REPORT ENDED
GREED **Computer**
3. INDEXED
4. CHECKED WARRANTS
5. CHECKED SIGNATURE
6. ASSESSMENT AND FINE CARD MADE
7. TRAFFIC VIOLATION COPY

ARREST WARRANT NUMBER

2017A2320500734

ACTION OF GRAND JURY

JAN 11 2018

True Bill
Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. -

18-GS-42-0160

The State of South Carolina

County of Spartanburg

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

JAN 22 2018

TERM

THE STATE

vs.

Kelly Emmanuel Bruton

Indictment for

**ATTEMPTED BURGLARY,
FIRST DEGREE**

SC Code: 16-11-311 & 16-1-80

CDR Code: 1151

Class

FILED
CLERK OF COURT
Spartanburg County
JAN 11 61 PM 2018
DOPEBLACK21

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

JAN 11 2013

At a Court of General Sessions, convened on _____, the

Grand Jurors of Spartanburg County present upon their oath:

ATTEMPTED BURGLARY, FIRST DEGREE

That the Defendant, Kelly Emmanuel Bruton, did in Spartanburg County on or about February 24, 2017 willfully and intentionally attempt to enter the dwelling located at [REDACTED] Oak Street, Spartanburg, South Carolina without consent and with the intent to commit a crime therein, and that the defendant did enter the dwelling either:

- (1) the Defendant did enter in the nighttime and/or
- (2) armed with a deadly weapon; and/or
- (3) caused physical injury to any person who is not a participant in the crime; and/or
- (4) uses or threatens the use of a dangerous instrument; and/or
- (5) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearms

in violation of §16-11-311 and 16-1-80, *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.


DEPUTY SOLICITOR
Asst.