

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY 19 2020

Appeal from Horry County Court of Common Pleas . S.C. SUPREME COURT
The Honorable William H. Seals, Jr. Circuit Court Judge

2020-000517

Domenic Merino, #350098.....Petitioner,

v.

State of South Carolina,.....Respondent.

APPENDIX

WILLIAM G. YARBOROUGH, III ■ LAUREN C. HOBBS
William G. Yarborough III, Attorney at Law, LLC
308 West Stone Avenue Greenville, SC 29609
(864) 331-1612 • Fax: (864) 370-0022

ATTORNEYS FOR PETITIONER

ALAN WILSON
Attorney General

JACOB A. ISENBERG
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEYS FOR RESPONDENT

INDEX

Index.....	i
Order of Dismissal.....	1 – 18
Amended Return and Partial Motion to Dismiss.....	19 – 29
Amended PCR Application.....	30 – 38
Return to PCR Application and Motion for More Definite Statement.....	39 – 44
<i>Pro se</i> PCR Application.....	45 – 54
Transcript of PCR Hearing held October 8, 2019.....	55 – 102
Transcript of Motion to Enforce Previous Plea Offer Hearing, held April 20, 2015.....	103 – 160
Transcript of Guilty Plea Hearing, held April 20, 2015.....	161 – 200
Motion to Enforce Previous Plea Offer.....	201 – 203
Sentencing Sheets.....	204 – 206
Indictments.....	207 – 208

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Domenic J. Merino,	)	
S.C.D.C. No. 350098,	)	Case No.: 2016-CP-26-06155
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

FILED
HORRY COUNTY
JAN 15 P 3:18
RENEE N. ELY
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Domenic J. Merino ("Applicant") on September 19, 2016, and amended by filing on March 27, 2018. Respondent made its return on or about July 5, 2017, and made an amendment on or about April 13, 2018. The Court convened an evidentiary hearing into the matter on Tuesday, October 8, 2019, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by William G. Yarborough, III, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Ralph J. Wilson, Jr., Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original motion and plea transcripts of April 20, 2015, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the January 2014 term of the Horry County Grand Jury for burglary, first degree (2014-GS-26-00323); and kidnapping (2014-GS-26-00322). Applicant was further indicted at the January 2015 term for armed robbery (2015-GS-26-00361). Ralph J. Wilson, Jr., Esq. represented Applicant, and Thomas G. Terrell, III, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 20, 2015, Applicant pled guilty as indicted. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for concurrent terms of 22 years on each charge.

By and through Counsel, Applicant filed a timely notice of appeal, and offered the following explanation for the appeal:

No issues were raised during the plea at issue in this appeal. The Appellant entered his plea under duress due to the totality of the circumstances depicted in Appellant's Factual Basis for Appeal and imminent trial facing life imprisonment. Following the Appellant's plea was sentencing by the Honorable Judge Benjamin H. Culbertson. The sentence of 22 years per charge concurrently was far harsher than the previous offer to the plea. It is for the foregoing reasons the Appellant requested my office file the Notice of Intent to Appeal and subsequently respond to this court's requests.

The factual basis for appeal there referenced set forth the following:¹

The Appellant was charged with Burglary 1st Degree, Armed Robbery, and Kidnapping in the Horry County General Sessions Court on April 20, 2015. Appellant was set for trial. Additionally, the Court scheduled pretrial motions on the same day. One of these motions was the Motion to Enforce the Previous Plea Deal. [. . .] This motion stated that Appellant received correspondence from Assistant Solicitor [Thomas Groom] Terrell, III on January 9, 2014, extending an offer for Appellant to plead guilty to kidnapping for a negotiated sentence of 13 years. The correspondence stated that the offer must be accepted by February 28, 2014, or it is considered rejected. This plea was extended again verbally by Senior Assistant Solicitor Donna Elder on July 16, 2014. A subsequent offer to plead to [armed] robbery with no recommendation was extended by Senior Assistant Solicitor Nancy Livesay on August 4, 2014. Appellant served a Motion for Ruel 5

¹ Though long, because of its procedural relevance to the claim for relief raised, it is restated here in its entirety.

Disclosure and Brady Material on the state by and through Assistant Solicitor Terrell on February 11, 2014.

On February 11, 2014, I received a response to discovery request containing 80 pages of documents and 1 CD which contained statement[s] from alleged victims, various witnesses, codefendant Paige Martin, and codefendant Kyla Saitta. On March 30, 2015, Appellant was served with a supplemental Brady response enclosing a DVD of a recorded interview of Carl Thomas dated July 23, 2014. This statement was exculpatory in nature. The State does not have the ability to decide what, if any, materials are utilized by a defendant in his defense. Appellant was not given the opportunity to review the evidence in possession of the state at the time the offer was given although it did exist at the time. Appellant would have accepted the plea offer and counsel would have advised him as to the same if Counsel had been aware of this evidence. The Court heard the motion and questioned the State as to why the evidence was not turned over before March 30, 2015, and the State responded with no valid reason. After arguments, the Court denied the Motion to Enforce Original Plea Offer. My argument before the court on behalf of Appellant at the time was simply that the Prosecutor had a duty to deal with Defendant fairly.

Client requested a Notice of Intent to Appeal be filed on his behalf. The Notice of Intent to Appeal was filed and served on behalf of Pro Se Appellant on April 28, 2015.

The reasons stated above and any other reasons Appellant has for filing the action are the subject of this appeal.

By order filed October 22, 2015, the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was issued on November 10, 2015.

Present Application

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

1. "Pursuant to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 23 674, 692 (1984) Applicant was denied his Sixth Amendment right to effective assistance of counsel due to counsel's failure to provide discovery materials under Rule 5."
 - a. "Statements were made by material witnesses that were Rule 5 material that had never been turned over to the Applicant before trial. Had Applicant been advised of these statements by counsel prior to the trial, the Applicant

could have had the opportunity to refute the statements, plan for defense witnesses to refute those statements, and he would have had the opportunity to enter into a knowingly and voluntarily plea negotiation with the State as a resolution. In the alternative, the Applicant would have been able to make an informed and voluntary decision and may have continued on with the trial in lieu of entering a guilty plea. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001)."

- b. "The State made available a plea offer to the Applicant concerning each of the charges. The original plea offer was thirteen (13) years for each: Burglary First, Kidnapping, and Armed Robbery. Although the S.C. Code Ann. Section 16-11-311 states that the penalty is life imprisonment or not less than fifteen (15) years, again, the Applicant was made an offer of thirteen (13) years. Based on the negotiation phase, there is no way to ensure that the Applicant was even remotely capable of entering into any plea voluntarily, knowingly, and intelligently at that point, as is required in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and the South Carolina Supreme Court requires that a defendant must be made aware of the nature and [crucial] elements such as any maximum and minimum penalties and the nature of the constitutional rights being waived. Pittman v. State, 337 S.C. at 599, 524 S.E.2d at 624; Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)."
- c. "Pursuant to Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), which states that "...a defendant is constitutionally entitled to effective assistance of appellate counsel." Applicant will show that his Direct Appeal was abandoned. Applicant will show that he was deprived of his constitutional right to appeal as a direct correlation to appellate counsel's deficient performance and that the applicant was unquestionably prejudiced by that deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005)."

Applicant requests relief as follows:

- "to reconsider sentence, or in the alternative, grant a new trial, or allow for a Belated Appeal pursuant to Wilson v. State, 348 S.C. 215, 599 S.E.2d 581 (2002)."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the

legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Involuntary Guilty Plea

Applicant claims his rejection of the State's prior plea offer was not made knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of the plea and the charges against him or her. Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991); see also Boykin v. Alabama, 395 U.S. 238, 243 (1969) (Courts must make sure defendants have "a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories."). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leake, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Richardson v. State, 310 S.C. 360, 363, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

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). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. 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). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent,

relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” Id. at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly

incredible.”). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

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

1. Failure to Recover Expired Plea Offer

Applicant’s claims are framed in a variety of ways, but all revolve around the singular issue of whether Counsel was ineffective in his efforts to recover the State’s expired offer to plead guilty in exchange for a sentence of 13 years.

The relevant facts of this case are not in dispute. Applicant was extended an offer to plead guilty in exchange for a sentence of 13 years, which initially expired February 28, 2014, and extended again verbally on July 16, 2014. Applicant did not accept the offers. Ultimately, the offer was replaced with an inferior offer on August 4, 2014, to plead straight up to armed robbery without a recommendation. On March 30, 2015, Counsel received a supplemental Brady response which included a recorded interview of Carl Thomas dated July 23, 2014. Counsel then sought to obtain the previously rejected 13-year offer, but the State refused to reinstate the offer. Counsel then filed a motion dated April 14, 2015, asking the court to enforce the previous plea offer because

the State's refusal went "against the spirit of the Memorandum of Chief Justice Toal dated March 1, 2004."

Counsel argued the motion on April 20, 2015, before Judge Culbertson. (Motion Tr. 29-35). Counsel argued that Carl Thomas' statement possessed both exculpatory and inculpatory elements, and thus the State had an obligation to turn the statement over prior to withdrawing a plea offer. (Motion Tr. 29-31). Judge Culbertson inquired as to "any authority that says the State has to turn over all inculpatory and exculpatory evidence prior to withdrawing a plea bargain[.]" and Counsel offered the memorandum issued by Chief Justice Toal on March 1, 2004. (Motion Tr. 31-32). Judge Culbertson noted it was a memorandum, again asked for legal authority, and noted there was no constitutional right to plea bargain, with which Counsel agreed. (Motion Tr. 32-33). The court again asked "what is the legal authority that mandates [the State] leave a plea bargain open until all Brady and Rule 5 disclosures have been made?" (Motion Tr. 33, ll. 11-13). Counsel again offered the memorandum. (Motion Tr. 33, ll. 14-19). Judge Culbertson read the memorandum, and recited part of it into the record:

"I believe that it is unethical to premise a plea agreement on the Defendant relinquishing the right to discovery. It has come to my attention that solicitors in some circuits are offering plea agreements to Defendants on the condition that they forego discovery."

(Motion Tr. 34, ll. 9-14). Counsel argued the language of the memorandum imposed upon the State a duty to turn over all evidence in their possession at the time they extended the plea offer; Judge Culbertson disagreed and denied the motion. (Motion Tr. 34-35). Two of Applicant's co-defendants made similar motions based on similar arguments, both of which were denied. (Motion Tr. 35-40). Applicant ultimately pled guilty and received a sentence of 22 years.

"Prosecutors have broad powers in the plea bargain process[.]" Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999). "Under the separation of powers doctrine, which

is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case.” *Id.* (quoting *State v. Thrift*, 312 S.C. 282, 291-92, 400 S.E.2d 341, 346-47 (1994)). “Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety.” *Id.*, 333 S.C. at 684, 511 S.E.2d at 400-01. “The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor’s actions. We must, therefore, analyze the State’s agreement within our judicial constraints.” *Id.*

“[A] defendant has no constitutional right to plea bargain.” *Id.* (citing *State v. Easler*, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff’d as modified, 327 S.C. 121, 489 S.E.2d 617 (1997)). “Furthermore, a trial judge is not required to accept a plea. *Id.* (citing *Santobello v. New York*, 404 U.S. 257 (1971)). “A plea agreement is only an ‘offer’ until the defendant enters a court-approved guilty plea. A defendant accepts the ‘offer’ by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court.” *Id.*, 333 S.C. at 688, 511 S.E.2d at 402 (citing *Harden v. State*, 453 So.2d 550 (Fla. Dist. Ct. App. 1984); see also *State v. Nesbitt*, 411 S.C. 194, 201 n.7, 768 S.E.2d 67, 71 n.7 (2015) (“We note that the Due Process clause is not implicated until the defendant enters his guilty plea, and that plea is accepted by the court. Therefore, if the defendant enters into a negotiated plea agreement prior to the court’s acceptance of his guilty plea, that agreement is a mere executory promise that, standing alone, has no constitutional significance, as it binds neither the government nor the defendant.”); *Puckett v. United States*, 556 U.S. 129, 137 (2009) (“Although the analogy may not hold in all respects, plea bargains are essentially contracts.”). The only exception is where a defendant can show he has detrimentally relied upon a plea agreement. *Id.*, 333 S.C. at 688-89,

511 S.E.2d at 402-03. Otherwise, a prosecutor may withdraw a plea offer at any time prior to an actual entry of the guilty plea. Id., 333 S.C. at 689-90, 511 S.E.2d at 403-04.

A textbook example of such detrimental reliance is found in Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007). In Custodio, the defendant was offered a 15 year cap on his sentence conditioned on if he would cooperate with law enforcement, disclose all of the burglaries in which he was involved, and help retrieve and return stolen property. Id., 373 S.C. at 7, 644 S.E.2d at 37. Custodio met with law enforcement the following day, told them he wished to accept the deal, and promptly directed them to “twelve to fifteen homes he had burglarized or attempted to burglarize.” Id. When Custodio attempted to get the oral agreement in writing, he was placated that a writing was a technicality. Id., 337 S.C. at 8, 644 S.E.2d at 37. After Custodio was appointed counsel, the attorney asserted the agreement was unenforceable. Id. Custodio pled guilty and was sentenced to 45 years incarceration. Id., 377 S.C. at 7, 644 S.E.2d at 37. The Supreme Court of South Carolina found that Custodio’s complete cooperation with law enforcement and assistance in recovering “over a half million dollars in stolen property” represented precisely the kind of detrimental reliance identified by Reed v. Becka. Custodio, 377 S.C. at 11-12, 644 S.E.2d at 39-40.

There is no evidence of any detrimental reliance on an agreement by Applicant. Here, rather, Applicant’s claim is founded upon the undisputed claim that not all discovery in the State’s possession was turned over prior to the expiration of the 13 year offer; thus, Applicant and Counsel misapprehended the considerable strength of the State’s case against Applicant. “There is no general constitutional right to discovery in a criminal case, and Brady² did not create one[.]” Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Rather, the scope of disclosures required to be

² Brady v. Maryland, 373 U.S. 83 (1963).

made by the State, are established by *specific* constitutional rights and the rules promulgated in the South Carolina Rules of Criminal Procedure. See, e.g. Brady v. Maryland, 373 U.S. 83 (1963) (suppression by prosecution of evidence favorable to the accused violates due process); Giglio v. United States, 405 U.S. 150 (1972) (must disclose offers made to cooperating witnesses); Rule 5(a)(1), SCCrimP (specifically listing information subject to disclosure upon defendant's request, as well as information not subject to disclosure). There is "no clearly established Supreme Court law" to provide "that a prosecutor is required to facilitate [a defendant's] consideration of the prosecution's plea bargaining positions or offers, or that a prosecutor cannot take a harsh or unpleasant position, including revocation of the plea offer." Williams v. Schriro, 351 Fed.Appx. 252, 254 (9th Cir. 2009) (citing United States v. Ruiz, 536 U.S. 622 (2002) (holding the Constitution does not require pre-guilty plea disclosure of impeachment information)). To the contrary, the Constitution, "in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." Ruiz at 630-31. "[A] constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." Id. at 631. A rule to the contrary "risks premature disclosure of Government witness information, which, the Government tells us, could 'disrupt ongoing investigations' and expose prospective witnesses to serious harm." Id. at 631-32.

Applicant's claim appears comparable to one of the arguments rejected by the Supreme Court of the United States in Weatherford v. Bursey. In Weatherford, the defendant Brett Allen

Bursey vandalized the Richland County Selective Service office in Columbia, South Carolina, alongside Jack M. Weatherford, an undercover agent for the South Carolina Law Enforcement Division. Weatherford at 547. Weatherford reported the incident, and in order to maintain his cover, he was arrested and charged along with Bursey, and even retained counsel. Id. The ruse was active and detailed—Weatherford reported to Bursey and Bursey's lawyer that he would obtain a severance of their trials, which neither man questioned. Id. at 548. Ultimately, Weatherford testified against Bursey at trial, after which Bursey was convicted and sentenced to 18 months in prison. Id. at 549. Bursey filed suit in federal court, and the Fourth Circuit Court of Appeals reversed the conviction, and further held Weatherford personally liable for damages. Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975). Among the various issues raised, the 4th Circuit concluded in part:

In Brady the Court held that the prosecution had a duty under the due process clause to insure that 'criminal trials are fair' by disclosing evidence favorable to the defendant upon request. Here appellees insist that state officers may conceal the identity of an informant from a defendant during his trial preparation, that the informant can deny up through the day before his appearance at trial that he will testify against the defendant, and that he can then testify with devastating effect—all without impairing a fair trial. We think not. Deception is an appropriate instrument in crime solution. It is inappropriate and highly suspect when utilized after indictment with the effect of lulling a defendant into a false sense of security and thus denying him the opportunity (1) *to consider whether plea bargaining might be the best course*, (2) to do a background check on Weatherford for purposes of cross-examination, and (3) to attempt to counter the devastating impact of eyewitness identification.

Id. at 487 (emphasis added). The Supreme Court, however, reversed the Fourth Circuit, reinstated the conviction, and very summarily dispensed with the here-relevant portion of the 4th Circuit's ruling:

The Court of Appeals suggested that Weatherford's continued duplicity lost Bursey the opportunity to plea bargain. But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.

Weatherford at 560-61.

To the extent Applicant would rely upon constitutional principles, he could not prevail. There is no right under the United States Constitution to have certain materials disclosed prior to the extension of a plea offer. Applicant offers no binding legal authority for as much and this Court cannot independently find any. To the contrary, the issue appears to have been repeatedly raised and repeatedly rejected, as evidenced by Weatherford.

To the extent Applicant insists Counsel should have argued the failure to disclose the statement constituted a Rule 5, SCCrimP, violation, rather than a Brady violation, such that the plea offer should have been reinstated, his argument still fails. Rule 5 does not authorize discovery of:

... statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

Rule 5(a)(2), SCCrimP. Thus, Counsel acted within the scope of reasonably effective assistance in opting to argue the statement was discoverable pursuant to Brady because it was partly exculpatory, albeit largely devastating, where Rule 5(a)(2), SCCrimP, imposed no obligation to disclose the statement until trial. See Yarborough, 540 U.S. at 5 (“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.”). Furthermore, even if the statements were specifically required to be disclosed by Rule 5 in a way that they were not by Brady, this Court is still unable to find any authority or construction of the rule to provide that plea offers extended must remain open until all discoverable materials in the State’s possession are made available to the defendant.

To the extent Applicant again relies upon the Toal memorandum, Counsel clearly raised that issue to the trial court, obtained a ruling, and then set forth the issue in the explanations for

the subsequent appeal. Counsel could do no more than he did. To the extent Applicant may seek to raise the claim of trial court error independent from the framing of ineffective assistance, he cannot do so, because PCR is not a substitute for direct review on appeal of the sentence or conviction. S.C. Code Ann. § 17-27-20(B); Gibson v. State, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998).

Applicant is doubtlessly frustrated by the State's apparently inadvertent³ and "delayed"⁴ disclosure of a highly inculpatory statement after he rejected a prior plea offer. However, this Court finds the law is unavailing to him. Further, the Court finds Counsel did all he could conceivably do to get the offer reinstated: he attempted to negotiate with the State, he filed a motion to argue the only possible authority available to him, and then filed explanations of the issue on the appeal from the guilty plea. Applicant identifies no new authority Counsel should have argued upon which Counsel could have prevailed. Accordingly, the Court finds no deficiency on the part of Counsel, nor any prejudice therefrom, and Applicant's request for relief is **DENIED**.

2. White Claim

Applicant also alleges that he should be entitled to relief pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

³ Applicant offers no evidence the non-disclosure was deliberate, and the records previously submitted by Counsel on appeal appear to reflect the State believed the Carl Thomas statement had already been turned over.

⁴ As noted above, the State was not yet obliged to disclose the statement under Rule 5, and Applicant himself now insists it was not at all exculpatory, but purely damaging, such that Brady is unavailing.

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted); see also Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) (imposing the duty to consult when there is reason to think either that a rational defendant would want to appeal or that the particular defendant reasonably demonstrated interest in doing so); contra Frazer v. South Carolina, 430 F.3d 696 (4th Cir. 2005) (reading Flores-Ortega to mean counsel generally has a duty to consult with his client regarding whether to pursue an appeal).

Where an Applicant reasonably demonstrates an interest in appealing, or where there is a reason to think a rational defendant would want to appeal, and where Counsel fails to either initiate that appeal or comply with Anders procedure, “White permits consideration of the full trial record on [an] issue in conjunction with appellate review of the PCR proceeding under an exception to the prohibition against appellate courts considering appeals in the absence of notice of direct appeal given and timely served.” Smith v. State, 309 S.C. 413, 415, 424 S.E.2d 480, 481 (1992) (citing Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986)).

In the present matter, the record reflects Counsel did appeal and submitted multiple documents detailing how the plea offer was extended, rejected, and only thereafter was Carl Thomas’ statement turned over to the defense. The South Carolina Court of Appeals did not find the explanation convincing and dismissed the appeal without detailed comment on the issue raised. Because Counsel did file the notice of appeal, along with a thorough explanation as required by the rules, Applicant is not entitled to White relief, and his claim thereto is **DENIED**.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his

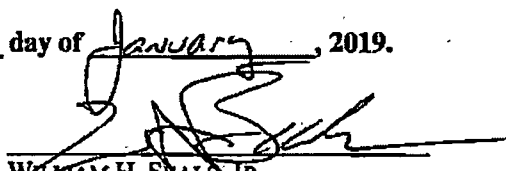
application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

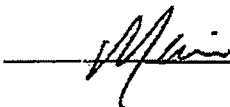
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991),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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 7 day of January, 2019.


 WILLIAM H. SEALS, JR.
 Presiding Judge
 Fifteenth Judicial Circuit

 South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Domenic J. Merino, #350098

☐ Plaintiff

v.

State Of South Carolina

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2016-CP-26-6155MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: William G. Yarborough, Iii, Bar No. 10271 Address: 308 West Stone Avenue Greenville, South Carolina 29609 phone: fax: e-mail: other:	Defendant's Attorney: Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: jjames@scag.gov other:
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO	
SECTION II: Motion/Order Type	
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for ☐ Plaintiff / ☒ Defendant	
November 20, 2019 Date submitted	
SECTION III: Motion Fee	
☐ PAID - AMOUNT: ☒ EXEMPT: (check reason)	
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	
JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION	
Date Filed: _____ Collected by: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

 FILED
 HORRY COUNTY
 2020 JAN 15 P 3:18
 REHEE H. ELVIS
 CLERK OF COURT
 HORRY COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT	
COUNTY OF HORRY	)		
Domenic J. Merino,	)	Case No.: 2016-CP-26-06155	
S.C.D.C. No. 350098,	)		
	)		
Applicant,	)		
	)		
v.	)	AMENDED RETURN AND	
	)	PARTIAL MOTION TO DISMISS	
State of South Carolina,	)		
	)		
Respondent.	)		

HORRY COUNTY
 2018 APR 16 PM 1:49
 REBEKKA EMMIS
 CLERK OF COURT
 HORRY COUNTY, SC

In response to the application for post-conviction relief filed by Domenic J. Merino (Applicant) on September 19, 2016, and amended by filing on March 27, 2018, Respondent would amend its return filed July 11, 2017, to show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the January 2014 term of the Horry County Grand Jury for burglary, first degree (2014-GS-26-00323), and kidnapping (2014-GS-26-00322). Applicant was further indicted at the January 2015 term for armed robbery (2015-GS-26-00361). The State's summation of the underlying facts, affirmed by Applicant in his plea, are as follows:

This occurred on September 4th, 2013, in the Longs section of Horry County. The three defendants¹ before you and other co-defendants, Carl Thomas and Paige Martin, all got together. The testimony would show that they were doing drugs, drinking, smoking, and they came up with a plan. That plan was to do an armed robbery on a one Mr. Christopher Kapalka. Mr. Kapalka, at the time, was living in Longs with the victim, who is present in the courtroom today, Ms. Katy Smith. They shared the same residence. They were – the co-defendants all got together, and after having devised this plan, they were on their way up to

¹ Applicant pled concurrently with co-defendants Kyla Toni Saitta and Shannon DeVante Cooper.

Longs to , to carry out their plan. When Mr. Kapalka started to dodge their phone calls and couldn't be reached, they decided to go by his house. When they went by his house, they found that there was not a cary in the driveway. They figured he wasn't there, and with that understanding, the three of these defendants, Ms. Martin and Mr. Thomas, decided that they would just break into the house instead. When they broke through the side door of Ms. Smith's house, this, this was at the nighttime, Your Honor. Ms. Smith was in, in her bed. She didn't understand what all the commotion was. She thought it was Chris and the other person who was living with them, Brittany, she thought it was them coming through the door.

Just shortly thereafter, the door to her room was busted open. She was confronted by masked, armed individuals who pointed guns to her head, made her lie flat, face down on the ground while they tied her up. They did drag her from room to room. They kept asking her things like, "Where's the money? Where's the money?"

While they were in there, they took, they took all of Ms. Smith's money that she had in her purse. It was about \$220. They took a large flat screen TV. They also took a rifle and an Xbox, Your Honor, from the house.

As they were leaving from the house shortly thereafter, they passed Mr. Kapalka in the street. After a brief confrontation from about 70 yards apart in the dark of night, Mr. Kapalka was able to recognize Ms. Saitta's voice from [a] prior relationship they had had, and from there all the pieces kind of fitting together and the law enforcement officers were able to determine that all these individuals conspired together to commit the burglary and the armed robbery and the kidnapping as a, as a natural result of the armed robbery on Mr. Kapalka.

(Tr. 18-20).

Ralph J. Wilson, Jr., Esq. represented Applicant, and Thomas Groom Terrell, III, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 20, 2015, Applicant pled guilty as indicted. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for concurrent terms of 22 years for each charge.

Applicant filed a timely notice of appeal. By order filed October 22, 2015, the South Carolina Court of Appeals dismissed Applicant's appeal for failing to provide a sufficient

explanation showing an issue reviewable on appeal. State v. Merino, App. Case No. 2015-000958 (S.C. Ct. App. Order filed Oct. 22, 2015). The Remittitur was issued on November 10, 2015.

II.

In his post-conviction relief application, amended by counsel on March 27, 2018, Applicant alleges he is being held unlawfully for the following reasons:

1. "Pursuant to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 23 674, 692 (1984) Applicant was denied his Sixth Amendment right to effective assistance of counsel due to counsel's failure to provide discovery materials under Rule 5."
 - a. "Statements were made by material witnesses that were Rule 5 material that had never been turned over to the Applicant before trial. Had Applicant been advised of these statements by counsel prior to the trial, the Applicant could have had the opportunity to refute the statements, plan for defense witnesses to refute those statements, and he would have had the opportunity to enter into a knowingly and voluntarily plea negotiation with the State as a resolution. In the alternative, the Applicant would have been able to make an informed and voluntary decision and may have continued on with the trial in lieu of entering a guilty plea. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001)."
 - b. "The State made available a plea offer to the Applicant concerning each of the charges. The original plea offer was thirteen (13) years for each: Burglary First, Kidnapping, and Armed Robbery. Although the S.C. Code Ann. Section 16-11-311 states that the penalty is life imprisonment or not less than fifteen (15) years, again, the Applicant was made an offer of thirteen (13) years. Based on the negotiation phase, there is no way to ensure that the Applicant was even remotely capable of entering into any plea voluntarily, knowingly, and intelligently at that point, as is required in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and the South Carolina Supreme Court requires that a defendant must be made aware of the nature and [crucial] elements such as any maximum and minimum penalties and the nature of the constitutional rights being waived. Pittman v. State, 337 S.C. at 599, 524 S.E.2d at 624; Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)."
 - c. "Pursuant to Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), which states that "...a defendant is constitutionally entitled to

effective assistance of appellate counsel.” Applicant will show that his Direct Appeal was abandoned. Applicant will show that he was deprived of his constitutional right to appeal as a direct correlation to appellate counsel’s deficient performance and that the applicant was unquestionably prejudiced by that deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005).”

Applicant requests relief as follows:

- “to reconsider sentence, or in the alternative, grant a new trial, or allow for a Belated Appeal pursuant to Wilson v. State, 348 S.C. 215, 599 S.E.2d 581 (2002).”

Previously provided and incorporated herein by reference are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant’s records from the South Carolina Department of Corrections, the plea transcript, Applicant’s appellate records, and the current application for relief. Respondent reserves the right to further amend this Return upon receipt of relevant information.

III.

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386

S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). 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." 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).

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant alleges some error in that he was at one point extended a plea offer of 13 years in order to resolve the charges against him, arguing that he could not have knowingly, voluntarily, or intelligently entered a plea at the time the offer was extended. First, Respondent is aware of no binding authority to show that the State can offer a plea deal too quickly, such that

a defendant's constitutional rights are violated. Second, Applicant did not accept the offer; as such, there is no issue that he involuntarily entered a guilty plea pursuant to the offer. Third, to the extent that Applicant may now wish to go back and enforce the 13 year offer he rejected, he could only do so upon a showing of detrimental reliance. See Reed v. Becka, 333 S.C. 676, 688-89, 511 S.E.2d 396, 402-03 (Ct. App. 1999). Applicant does not and cannot show any such reliance—indeed, Applicant's own argument is that he couldn't have accepted the offer. Fourth, Applicant in no way ties the 13 year offer into any deficiency of counsel, but rather merely asserts that the 13 years offered is less than the statutory minimum for kidnapping.

S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” For the foregoing reasons, Respondent requests the Court summarily dismiss this particular allegation of ineffective assistance of counsel.

V.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every

'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy").

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

In this matter, Applicant remained represented by plea counsel through the short appellate process. As demanded by the South Carolina Court of Appeals, Mr. Wilson offered an two explanations in an effort to satisfy Rule 203(d)(1)(B)(iv), SCACR, and conceded "[n]o issues were raised during the plea at issue in this appeal." Plea counsel's good faith effort to satisfy the demands of his client for an appeal undeniably demonstrate that Applicant was not abandoned on appeal, but was effectively represented for the full duration of the appellate process available to him. Applicant, for his part, offers no issues that plea counsel could have raised in his explanations to establish a factual basis for appeal.

S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Because Applicant alleges no facts in support of his bald allegation of abandonment, because the record unequivocally contradicts that assertion, and because Applicant offers no issues that could have been raised in his explanations to establish a factual basis for appeal, Respondent

respectfully requests the Court summarily dismiss this particular allegation of ineffective assistance of “appellate” counsel.

VI.

In his request for relief, Applicant requests in part that he be granted a belated appeal pursuant to Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002). Wilson primarily stands for the proposition that the PCR statute of limitations does not apply to claims for relief made pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). To the extent that Applicant seeks an appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), that request is without merit as a matter of law. Counsel clearly complied with Applicant’s request for an appeal and filed a notice of appeal, as well as two explanations for the appeal, on his behalf. That was the extent of plea counsel’s obligations to Applicant. See Anders v. California, 386 U.S. 738 (1967). That the appellate courts dismissed his appeal as meritless does not entitle him to a second appeal. Accordingly, pursuant to S.C. Code Ann. § 17-27-70(c), the Court should summarily dismiss this particular request for relief.

VII.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC; Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing.

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

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

VIII.

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

[Conclusion and signature on following page]

IX.

WHEREFORE, Respondent respectfully requests that this Court grant its partial motions to dismiss set forth in Sections IV-VI of this amended return, and thereafter convene an evidentiary hearing on the allegations of ineffective assistance of plea counsel.

Respectfully submitted,

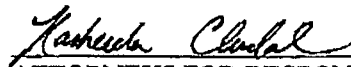
ALAN WILSON
Attorney General

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

April 13th, 2018

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

2016-CP-26-6155

DOMENIC J. MERINO, #350098)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

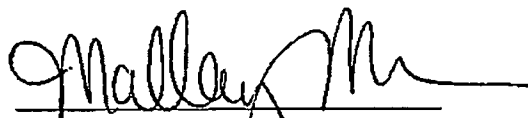
Respondent.)

HORRY COUNTY
 2018 APR 16 PM 1:49
 REBEKKA LEVINS
 CLERK OF COURT
 HORRY COUNTY, SC

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 Amended Return and in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville, SC 29601

DATED this 13th day of April, 2018.


 Mallory Morris, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DOMENIC MERINO, # 350098

Plaintiff(s)

vs.

STATE OF SOUTH CAROLINA

Defendant(s)

Submitted By: William G. Yarborough III

Address: 522 N. Church Street, Greenville SC 29601

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2016-CP - 26- 6155

SC Bar #: 10271

Telephone #: (864) 331-1612

Fax #: 864-370-0022

Other:

E-mail: wgyarborough@gmail.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|--|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ General (130)
☐ Breach of Contract (140)
☐ Fraud/Bad Faith (150)
☐ Failure to Deliver/Warranty (160)
☐ Employment Discrim (170)
☐ Employment (180)
☐ Other (199) _____ | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 ____ -NI- _____
☐ Notice/ File Med Mal (230)
☐ Other (299) _____ | Torts - Personal Injury
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Assault/Battery (370)
☐ Slander/Libel (380)
☐ Other (399) _____ | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) _____ |
| Inmate Petitions
☒ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) _____ | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) _____ | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Incapacitated Adult Settlement (790)
☐ Other (799) _____ | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) _____ |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) _____
☐ Sexual Predator (510)
☐ Permanent Restraining Order (680)
☐ Interpleader (690) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Pre-Suit Discovery (670) | | |

Submitting Party Signature:

William G. Yarborough III

Date:

03/05/18

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FORM 5

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Domenic J. Merino SCDC#350098)
 Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS)

APPLICATION FOR)

POST-CONVICTION RELIEF)

FILED
 HORRY COUNTY
 2015 MAR 27 PM 12:52

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institute
2. Name and location of Court which imposed sentence Horry County General Sessions- 15th Judicial Circuit
3. Name(s) of co-defendant(s) (if any) Paige Martin, Kyla Saitta and Carl Thomas
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014-GS-26-000322- Burglary First
 - (b) 2014-GS-26-00323- Kidnapping
 - (c) 2015-GS-26-00361-Armed Robbery
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 20, 2015- 22 years- Concurrent

Revised 3/2003

- (b) April 20, 2015- 22 years-concurrent
- (c) April 20, 2015- 22 years- Concurrent
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty X
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere _____
- 7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
- 8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Dismissed
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. October 22, 2015
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. State v. Merino, App. Case No. 2015-000958 (S.C. Ct. App. Order filed October 22, 2015. Remittitur was issued on November 10, 2015).
 - ii. _____
 - iii. _____
- 9. If you answered "no" to (7), state your reasons for not so appealing:
 - (a) N/A
 - (b) _____
 - (c) _____
- 10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

(a) Pursuant to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984) Applicant was denied his Sixth Amendment right to effective assistance of counsel due to counsel's failure to provide discovery materials under Rule 5.

(b) _____

(c) _____

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

(a) Statements were made by material witnesses that were Rule 5 material that had never been turned over to the Applicant before trial. Had Applicant been advised of these statements by counsel prior to the trial, the Applicant could have had the opportunity to refute the statements, plan for defense witnesses to refute those statements, and he would have had the opportunity to enter into a knowingly and voluntarily plea negotiation with the State as a resolution. In the alternative, the Applicant would have been able to make an informed and voluntary decision and may have continued on with the trial in lieu of entering a guilty plea. Roscoe v. State, 345 S.C. 16, 546 S.E. 2d 417 (2001).

(b) The State made available a plea offer to the Applicant concerning each of the charges. The original plea offer was thirteen (13) years for each: Burglary First, Kidnapping, and Armed Robbery. Although the S.C. Code Ann. Section 16-11-311 states that the penalty is life imprisonment or not less than fifteen (15) years, again, the Applicant was made an offer of thirteen (13) years. Based on the negotiation phase, there is no way to ensure that the Applicant was even remotely capable of entering into any plea voluntarily, knowingly, and intelligently at that point, as is required in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and the South Carolina Supreme Court requires that a defendant must be made aware of the nature and crucial elements such as any maximum and minimum penalties and the nature of the constitutional rights being waived. Pittman v. State, 337 S.C. at 599, 524 S.E. 2d at 624; Dover v. State, 304 S.C. 433, 405 S.E. 2d 391 (1991).

(c) Pursuant to Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), which states that "...a defendant is constitutionally entitled to effective assistance of appellate counsel." Applicant will show that his Direct Appeal was abandoned. Applicant will show that he was deprived of his constitutional right to appeal as a direct correlation to appellate

counsel's deficient performance and that the applicant was unquestionably prejudiced by that deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E. 2d 702 (2005).

12. Prior to this application have you filed with respect to this conviction:
 - (a) any petition in a State Court under South Carolina Law? Yes-
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
 - (d) any other petitions, motions or applications in this or any other Court? 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. South Carolina Court of Appeals- Direct Appeal
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. Dismissed - Abandoned
 - ii. _____
 - iii. _____
 - iv. _____
 - (d) the date of each such disposition:
 - i. 10/22/2015
 - ii. _____
 - iii. _____
 - iv. _____

- (c) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Direct Appeal was dismissed according to Rule 203.
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? N/A
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
 - (e) preparation, presentation or consideration of any petitions, motions or

applications with respect to this conviction, which you filed? Yes-Amended PCR

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. Ralph J. Wilson, Jr., PO Box 2461, Conway, SC 29528

ii. Steven W. Fowler 1018 Hwy 17 South, N. Myrtle Beach, SC 29582

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Plea/Sentencing

ii. PCR

iii. _____

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

to reconsider sentence, or in the alternative, grant a new trial, or allow for a Belated

Appeal pursuant to Wilson v. State, 348 S.C. 215, 559 S.E. 2d 581 (2002).

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

No

STATE OF SOUTH CAROLINA)

County of HORRY)

VERIFICATION

I, Domenic J. Merino, 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.

Willie D. Yerby

SWORN to and subscribed before me this 5th
day of March, 2008.

Arthur J. Galt (L.S.)
Notary Public

My Commission Expires: 06-08-2022

FILED
HORRY COUNTY
2008 MAR 27 PM 12 53

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

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

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

Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON FLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Domenic J. Merino,	)	Case No.: 2016-CP-26-06155
S.C.D.C. No. 350098,	)	
	)	
Applicant,	)	
	)	RETURN AND MOTION
v.	)	FOR MORE DEFINITE STATEMENT
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
 HORRY COUNTY
 2017 JUN 16 PM 4:41
 KEEFER H. ELVIS
 CLERK OF COURT
 HORRY COUNTY, SC

In response to the application for post-conviction relief filed by Domenic J. Merino (Applicant) on September 19, 2016, Respondent would show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the January 2014 term of the Horry County Grand Jury for burglary, first degree (2014-GS-26-00323) and kidnapping (2014-GS-26-00322). Applicant was subsequently indicted at the January 2015 term for armed robbery (2015-GS-26-00361). Ralph J. Wilson, Jr., Esquire, represented Applicant, and Thomas Groom Terrell, III, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On April 20, 2015, Applicant pled guilty as indicted. The Honorable Benjamin H. Culbertson sentenced Applicant to concurrent terms of twenty-two years' incarceration for each charge.

Applicant filed a timely notice of appeal. By order filed October 22, 2015, the South Carolina Court of Appeals dismissed Applicant's appeal for failing to provide a sufficient explanation showing an issue reviewable on appeal. State v. Merino, App. Case No. 2015-000958 (S.C. Ct. App. Order filed October 22, 2015). The Remittitur was issued on November 10, 2015.

II.

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

1. Ineffective Assistance of Counsel
 - a. "Counsel was ineffective in that counsel failed to investigate"
 - b. "Counsel was ineffective in that he failed to advise regarding Carl Thomas"

Applicant requests relief as follows:

- "Reversal and or resentencing"

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, Applicant's appellate records, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting

Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). 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." 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, 106 (1985).

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth sufficient facts to "support each ground" or to explain with any specificity the facts upon which his claims are based. Namely, Applicant does not indicate precisely what it was that counsel failed to investigate. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so

that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

V.

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

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

VI.

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

VII.

WHEREFORE, the Respondent requests that an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully submitted,

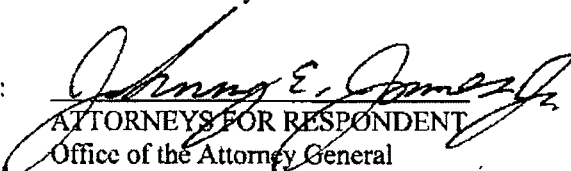
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY E. JAMES JR.
Assistant Attorney General

By:


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

5 July, 2017

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

DOMENIC J. MERINO, #350098,)

Applicant,)

VS)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2016-CP-26-6155

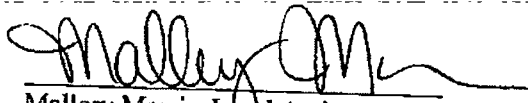
AFFIDAVIT OF SERVICE BY MAIL

FILED
HORRY COUNTY
2017 JUN 10 PM 4:41
RACHEL N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by e-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 for More Definite Statement** on the above-captioned matter on the following person by e-mail:

Steven W. Fowler, Esquire
1018 Highway 17 South
North Myrtle Beach, SC 29582

DATED this 5th day of July, 2017.


 Mallory Morris, Legal Assistant
 For Respondent

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Domenic J. Marine # 350098
Full name and prison number (if any) of Applicant.

10

6155

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

2016 SEP 09 AM 9:49

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee C.I. 740 Winstead Hwy. Bishopville SC 29010
2. Name and location of Court which imposed sentence Horry County General Sessions Court, S.C.
3. Name(s) of co-defendant(s) (if any) Jaime Martin, Kyle Smith, Carl Thomas.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Burglary 2014-GS-2000-322
 - (b) Kidnapping 2014-GS-2000-323
 - (c) Robbery 2014-GS-2000-361
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 20, 2015
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty yes
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Appeal from Horry County
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) _____
- (b) _____
- (c) _____

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

- (a) Counsel was ineffective in that Counsel failed
- (b) to investigate. Counsel was ineffective in that
- (c) he failed to advise regarding Carl Thomas

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A

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

- iv. N/A
- (d) the date of each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

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

- i. N/A
- 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?

N/A

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

(a) which grounds have been presented:

- i. N/A
- 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) N/A
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? Yes
- (b) your trial, if any? N/A
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

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. Ralph J. Wilson 1300 Second Ave, Ste 212
 - ii. PO Box 1827 Conway, S.C. 29528
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Pleading
 - ii. Sentencing
 - iii. _____

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

Reversal and or resentencing

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

No

STATE OF SOUTH CAROLINA)

16
VERIFICATION

County of Lorry)

I, Douglas McNamee, 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.

Douglas McNamee

SWORN to and subscribed before me this 8
day of Sept, 2016.

Debra Eastman (L.S.)
Notary Public

My Commission Expires: 3/3/2021

2016 SEP 19 AM 9:49
NOTARY PUBLIC

14
51

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

I, Dorinda P. L. L., 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.

Dorinda P. L. L.
Applicant

SWORN or affirmed to and subscribed before me this
8 day of Sept, 2016.

Dorinda P. L. L.
Notary Public

My Commission Expires: 3/3/2024

2016 SEP 19 AM 9:49
Notary Public Seal

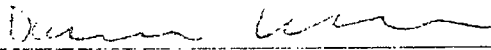
14

51

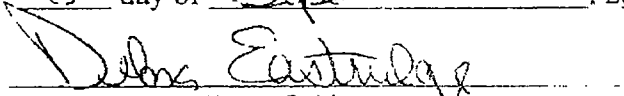
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

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

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

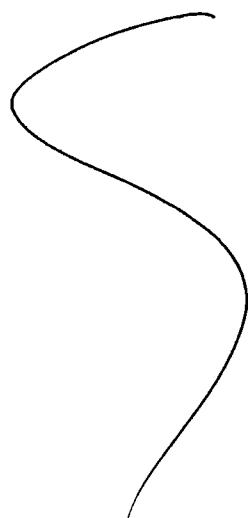

Applicant

SWORN or affirmed to and subscribed before me this
8 day of Sept, 2016.


Notary Public

My Commission Expires: 3/3/2024

2016 SEP 19 AM 9:49



54

CLERK OF COURT



MELANIE HUGGINS-WARD

CLERK OF COURT
511 W. VINE ST.
CONWAY, SC 29526
(843) 915-5000 ext. 100 (toll-free) (843) 915-0031

CLERK OF COURT

2016 SEP 27 AM 8:12

SEPTEMBER 27, 2016

DOMENIC J MERINO #350020
LEE CORRECTIONAL INSTITUTION
990 WISACKY HWY
BISHOPVILLE, SC 29010

RE: POST-CONVICTION RELIEF
CIVIL ACTION #2016-CP-26-00055

DEAR MR. MERINO,

THE POST-CONVICTION RELIEF APPLICATION HAS BEEN FILED AND
ASSIGNED THE ABOVE CIVIL ACTION NUMBER FOR THE DOCKET.
YOUR COPY IS ENCLOSED WITH THE ABOVE INFORMATION SHOWN.
COPIES HAVE BEEN FORWARDED TO THE OFFICE OF THE ATTORNEY
GENERAL. THAT OFFICE WILL BE PROCESSING YOUR CASE FOR
COURT PROCEEDINGS.

SINCERELY,

Melanie Huggins-Ward

MELANIE HUGGINS-WARD
CLERK OF COURT

MHW/flm
ENCLOSURES

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2016-CP-26-06155
DOMENIC J. MERINO,	)	
Plaintiff,	)	
Vs	)	Transcript of Record
STATE OF SOUTH CAROLINA,	)	OCTOBER 8, 2019
Defendant.	)	

B E F O R E:

The Honorable William H. Seals, Jr.
Horry County Courthouse
Conway, South Carolina

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

William G. Yarborough, Esquire
Attorney for Plaintiff

Johnny E. James, Jr., Esquire
Attorney for The State

Sallie Beth Todd
Official Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>
RALPH WILSON, JR.				
BY MR. YARBOROUGH	4		27	
BY MR. JAMES		18		
DOMENIC J. MERINO				
BY MR. YARBOROUGH	31			
BY MR. JAMES		40		

Certificate of Court Reporter				49

E X H I B I T S

(There were no exhibits marked during the hearing.)

1 **THE COURT:** Okay. I am ready whenever you are.

2 **MR. JAMES:** If it may please the Court?

3 **THE COURT:** Yes, sir.

4 **MR. JAMES:** Your Honor, this is the matter of Domenic J.
5 Merino versus State of South Carolina, docket number 2016-CP-
6 26-06155. Mr. Merino is present here in the courtroom today
7 and is represented by Mr. Bill Yarborough, Esquire. Mr.
8 Merino was indicted at the January 2014 term of the Horry
9 County Grand Jury for Burglary in the 1st degree and
10 Kidnapping. He was further indicted at the January 2015 of
11 the Grand Jury for Armed Robbery. Your Honor, he was
12 represented on those charges by Ralph J. Wilson, Jr., Esquire
13 who is present here in the courtroom today. The case was
14 prosecuted by Thomas Terrell, III of the 15th Circuit
15 Solicitor's Office. On April 20th, 2015 the applicant plead
16 guilty as indicted and the Honorable Benjamin H. Culbertson
17 sentenced him to concurrent terms of 22 years for year charge.
18 He timely filed a Notice of Appeal from that sentence.
19 However, by order filed October 22nd, 2015 the South Carolina
20 Court of Appeals dismissed the appeal for failure to provide a
21 sufficient explanation of the guilty plea. The remittitur was
22 issued November 10 of 2015 and this application for Post
23 Conviction Relief followed on September 19th, 2016; thereafter
24 amended by filing on March 27th, 2018. Your Honor, the State's
25 understanding of the allegations are as set forth in the

1 State's Amended Return which should reflect at this time the
2 allegations as they were set forth in the Amended Application
3 by Mr. Merino. With that understanding set forth, the State
4 will give the floor over to Mr. Yarborough to proceed with his
5 case.

6 **THE COURT:** Alright. Mr. Yarborough.

7 **MR. YARBOROUGH:** I call Mr. Wilson.

8 **THE COURT:** Alright.

9 **RALPH WILSON, JR., HAVING BEEN FIRST**
10 **DULY SWORN, TESTIFIED AS FOLLOWS:**

11 **CLERK:** Please have a seat and state your name for the
12 Court.

13 **MR. WILSON:** Thank you. Ralph Wilson, Jr.

14 **DIRECT EXAMINATION OF MR. WILSON BY MR. YARBOROUGH:**

15 Q: Good morning, Mr. Wilson.

16 A: Good morning, sir.

17 Q: Can you tell the Court a little bit about the timeline of
18 what happened in this case? I believe you were representing
19 Mr. Merino, but I think what we're really trying to focus on
20 is the year or two that lead up before you were getting ready
21 to go to trial.

22 A: I originally got this case; I was called by Orrie West and
23 Paul Taylor was originally representing Mr. Merino if I'm not
24 mistaken and then he was removed. So, I got a call from Orrie
25 West I think this was in '14 or '15 to represent Mr. Merino

1 and I decided that I wanted to take the case. So, we began
2 representing him, I think, around 2014. After that I met with
3 him a few times, talked with him and we proceeded to try to
4 develop a defense. I think when I met with him the first
5 time, I believe he might have been incarcerated, I'm not sure,
6 or if it was at my office.

7 Q: Okay. And did you get the discovery in the case?

8 A: We did. We filed a motion for Brady, our typical filings
9 are within a week or two weeks within the time that we
10 actually get the actual cases either by appointment or by
11 retainer. I believe this was appointed case, so we filed for
12 the Brady motion. Once we filed the Brady we did receive
13 discovery in this matter, back in I believe it was '14 or '15.

14 Q: Okay. And did you recall reviewing that information when
15 you got it?

16 A: Ad nauseam, we knew that this was going to be a complex
17 case because of the charges. We also knew there were a number
18 of co-defendant's which also concerned me as well. Anytime
19 that you have that going on my fear is that one of the co-
20 defendant's would turn state's evidence and that's always
21 something we vet very carefully. So, we went through great
22 exhaustion actually to do a lot of research on the co-
23 defendants. I had numerous conversations with my client
24 actually about the relationship which were kind of crossed
25 between the co-defendants as well as the victims, they knew

1 each other and there had been some cross relationship between
2 the two.

3 Q: When you had the case at that point, how was the evidence
4 against your client?

5 A: The only thing I was concerned about when I first got the
6 case and we looked through it was probably going to be the
7 victims. Okay. And my concern was for trial was that one of
8 the victims was an elderly lady. And anything you bring that
9 up in front of a jury in Horry County or pretty much anywhere
10 in South Carolina really, that's always going to be an issue.
11 So, you worry about jury nullification, I was worried about
12 that. But, there was not a lot of evidence against him as far
13 as, you know, me being concerned about trying it and trying to
14 develop and alibi defense that he was not there. And so
15 that's kind of where we were going that he was not there, that
16 again, we believed that there was some evidence also that the
17 daughter, I think the granddaughter Britney as well as
18 Christopher, there was some evidence that we thought that they
19 may have been involved in the crime itself and had robbed the
20 grandmother of her belongings.

21 Q: Was it safe to say that as of August 4th, 2014, I believe
22 is when the initial plea offer was rescinded, there was no
23 direct evidence against Mr. Merino?

24 A: That's correct.

25 Q: Okay. And so at that point y'all are preparing for trial.

1 A: That is correct.

2 Q: And you had filed your, your Brady motion at that point
3 and had the State complied with the Brady motion?

4 A: We thought they had completely. So, we thought we had all
5 of the evidence at the time.

6 Q: And did it become clear that Mr. Merino did not think that
7 there was very much evidence against him at that point?

8 A: Yes. During that time there was not a ton of -- there was
9 circumstantial evidence, you know, which obviously in the law
10 is weighted, you know, similarly I would say if not equal to
11 direct evidence.

12 Q: Sure.

13 A: But, there was not a lot of direct evidence at all.

14 Q: And did the State make an offer?

15 A: They did. Donna Elder had extended an offer originally
16 for 13 years. I think Nancy Livesay took over and reextended
17 the same offer for 13 years.

18 Q: And did either one of the prosecutors give you any of the
19 statements prior to the offer expiring?

20 A: They did not. We actually did not find out about the
21 statement for Mr. -- I think it's Carl Thomas, I think that's
22 his name. I didn't find that out until I was at a status
23 conference. We were actually about to set the date for the
24 trial and we happened to be having a conversation in the
25 status conference and the Judge was saying, Mr. Wilson are you

1 going to be ready? I said, Judge I'll be ready, we're ready
2 to go forward. I think Mr. Tom Terrell said, yeah we have a
3 statement from so and so and it was Carl Thomas and I
4 remembered my paralegal, my office manager who is here looked
5 and me, I looked at her and we had no clue that even existed.

6 Q: Right. And they hadn't given it to you?

7 A: No. They hadn't given it to us.

8 Q: Okay. And did you go to the State and say hey where is
9 the discovery?

10 A: Yes. I actually had a conversation with Tom Terrell at
11 the table in the status conference and explained to him that
12 we did not have that, didn't know about it. Obviously, the
13 rules on trial by ambush is very clear and I was concerned
14 that they didn't turn this over to us obviously for reasons
15 regarding the Brady, which we had -- and they had known about
16 this for some time. This had been a while; I want to say it
17 have been a year ---

18 Q: A year or nine months plus?

19 A: Yes.

20 Q: So, at that point did it make you feel ineffective at
21 where you were in the case?

22 A: Yes. And I explained that to Judge Culbertson. We filed
23 a motion with the Court to ask the Court to force the State to
24 put the plea offer back on the table in light of the fact they
25 did not turn the evidence over to us. Now, the reason I did

1 that was two-fold. One, I thought that it was equitable and
2 fair to my client to have that plea deal reoffered. But, also
3 my concern was, is that when they failed to turn it over and
4 there could have been something exculpatory; one, that puts
5 you in violation of Brady, which I believe that sanctions may
6 have been appropriate at the time. But, also, you know, I was
7 really concerned that now the alibi that we were going to use,
8 the defense that we had developed over a period of, you know,
9 a year was going to be completely destroyed.

10 Q: Okay. And so that was the statement of Carl Thomas. Was
11 there another statement or was it just the statement of Carl
12 Thomas?

13 A: It was the statement of Carl Thomas that we found out
14 about. There may have been another statement, I'm not aware.
15 There was, the day of trial, there was another witness. I
16 can't remember her name right now but she was a client of
17 Barbara Pratt and we were all going to trial together, the
18 three folks that were on trial that morning, I believe, was
19 Shannon who was with Eric Fox and then Barbara Pratt's client
20 decided to turn State's evidence and give testimony against my
21 client.

22 Q: Okay.

23 **MR. YARBOROUGH:** May I approach the witness just one
24 second, Your Honor?

25 **BY MR. YARBOROUGH:**

1 Q: Do you recognize this that came out of the discovery
2 package?

3 A: I vaguely remember it.

4 Q: Okay.

5 A: Vaguely, vaguely.

6 Q: Does it look like something that was a statement given to
7 you during your representation?

8 A: It's possible. I don't recall to be honest with you.

9 It's possible. It's possible.

10 Q: Would it surprise you if Mr. Merino relied on this
11 statement?

12 A: It would not surprise me. No. It would not surprise me.

13 Q: Because, I mean, to be honest without the statements that
14 were not turned over to you, the case against Mr. Merino was
15 pretty weak?

16 A: Again, it was a circumstantial case. We actually prepared
17 a motion, a heavy motion for directed verdict that it was so
18 circumstantial.

19 Q: Okay. And it's safe to say that he was relying on the
20 lack of evidence against him in his decision to go to trial?

21 A: Absolutely. And I actually advised him regarding this
22 matter, because again we, we knew we had a good case.

23 Obviously, I -- and let me explain also why this was our
24 attitude. I knew my client had a YOA issue and so we knew
25 that there was going to be additional time if he plead guilty

1 to something. And once we realized that the case itself was
2 not very strong, we kind of decided at that point in time that
3 we were going to probably end up heading to trial. You know,
4 they weren't offering us anything that was better than the 13
5 years that he originally got. And, you know, with them
6 tacking on the YOA stuff, you know, it was going to be a
7 problem.

8 Q: Right. So, after, after you learned about the statements
9 did you go back to the solicitor's office and ask them to put
10 the 13 years back on the table?

11 A: I did. Yes, sir.

12 Q: And how did that go?

13 A: That did not go well. Tom Terrell and I actually had a
14 very -- and Tom and I work together all the time, but we had a
15 heated conversation. My concern was the failure of the State
16 to turn that evidence over to us which would have definitely
17 changed my attitude about the case. Once I heard the tape and
18 heard his statement, there was very detailed, you know, and I
19 got -- I had real concerns.

20 Q: Okay. It was extremely damaging towards your client.

21 A: It was devastating to the case.

22 Q: Okay.

23 A: Absolutely.

24 Q: Did you feel like your client could make a knowing and
25 voluntary waiver of his right to go to trial without that

1 discovery?

2 A: No.

3 Q: Okay. And, in fact, at some point you enter into a plea
4 in front of Judge Culbertson; is that correct?

5 A: That's correct.

6 Q: And did you tell -- did you tell Judge Culbertson that the
7 State had tied your hands here and you felt like that you were
8 acting ineffectively?

9 A: Yes. I explained to the Judge that, you know, if I had
10 gotten the tape earlier or we knew about that evidence,
11 obviously the first thing I'm going to do is; one, go talk to
12 my client about it. We would vet the information that he had
13 as well as, obviously, at that point in time I want to tell my
14 client that look we may need to talk about pleading instead of
15 trying to go to trial. You know, trial is not for -- not a
16 situation you want to enter into when you know there is
17 devastating direct evidence. And when I say direct, this
18 wasn't just circumstantial, he actually put my client in the
19 van, you know, and explained that he was supposed to receive
20 slips of heroin, I believe it was, for, you know, driving him
21 there and that my client got out of the car and went into the
22 residence to do this crime.

23 Q: You do criminal work every day, right?

24 A: Every day.

25 Q: Okay. And you've spoken at length today about Brady

1 violations. Are you familiar with Rule 5 of the -- did you
2 file a Rule 5 motion?

3 A: Yes, sir.

4 Q: Okay. And did the State comply with that Rule 5 motion?

5 A: In the beginning we thought they had.

6 Q: Right.

7 A: In the end we realized they did not.

8 Q: Okay. And do you remember, it's been a while but do you
9 remember when you argued to Judge Culbertson, did you argue
10 that it was a Brady and fair dealing violation or did you
11 argue that it was a Rule 5 violation?

12 A: I don't recall to be honest with you.

13 Q: If I told you if you went back in the record and looked at
14 it, you argued under fairness and Brady as opposed to Rule 5;
15 would you take my word for it?

16 A: I would take your word for it. Yes.

17 Q: And you'd say the transcript fairly and accurately
18 represents your argument?

19 A: Absolutely.

20 Q: Okay. And you're familiar with Part C of Rule 5 under the
21 South Carolina heading of documents and tangible objects;
22 you're familiar with that part?

23 A: Yes, sir.

24 Q: And upon the request -- I'm just reading the rule. Upon
25 request the prosecution shall permit the defendant to inspect,

1 copy books, papers, documents, photographs, tangible objects,
2 buildings or places, or copies or portions thereof, which are
3 in the possession, custody or control of the prosecution, and
4 which are material to the preparation of the defense. Do you
5 feel like they complied with that?

6 A: I don't feel they complied with it fully because again,
7 they knew about the statement before hand and didn't turn it
8 over to us.

9 Q: Okay. And you told the Judge you felt like they were boot
10 strapping you or keeping your hands tied together and hadn't
11 given it to you. And do you feel like it negatively affected
12 your client?

13 A: One hundred percent it did. And I had this conversation
14 with Mr. Merino, I told him, you know, that I was -- I even
15 apologized to him, you know, that I felt bad about the fact
16 that we didn't get that evidence before hand. Obviously, if I
17 had had that statement it would have changed my opinion about
18 doing the plea for 13 years and then, you know, you gauge as a
19 lawyer, you know, based on the evidence you gauge how far
20 you're going to push your client or advise them about
21 pleading. And at the time we just didn't know that that
22 evidence was out there. I didn't know.

23 Q: And do you remember about what year in time this was when
24 this happened? What year?

25 A: The crime itself or the plea?

1 Q: The plea.

2 A: I don't recall. It may have been in '17, '16. I'm not
3 sure.

4 Q: Okay. Were you familiar with Justice Toal's requirement
5 that the solicitor's office turn over Rule 5 material?

6 A: Yes. And we argued part of that as well and put that in
7 our petition to the Court when I asked the Court to, you know,
8 force the prosecution to put the plea deal back on the table.

9 Q: Okay. And at that point they did not.

10 A: They did not.

11 Q: Okay. And at some point you filed a Notice of Appeal and
12 then later an Explanation of Issue Raised After Plea in this
13 case.

14 A: I believe I did. Yes.

15 Q: I'll show them to you and just ask if you recognize them.

16 **THE COURT:** I think they're part of the Judge's packet.
17 Am I correct in that and I don't need to move that into
18 evidence?

19 **THE COURT:** Are they in the packet?

20 **MR. JAMES:** That is included in the packet, Your Honor,
21 and it should be part of the record of this Court.

22 **MR. YARBOROUGH:** So that would be the appeal and the
23 explanation?

24 **MR. JAMES:** It would be the Explanation of Issue Raised
25 After Plea. It would be the Notice of Appeal. It would be

1 the Order dismissing that appeal. It would be the Remittitur.

2 **BY MR. YARBOROUGH:**

3 Q: Okay. And you did that; is that correct?

4 A: That's correct, I did.

5 Q: And is it safe to say in those that you're arguing under
6 Brady and not under Rule 5?

7 A: That's correct.

8 Q: Okay. And so those issues were not briefed to your
9 knowledge at some point; is that correct?

10 A: That's correct.

11 Q: And -- and I think I asked you this, but I should ask it
12 again. Do you think that giving that information -- the
13 statement's information to your client that it would have
14 materially -- those statements themselves would have
15 materially altered the applicant's decision making on the plea
16 had it been disclosed?

17 A: I believe it would have. I would have definitely advised
18 him differently. You know, again I don't have a crystal ball
19 to go back and determine what his thoughts would have been.
20 But, I would imagine, I would hope that he would listen to me
21 and say, you know, I need to go ahead any maybe take a plea.
22 But, again, I don't know what he would have done, but I would
23 imagine he would have. That evidence was strong. It was
24 extremely strong, and it was so believable. That was other
25 issue that I had with him. He just gave such detailed

1 information inside of that statement, which was congruent with
2 the circumstantial evidence, which was the problem. Because
3 before that statement they had nothing that was congruent with
4 the circumstantial evidence.

5 Q: And are you aware that there was a co-defendant that this
6 same situation happened to in this case? That one of the
7 other co-defendant's they had not turned over statements as
8 well?

9 A: I'm not aware. No, sir.

10 Q: Okay. Did you file a Motion to Reconsider the sentence?

11 A: I don't recall if I did. I may have. I'm not sure. I
12 don't recall.

13 Q: Okay. Are you familiar that another one of the
14 defendant's filed a Motion to Reconsider?

15 A: I'm not aware.

16 Q: And you're not aware that that was granted at some point?

17 A: I'm not aware. No, sir.

18 Q: Okay. And to your knowledge, there is no policy here that
19 the solicitor's office agrees to withhold these statements?

20 A: There is no policy. You know, there have been some new
21 developments about, you know, statements or whatever, but
22 there's no policy that I'm aware of. But, this is not the --
23 this is the first time it got this far as far as me having to
24 file those motions, but, you know, I have seen this happen a
25 number of times in my career.

1 Q: Okay. But, you're aware now that Judge Toal's made
2 specific findings that this is not appropriate; is that
3 correct?

4 A: Yes.

5 Q: Okay. You've pointed out the fact that you felt like this
6 was a PCR issue during the plea colloquy.

7 A: Yeah. I even told my client privately that he needed to
8 file a PCR if he wasn't granted the appeal. That's how
9 concerned I was about the evidence itself.

10 Q: Okay. And, not to belabor the point, but having looked at
11 what I showed you, you didn't file the appeal under -- you
12 filed under Brady, not under Rule 5.

13 A: That's correct. Yes.

14 Q: Alright. Thank you.

15 A: Yes, sir.

16 **MR. YARBOROUGH:** I don't have any further questions.

17 **THE COURT:** Cross.

18 **CROSS EXAMINATION OF MR. WILSON BY MR. JAMES:**

19 Q: Good afternoon, Mr. Wilson.

20 A: Good afternoon, sir.

21 Q: How long have you been an attorney in this state?

22 A: I think going on 12 years now.

23 Q: And most of that practice has been criminal?

24 A: About 75 percent of my practice is. Yes.

25 Q: And so you've done a lot of criminal cases in the last 12

1 years, correct?

2 A: Yes.

3 Q: You've represented a lot of clients?

4 A: A ton of clients. Yes.

5 Q: And you've represented clients from the early stages of
6 their proceedings, correct?

7 A: Yes, sir.

8 Q: And you've represented clients coming into the case in
9 later stages of the proceedings, correct?

10 A: Absolutely.

11 Q: And you've faced serious crimes?

12 A: Extremely. That's mainly what we handle.

13 Q: And have you handled maybe less serious crimes?

14 A: We'll do magistrate's court level stuff, you know,
15 shoplifting, habitual offenders, CSC cases, everything from
16 the beginning with disorderly conduct all the way up to murder
17 and capitol offenses.

18 Q: Would you agree with me that the strength of the State's
19 case can ebb and flow over the course of the days leading up
20 to trial?

21 A: Absolutely. Yes.

22 Q: And as you approach trial, evidence that you didn't know
23 existed may suddenly appear, correct?

24 A: It's happened. Yes.

25 Q: And new evidence can continue to develop, correct?

1 A: Absolutely.

2 Q: For example, we have a co-defendant in this case turn
3 State's evidence, correct?

4 A: That's correct.

5 Q: And in the reverse, some evidence can suddenly get weaker,
6 correct?

7 A: That's true too. Yes.

8 Q: Witnesses can suddenly decide they don't want to
9 cooperate, correct?

10 A: That's true.

11 Q: And despite all of that the State does offer plea offers
12 well in advance of trial, correct?

13 A: They do.

14 Q: And you understand that is entirely in the State's
15 discretion?

16 A: Absolutely.

17 Q: And they can take that offer back at any time, correct?

18 A: They can remove it at any point in time that they choose.
19 It's at their discretion there's no mandate that they
20 offer any plea offers.

21 Q: Correct, sir.

22 A: Yes.

23 Q: So, they can give you an offer that says it's going to
24 expire in 20 days, correct?

25 A: That's correct.

1 Q: And then they can wake up the next morning and take it
2 back.

3 A: That's right.

4 Q: Now, here you did not get the statement of Carl Thomas
5 prior to the expiry of the 13-year offer, correct?

6 A: That's correct.

7 Q: But you did get it afterward, correct?

8 A: We got it late in the game. Yes.

9 Q: But you did get it prior to trial, correct?

10 A: Absolutely. Yes, we got it prior to trial.

11 Q: And certainly prior to the date that Mr. Merino plead
12 guilty?

13 A: Yes. Yes.

14 Q: And did you show that statement to him?

15 A: Yes.

16 Q: And did you explain it to him?

17 A: I did.

18 Q: And you explained to him the impact it had on the strength
19 of the State's case?

20 A: One hundred percent.

21 Q: And the viability of his defense?

22 A: Yes, because we were about to head to trial. Absolutely.

23 Q: And at that time did you advise him to plead guilty?

24 A: I did. This happened, just to be clear, this happened all
25 on trial morning. Alright. So, we were prepared to go to

1 trial. Once we knew about the statement that was one thing,
2 Carl Thomas. And if my memory serves me correct it wasn't
3 until that morning of trial that that other witness, the other
4 co-defendant was going to turn State's evidence.

5 Q: So, did you learn of both statements on the same day or
6 did you learn of the Carl Thomas late in the process and then
7 the co-defendant on the day of trial?

8 A: That's right, that's what happened.

9 Q: Well, to be clear I gave you two scenarios. Was it the
10 later of those two scenarios?

11 A: Well, first Carl Thomas at the status conference.

12 Q: Okay.

13 A: And this was before trial.

14 Q: And how long, how long before trial was the status
15 conference?

16 A: I want to say a month, month and a half maybe. It wasn't
17 a long time, but I could be wrong so don't quote me on that.
18 But, at the day of trial then Barbara's client, I don't recall
19 her name, but the young lady was going to then testify and it
20 was going to leave my client with Shannon, who was the other
21 co-defendant, in trial together; which I knew with her
22 statement, I believe was going to be really congruent with
23 what Carl Thomas had to say, would have been an absolute
24 conviction.

25 Q: Okay. So, here we have a gap and we'll say about a month.

1 A: Correct.

2 Q: I know you said don't quote you on that, but I'm going to
3 quote you on that for now. You learned of the Carl Thomas
4 statement.

5 A: That's right.

6 Q: You don't have the other co-defendant turning State's
7 witness yet.

8 A: That's right.

9 Q: On the Carl Thomas statement alone, did you advise your
10 client that he should plead guilty?

11 A: I think we talked about it. I was concerned that they
12 weren't going to offer anything because again, their attitude
13 was different. Tom Terrell's attitude about the case was
14 different from, you know, Donna Elder's attitude, who was the
15 first prosecutor. I didn't get the sense that he was going to
16 give us anything. Tom and I did have conversations about
17 maybe allowing my client to plead, but I also talked with my
18 client about how devastating the evidence was and that it's
19 possible that we might have to take a plea. But, my
20 understanding from talking with him, he did not want a plea at
21 the time even though I firmly believe that if we had that
22 statement -- because by then, I mean, we felt like we had to
23 go to trial. I think he felt like he had to go to trial and I
24 definitely felt like, you know, we weren't going to get a good
25 deal after the 13 was taken off of the table and that was my

1 thinking at the time.

2 Q: But you did enter into plea negotiations with the
3 solicitor, correct?

4 A: Yes. After the fact? You mean after the 13 years?

5 Q: After the 13 years and after the Carl Thomas statement.

6 A: Yes.

7 Q: You went back to Solicitor Terrell and asked for an offer?

8 A: Yes.

9 Q: And at that time did he give you anything or did he say
10 well let's think about it?

11 A: No. He said no. They weren't going to reoffer the 13 and
12 they would not extend any other offer in the case.

13 Q: And then trial comes and one of the co-defendants turns
14 State's witness?

15 A: That's right. On that day of trial Barbara Pratt came to
16 me and she said look, you know, I think my client's going to
17 testify. And even with, you know, the information I had from
18 Carl's statement, you know, we knew we could try to impeach
19 him. Once we knew that she was going to testify, we literally
20 had to go back in and talk about trying to work it out and
21 trying to get something. I didn't want to do the plea
22 straight out, but I didn't see any alternative because he was
23 facing so much time.

24 Q: So, before Barbara Pratt came to you and said my client's
25 about to light your client up ---

1 A: Yeah.

2 Q: --- you're looking at the Carl Thomas statement and it's
3 the only real evidence to bring this circumstantial evidence
4 together?

5 A: Yeah. The thing was this, you know, my office went to
6 great lengths to impeach Carl Thomas. So, we went on
7 Facebook, social media, we also went and looked him up. We
8 actually have a file on him in my file where we were scouring
9 to impeach his testimony. We knew that he was a drug user, we
10 could use that. We also knew that he had gave some statements
11 that might not be completely accurate, so we were prepared to
12 deal with that. Once we knew that the young lady was going to
13 turn State's evidence that morning it became apparent to me
14 that we were dead in the water. I mean, it was just
15 absolutely going to be impossible even if I created a smoke
16 screen for Carl Thomas then I knew at that point in time I
17 would not have enough time to vet her testimony and then tear
18 it apart and do the research we did on Carl Thomas. That was
19 our strategy. As far as my client was concerned, obviously at
20 that point in time he knew that, you know, Carl Thomas'
21 statement was out there and that this young lady, once she
22 decided to testify and I told him that, was going to create a
23 huge problem from us at trial. Because both of them then were
24 going to put him at the scene and getting out of the car.
25 Q: And to be clear, we have been dancing around names. This

1 co-defendant that turned, was that Kila Saitta?

2 A: I'll be honest, I don't remember her name, but if she was
3 represented by Barbara Pratt then that's her.

4 Q: We have a Kila Saitta, a Shannon Cooper and a Jonathan
5 Merino.

6 A: It would be Kila. Yes.

7 Q: Okay.

8 **MR. JAMES:** I beg a moment of the Court's indulgence.

9 **BY MR. JAMES:**

10 Q: And you did file a Notice of Appeal in this case?

11 A: I did.

12 Q: And you set forth an explanation -- you set forth two
13 explanations; did you not?

14 A: That's correct.

15 Q: And you set forth all of the facts to show to the Court of
16 Appeals that you had not had all of the evidence in your
17 possession, all of the discovery in your possession at the
18 time that the 13 year plea offer was declined.

19 A: Yes.

20 Q: Was it an affirmative decline or did y'all just let it
21 expire?

22 A: It expired. I don't think we ever signed anything, I
23 don't think he ever signed anything, and I don't recall
24 signing anything, I don't recall that. But, it's possible but
25 I don't remember the details.

1 Q: And you raised those facts to the Court of Appeals, and
2 they dismissed the appeal anyway?

3 A: Yeah, now just to be clear, I file the Notice of Intent to
4 Appeal and then the explanation. I don't know what happened
5 in the procedural matter after that, after I filed it.

6 Q: But, if the records show that the Court of Appeals
7 dismissed the appeal shortly after that, you wouldn't contest
8 that?

9 A: No, absolutely not. Absolutely not.

10 MR. JAMES: I have no further questions for this witness,
11 Your Honor.

12 THE COURT: Alright. Any follow-up?

13 MR. YARBOROUGH: A couple of quick questions.

14 **REDIRECT EXAMINATION OF MR. WILSON BY MR. YARBOROUGH:**

15 Q: He asked you about the Court of Appeals, in your Court of
16 Appeals filing you argued Brady. You did not argue that there
17 was a Rule 5 violation; is that correct?

18 A: No. I think what I was thinking, obviously, was that
19 under Brady they have to -- they have a responsibility --
20 because their argument at the hearing was that, you know,
21 there was nothing exculpatory in it so they didn't have to
22 turn it over and our argument, obviously, was a little bit
23 different. And we felt that that was something that they
24 needed to turn over to us. Again, his inconsistencies can be
25 exculpatory.

1 Q: Alright. How about this, was it material?

2 A: His statement?

3 Q: The statement, yeah.

4 A: Yes.

5 Q: It was unquestionably material?

6 A: Yes.

7 Q: And it -- would you agree that there was a reasonable
8 probability that that statement would have changed the
9 resulting proceeding which was before the Court?

10 A: The trial?

11 Q: Yes.

12 A: Yes.

13 Q: Okay. And that was, that was never perfected before the
14 South Carolina Supreme Court or Court of Appeals. That issue
15 right there was never taken up on appeal.

16 A: I think, again, talking about the evidence would be close
17 to it. But again, no, there was not -- there wasn't a Rule 5
18 mentioned in the explanation to the Court, no.

19 Q: Right. And I think that we're playing here with ---

20 A: Semantics.

21 Q: Yeah. But I think that -- you're aware that the Court's
22 been pretty clear about the materiality of Rule 5 versus just
23 the Brady analysis. Rule 5 sets forth specific issues in
24 which the solicitor's office is required to turn over specific
25 findings.

1 A: That's right.

2 Q: Specific reports?

3 A: That's right.

4 Q: And in this case that was violated, right?

5 A: I agree with that, yes.

6 Q: Okay. But, you have no independent knowledge that -- you
7 know you filed a Brady motion and you argued that but you
8 don't have any independent recollection of their being a
9 specific Rule 5 motion being filed?

10 A: With the Court of Appeals or with the trial court?

11 Q: Well actually, either, both, either way.

12 A: When we go to Court -- maybe I'm confused about what
13 you're saying. But, when I go to Court and if I'm discussing
14 Rule 5 or a Brady motion, they're interchangeable.

15 Q: Okay. I know they're interchangeable in your and my
16 world.

17 A: Yes.

18 Q: But, would you agree that Rule 5 sets out specific
19 requirements that hold the solicitor's office to specific
20 obligations?

21 A: Absolutely. Rule 5 is part and parcel of every Brady
22 motion that we file. Absolutely. Yes.

23 Q: Okay. And any motions you file would be part of the
24 filings with the Court, correct? With -- they're part of the
25 package here?

1 A: Yes. Should be, should be.

2 Q: Can I ask you; you feel that those statements were
3 material and prejudicial?

4 A: Highly.

5 Q: Okay. And you're not familiar with whether or not, the
6 other co-defendants filed a Motion to Reconsider.

7 **MR. JAMES:** Objection, irrelevant.

8 **THE COURT:** How would that be irrelevant?

9 **MR. JAMES:** What the other attorneys did or did not do, I
10 do not believe is relevant to the performance of this attorney
11 in this case with this client.

12 **THE COURT:** And how do you argue that, Mr. Yarborough?

13 **MR. YARBOROUGH:** I think the, the record's pretty clear
14 that one of the other lawyers filed a Motion to Reconsider in
15 this case and that was granted by the Court because of the
16 violation. And I also don't think that Mr. Wilson filed a
17 Motion to Reconsider. I mean, he filed an appeal, not a
18 Motion to Reconsider.

19 **THE COURT:** Alright. I'm going to deny your objection.

20 **MR. JAMES:** Thank you, Your Honor.

21 **BY MR. YARBOROUGH:**

22 Q: Mr. Wilson, thank you.

23 **MR. WILSON:** Your Honor, would like me to answer the
24 question?

25 **MR. YARBOROUGH:** I don't have any further questions.

1 Thank you.

2 **THE COURT:** Anything else from the State?

3 **MR. JAMES:** Nothing further from the State, Your Honor.

4 **THE COURT:** Alright. Call your next witness.

5 **MR. YARBOROUGH:** I call Mr. Merino.

6 **DOMENIC MERINO, HAVING BEEN FIRST**
7 **DULY SWORN, TESTIFIED AS FOLLOWS:**

8 **CLERK:** Please have a seat and state your name for the
9 Court.

10 **MR. MERINO:** My name is Domenic John Merino.

11 **DIRECT EXAMINATION OF MR. MERINO BY MR. YARBOROUGH:**

12 Q: Good afternoon, Mr. Merino. Who represented you in this
13 case?

14 A: Mr. Ralph Wilson, Jr.

15 Q: Okay. And did he work closely with you?

16 A: Yes and no.

17 Q: Okay.

18 A: No, when it comes to certain dealings and yes.

19 Q: Okay. But, he brought you discovery for you to look at?

20 A: Yes.

21 Q: Okay. And as part of that discovery did you review this
22 document?

23 A: Yes. This is Kila Saitta's initial ---

24 Q: Okay. Now, you're going to have to say that really slow
25 for her.

1 A: Alright.

2 Q: Tell us what that document is?

3 A: This is Kila Saitta's initial statement. You know, she
4 was the first one to get arrested in my case. So, this was
5 her first statement which had no indication that my name is
6 brought up in this statement.

7 Q: When you say in this ---

8 **MR. YARBOROUGH:** Can I mark this and move it into
9 evidence? I'll show it to you.

10 **THE COURT:** Without objection?

11 **MR. JAMES:** Without objection, Your Honor.

12 **BY MR. YARBOROUGH:**

13 Q: Did you review that as part of the discovery that you saw
14 in this case?

15 A: Yes. That was in the initial discovery.

16 Q: Okay. And is that the only statement you're aware of that
17 was involved?

18 A: That was the only statement besides Paige Martin's
19 statement and she also indicates everybody else excluding
20 myself. But, she also says two other people, the same as Kila
21 Saitta's. So, those were the only two initial statements of
22 co-defendants initially telling on people.

23 Q: Okay. And Mr. Wilson shared all of those with you, right?

24 A: Yes. That is correct.

25 Q: Okay. And he did -- y'all talked about strategy and what

1 the best thing to do in your case was; isn't that right?

2 A: Well, that was more, that was towards when trial was
3 coming up because we still had no, no idea when we were going
4 to trial. We just knew that my case was going to be placed on
5 the docket soon.

6 Q: Okay. But, when it was placed on the docket did you have
7 any statements that were against you?

8 A: Not until two weeks before I was going to trial.

9 Q: I said when it was placed on the docket did you have any -
10 --

11 A: No.

12 Q: Okay. The answer to that is no. Now, did they offer you
13 -- did Mr. Wilson come to you with an offer at some point for
14 13 years as a plea?

15 A: August 10th, 2014 I was placed with a plea deal of 13 years
16 for kidnapping.

17 Q: Okay. At that point had you seen any statements against
18 you that incriminated you?

19 A: No.

20 Q: Okay. And Mr. Wilson had shared his file with you at
21 that point, correct?

22 A: Yes.

23 Q: Okay. And to your knowledge, did Mr. Wilson have any of
24 those statements?

25 A: No.

1 Q: Okay. So, when the plea offer was exhausted or off the
2 table you still had not had a chance to review any statements
3 from any witness that were finding you involved in this?

4 A: No.

5 Q: Okay. And so, did you take the 13 year offer?

6 A: No.

7 Q: Okay. Why didn't you?

8 A: Because from everything I'm seeing in these motions, it
9 has nothing that indicates me, that actually implicates me
10 into the crime.

11 Q: Right.

12 A: You know, they had this Carl Thomas statement since July
13 of 2014. Now ---

14 Q: You don't know that -- what I'm trying to say is had you
15 seen anything at that point that implicated you?

16 A: No.

17 Q: Okay. And Mr. Wilson was sharing that file with you,
18 correct?

19 A: Yes.

20 Q: Okay. And did you and Mr. Wilson talking about pleading
21 guilty or not pleading guilty?

22 A: Yeah, we both declined it and said that we would like to
23 set forth for trial.

24 Q: Right. And did he tell you like he just said that there
25 was a chance that because of the nature of the case that

1 people can look back upon you, but he didn't see any evidence?

2 A: Yes. That's correct.

3 Q: So, what he said was exactly correct?

4 A: Yes.

5 Q: Okay. So, at some point you're getting ready for trial
6 and they tell you about these other two statements, right?

7 A: Yes.

8 Q: Okay. Now, tell the Court about how that happened.

9 A: Alright. I think it was approximately March 31st, I was
10 set for trial April 20th. March 31st Mr. Wilson comes up to
11 see me in J. Reuben Long and he was like, you know, we have a
12 problem. I said what's that. He goes Carl Thomas, they have
13 this Carl Thomas statement for almost nine months and they're
14 just giving it to me now, you know. Once I reviewed it with
15 Mr. Wilson, I asked Mr. Wilson was there any chance that I
16 could take, you know, the 13 year plea.

17 Q: Right. So, you told him at that point that you wanted to
18 take the 13 year plea?

19 A: Yes, because now I see that they have sufficient evidence
20 against me, but at the time when they offered me the plea deal
21 they didn't have sufficient evidence against me. So, you
22 know, I'm sitting here and I'm thinking like okay, you know,
23 let's just take it to trial, you know. I'm feeling good about
24 going to trial, but now once I see that they can literally
25 crush me and not only was it one person, it was another

1 statement also. You know, because one of my co-defendant's
2 recanted her statement and then implicated me. Now, all of
3 this is starting to come up and I have no chance to take my
4 guilty plea, you know, and I'm forced to go to trial.

5 Q: Let me ask you this. Let me ask you this. Did the fact
6 that the State had withheld those statements from you
7 materially alter the way in which you handled your case?

8 A: Oh, 100 percent.

9 Q: And would you have handled it differently if you would
10 have gotten those?

11 A: Yes. I would have had 13 years instead of 22 years.

12 Q: Okay. And do you feel like there's a reasonable
13 probability of the outcome of that original offer, the
14 proceeding would have been different?

15 A: Yes. It would have been completely different.

16 Q: Okay. And you're not a lawyer, right?

17 A: No.

18 Q: And you don't know the difference between Rule 5 and
19 Brady, right?

20 A: No.

21 Q: Okay. Are you aware that the -- of there ever being a
22 Motion to Reconsider the sentence filed for you?

23 A: No. There was only the initial direct appeal.

24 Q: Okay.

25 A: And are you aware that the other co-defendants who filed

1 motions were granted?

2 **MR. JAMES:** Your Honor, I must respectfully renew my
3 prior objection.

4 **THE COURT:** Overruled.

5 **MR. JAMES:** Thank you, Your Honor.

6 **BY MR. YARBOROUGH:**

7 Q: Are you aware?

8 A: Yes. I am aware.

9 Q: Okay. And did they get their original offers back?

10 A: Yes. Kila Siatta went back on a Motion to Reconsider.
11 Her original plea was 13 and she received a 13 year sentence.
12 And then Honorable Judge Culbertson gave her 10 years on the
13 Motion to Reconsider.

14 Q: Okay. But, y'all filed an appeal and didn't file a ---

15 A: I had no idea what a Motion to Reconsider was until I
16 found out that's what she went on. But, I figured, you know,
17 since Mr. Wilson, Barbara Pratt and, you know, Eric Fox we all
18 got tried at the same time, we all got sentenced at the same
19 time, that they all would have took the proper measurements
20 and that we all would have did a Motion to Reconsider or
21 whatever the case may be. I don't know what happens
22 afterwards, all I know is I got sent to prison.

23 Q: Are you familiar with your appeal? Do you know if anybody
24 was ever appointed by the State Appellate or anybody ever talk
25 to you about your ---

1 A: No. The only thing I received which was a copy of what
2 Mr. Wilson filed on my behalf and he also write in the
3 statement that he was not paid for me to retain to continue
4 with the appeal, but it was just to file the motion and then I
5 think it was a couple of months later I just received a piece
6 of paper in the mail stating that my motion for appeal was
7 denied and it was for the lower court's to handle.

8 Q: Okay. And at some point after that we filed this PCR; is
9 that correct?

10 A: Yes.

11 Q: Okay.

12 **MR. YARBOROUGH:** Your Honor, can I have a minute just to
13 kind of ---

14 **THE COURT:** Yes.

15 **BY MR. YARBOROUGH:**

16 Q: The statement that -- the two statements that you didn't
17 get were those both from people that were informants or
18 cooperating witnesses in your case?

19 A: Yes.

20 Q: Okay. And who were they again?

21 A: That was Carl Thomas and Paige Martin.

22 Q: Okay. And I ask you, if you would have known about this
23 would you have accepted the ---

24 A: Yes. I would have accepted the 13 year plea when they
25 offered it to me in August of 2014.

1 Q: And did Mr. Wilson even tell you at that point he felt
2 like he had been handtied with this whole thing?

3 A: Yeah. And, you know, he explained the situation, you
4 know, that he don't like when stuff like this happens, you
5 know, but he does see it happen from time to time, you know,
6 and basically it forced us, you know, to go to trial, you
7 know, when if they would have at least showed us these
8 statements I would have been intelligently and knowingly aware
9 of what to do with my life and how to handle my situation
10 instead of forcing me to go to trial, forcing me to engage in
11 a plea at the last minute because I was scared that I was
12 going to get life in prison if I were to lose in trial.

13 Q: Okay.

14 A: So, I had all of the se variables to deal with once
15 receiving these statements.

16 Q: Right. And so, by the time the 13 year offer was off the
17 table, that's when you got the statements was after that?

18 A: That's correct.

19 Q: Is there anything else you want to tell the Court? I
20 think we've covered everything.

21 A: I mean, just at the end of the day, you know, I feel like
22 I was railroaded into getting a 22 year sentence, you know,
23 when coming to, you know, at a place where, you know, I just
24 feel like I wasn't dealt with fairly. That's all, that's it.

25 Q: Because you would have done things differently?

1 A: Yes. I would have done things differently and took the 13
2 year plea. That's all.

3 Q: Okay. Nothing further. Thank you.

4 **CROSS EXAMINATION OF MR. MERINO BY MR. JAMES:**

5 Q: Mr. Merino.

6 A: Yes, sir.

7 Q: Did I understand you correctly that your testimony here
8 today, is that after receiving the Carl Thomas statement and
9 after learning that one of your co-defendant's was going to
10 turn on you, at that time you wanted to go back and take the
11 13 year offer?

12 A: Yes. That is correct.

13 Q: Alright. You were present here in the courtroom today
14 when I asked the questions of your former defense attorney,
15 Mr. Ralph Wilson, Jr.; correct?

16 A: Uh-huh. (Affirmative response)

17 Q: And he and I discussed that there was a gap in time
18 between when you learned of the Carl Thomas statement and when
19 you learned that your co-defendant was going to turn on you;
20 correct?

21 A: Yes.

22 Q: After you learned of the Carl Thomas statement and before
23 you learned of the co-defendant, at that time did you wish to
24 plead guilty and go back and get the 13 years or did you still
25 think that you wanted to go ahead to trial?

1 A: No. I still, I still wanted to take the original plea of
2 13 years. But, you know, Mr. Wilson informed me, he's like I
3 don't think I'm going to be able to get that plea now so we're
4 going to have to go to trial.

5 Q: And then certainly after your co-defendant turned on you,
6 you definitely ---

7 A: Yes. I definitely, yes, I wanted to take the 13 year
8 plea, you know, and it wasn't given to me. They made me take
9 an open plea from 15 to life. So, it was really at the
10 Judge's discretion. You know, Mr. Wilson really came when I
11 was getting ready to pick my jury, you know, Mr. Wilson pulled
12 me into the back and he said, you know, you should take this.
13 I can get you 15, the Judge is not going to oppose this 15,
14 you know, just take the 15 but it's an open plea. So, I said
15 I really don't want to take it, you know, so we started
16 discussing further in detail and then that's when all of this
17 came about.

18 Q: Well, now this raises another question for me. Was it
19 your understanding that you were pleading guilty in exchange
20 for a 15 year sentence?

21 A: He just said it was a guilty plea. He just said it was an
22 open plea, you know, he said I could get 15 and I could get
23 life.

24 Q: Oh, okay. So, it could go anywhere from 15 to life?

25 A: Yes.

1 Q: And that was your understanding?

2 A: Yes.

3 Q: Okay. Thank you for clarifying.

4 **MR. JAMES:** I have no further questions for this witness,
5 Your Honor.

6 **THE COURT:** Alright. Anything further?

7 **MR. YARBOROUGH:** No, sir, Your Honor.

8 **THE COURT:** Any other witnesses?

9 **MR. YARBOROUGH:** No, sir, Your Honor.

10 **THE COURT:** Any witnesses on behalf of the State?

11 **MR. JAMES:** I do not believe I need to call Mr. Wilson
12 back up here, Your Honor.

13 **THE COURT:** Alright. Mr. Yarborough, why don't you just
14 briefly summarize where you're coming from and what you think.

15 **MR. YARBOROUGH:** Your Honor, the State had obviously
16 withheld these statements and they -- those statements should
17 have been turned over based on Rule 5 and they weren't. Now,
18 once they were turned over, both Mr. Wilson and the applicant
19 agree that they wanted to go back and take the 13 year deal,
20 before that there really was no evidence holding -- showing
21 that the applicant was guilty. And so, at that point the
22 applicant had not accepted the deal. The State was under
23 requirement to turn over the statements of the co-defendant's
24 based on Rule 5. Now, I think that the problem became and
25 where it got convoluted was that the motions that were filed

1 were under Brady and the argument that was filed to the South
2 Carolina Supreme Court were under Brady and what it is, it
3 technically it gets a little bit confusing in my head at
4 times. But, what Rule 5 specifically outlines is the
5 statements that are going to be used at trial that are in the
6 possession at that point of the solicitor's office, must be
7 turned over and that's the lawyers obligation to get those.
8 At that time, those statements were not turned over, they
9 materially changed the outcome of the case and so we think
10 that the applicant should be granted his Post Conviction
11 Relief application on that. But, take it one step further, if
12 you take that issue up to the Supreme Court, right then
13 Justice Toal had already made her decision, saying look you
14 guys got to quit playing these games, we're going to turn
15 these things over, we're going to reverse these things. If
16 that would have been taken up, that issue and that issue alone
17 would have been preserved he would have won at that point.
18 That issue was not preserved because it was under Brady, it
19 was not under Rule 5 discovery and it's clear from the two
20 filings to the Court that that's what it was. And the
21 applicant never had another person handle his appeal which
22 could have raised those issues and perfected at that point.
23 So, the first time the applicant's had to raise these issues
24 is here and we'd ask that you grant his PCR, allow him to go
25 back and, you know, he's going to have to start fresh, but I

1 think that he would be entitled to that at this point.

2 **THE COURT:** Alright. Let me hear from the State.

3 **MR. JAMES:** Your Honor, whether or not to offer any kind
4 of plea offer, no matter how great or how little is entirely
5 within the discretion of the solicitor. They can give it at
6 any time, they can take it away at any time. They can give it
7 before all of the evidence has been turned over, they can wait
8 until after all of the evidence has been turned over. They
9 can never give one at all, they can give one on the first day
10 that he is arrested. So, whether or not they had turned over
11 the statement of Carl Thomas is wholly irrelevant to whether
12 or not he was intitled to have any kind of plea offer, whether
13 he was intitled to entertain the 13 year plea offer or any
14 such thing. Your Honor, the precedent that is made abundantly
15 clear, the scope of the State's discretion in making plea
16 offers is set forth clearly in Reed vs. Becka, that would be
17 333 SC 676, alternately 511 S.E.2nd 396. That is a Court of
18 Appeals case from 1999 that clearly demonstrates that unless
19 there is some sort of detrimental reliance on acceptance of a
20 plea offer the Court has no authority to force the State to
21 reoffer a prior plea offer that has since expired or which was
22 previously declined. Your Honor, similarly there's nothing to
23 show that any kind of detrimental reliance on the declination
24 of a plea offer gives any basis to go back and reimpose a
25 prior, previously offered plea offer.

1 **THE COURT:** Did the State violate the Rule 5?

2 **MR. JAMES:** I have not heard any evidence to establish
3 that the State has violated Rule 5. It turned over the
4 evidence prior to trial, at least a month prior to trial, such
5 that Mr. Merino had time to prepare for trial in light of that
6 evidence. And he made the decision after Ms. Siatta, as I
7 understand it, plead guilty and intended to turn on him, to
8 plead guilty straight up. So, the State, as I understand it,
9 certainly could have turned over the statement in a more
10 timely fashion, but it did turn it over well in advance of
11 trial in compliance with the rules. So, there's nothing in
12 Rule 5 that provides that it can bind the State to any plea
13 agreements that it has previously offered. Your Honor, I am
14 extremely concerned that any effort by report to establish
15 that a prior plea offer can be forced to stay open, from that
16 point onto conviction at trial for any reason is going to not
17 (inaudible) to the benefit of defendants. It might benefit
18 Mr. Merino here today, but as to any other defendants what
19 they are going to experience is not that they get these plea
20 offers and they stay open until such time as they have all of
21 the evidence. What is going to happen is that the State is
22 not going to extend plea offers until it has all of the
23 evidence. And ask I explained and as I explored with Mr.
24 Wilson, the State keep getting evidence all of the way up
25 until the time of trial. Sometimes the State gets new

1 evidence right at the start of trial. Sometimes the State
2 gets evidence in the middle of trial.

3 **THE COURT:** When did they get this evidence?

4 **MR. JAMES:** Your Honor, my understanding from the
5 testimony that Mr. Wilson gave was that it was nine months
6 prior to the date it was turned over after the status
7 conference is what I understood that to be.

8 **THE COURT:** Alright.

9 **MR. YARBOROUGH:** Your Honor, that's correct. I think it
10 was clear that it was nine months, and that was nine months
11 prior to the -- I mean, nine months after the opportunity to
12 accept the deal was. And I think Mr. Wilson was clear that he
13 knew and everybody knew at that point that those statements
14 had not been turned over so that the defendant could have
15 relied on those statements in making his decision whether or
16 not to accept the deal. And I think that the Court has
17 clearly said over and over again that that's not appropriate.
18 You can go back and look at State versus Gibson. There's a
19 number of cases that have held similarly that the defendant's
20 ability to review/look at the evidence against him is an
21 important cog that happens in that process and that process is
22 protected by this Court so that they can look at the evidence
23 and determine whether or not to make a plea or not make a
24 plea. And at this point that didn't happen.

25 **THE COURT:** Alright. Anything further from the State?

1 **MR. JAMES:** One thing that does need to be noted here
2 about the scope of the evidence and testimony that has been
3 entered here today. There's no evidence in the record to show
4 any kind of malfeasance on the part of the State as to this
5 evidence. The State has no interest in making sure that
6 people don't plead guilty. The State wants people to come
7 clean and admit to their culpability in illegal conduct. As
8 far as we can be aware, the State thought that it turned over
9 the -- and I will admit, I'm speculating a little bit beyond
10 the scope of the evidence presented here today; but, as far as
11 we know the State thought it had given it over and just
12 hadn't. Things slip through the cracks sometimes. For all of
13 these reasons, for the case law that I have cited to you
14 previously I would respectfully request that this Court deny
15 Post Conviction Relief. I would note there is the Toal order.
16 That is an order, it is not necessarily a published opinion.
17 It does not overturn Reed versus Becka or any of the other
18 numerous cases that provide that the discretion to provide a
19 plea offer is entirely within the State's discretion. My
20 understanding of the Toal order is that it needs to be a more
21 -- it's trying to put -- cut down on a more knowing quid pro
22 quo by the State, where the State has this evidence and says
23 hey if you plead guilty but don't ask me for the evidence you
24 can take this good offer. And that's what my understanding of
25 what Justice Toal was trying to cut down on at that time.

1 It's not this circumstance where, as Mr. Merino argues and as
2 numerous other applicant's have argued, they didn't have all
3 of the evidence that ultimately come to light and therefore a
4 prior plea offer has to stay open. In that circumstance, the
5 State has to bot offer any plea offer until it believes it has
6 all of the evidence and that's not until the day of or during
7 trial.

8 **THE COURT:** Alright. I will take it under advisement and
9 let you know something.

10 **MR. YARBOROUGH:** Thank you, Your Honor.

11 **(ADJOURNED)**

12

13

14

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY)

The State,)
)
 Plaintiff,)
)
 vs.) 2013-GS-26-4764
) 2013-GS-26-4765
 Kyla Toni Saitta,) 2014-GS-26-328
) 2015-GS-26-359
 Defendant.)

The State,)
)
 Plaintiff,)
)
 vs.) 2013-GS-26-4759
) 2013-GS-26-4760
 Shannon De Vante Cooper,) 2013-GS-26-4761
) 2014-GS-26-326
 Defendant.) 2015-GS-26-360

The State,)
)
 Plaintiff,)
)
 vs.) 2014-GS-26-322
) 2014-GS-26-323
 Domenic John Merino,) 2014-GS-26-324
) 2014-GS-26-329
 Defendant.) 2015-GS-26-361

Transcript of Record
April 20, 2015
Motions

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

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

Thomas G. Terrell, III, Esquire
Lauree Richardson, Esquire
Attorneys for Plaintiff

Barbara Pratt, Esquire
Attorney for Defendant,
Kyla Toni Saitta

J. Eric Fox, Esquire
Attorney for Defendant,
Shannon De Vante Cooper

Ralph J. Wilson, Jr., Esquire
Attorney for Defendant,
Domenic John Merino

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

State v. Saitta, et al. (Motions)

3

1

E X H I B I T S

2

(There were no exhibits marked during the hearing.)

3

4

5

6

7\

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

State v. Saitta, et al. (Motions)

4

1 (On the record, April 20, 2015. Motions heard prior to
2 pleas.)

3 THE COURT: All right. This is the case, State of South
4 Carolina versus Shannon De Vante Cooper, 2014-GS-26-326, 2013-
5 GS-26-4759, 2013-GS-26-4760 and 2013-GS-26-4761, indictments
6 charging the Defendant with armed robbery, burglary in the
7 first degree, kidnapping and possession of a weapon during the
8 commission of a violent crime; also, State of South Carolina
9 versus Domenic John Merino, indictments 2014-GS-26-329, 2014-
10 GS-26-322 and 2014-GS-26-323, charging the Defendant with
11 armed robbery, burglary in the first degree and kidnapping;
12 also, State of South Carolina versus Kyla Toni -- how do you
13 pronounce that last name?

14 MS. PRATT: Saitta, Your Honor.

15 THE COURT: Saitta, 2014-GS-26-328, 2013-GS-26-4764, and
16 2013-GS-26-4765 charging the Defendant with armed robbery,
17 burglary first degree and kidnapping. According to my
18 records, Thomas Groom Terrell, III, is appearing on behalf of
19 the State. Are you also appearing in this -- participating,
20 Ms. Richardson?

21 MS. RICHARDSON: Yes, sir, Your Honor.

22 THE COURT: All right. Lauree Richardson also appearing
23 on behalf of the State. The Defendant Shannon De Vante Cooper
24 is represented by Attorney J. Eric Fox. Domenic John Merino
25 is represented by Attorney Ralph J. Wilson, Jr., and Kyla Toni

State v. Saitta, et al. (Motions)

5

1 Saitta is represented by Attorney Barbara W. Pratt. All
2 right. I understand we have some pretrial motions; is that
3 correct?

4 MR. WILSON, JR.: That's correct, Your Honor.

5 THE COURT: All right. How do we want to -- I
6 understand there's a number of motions. How do we want to
7 address these first?

8 MR. WILSON, JR.: Whatever the Court suggests, Judge.

9 MS. PRATT: Your Honor, I'd suggest that we hear on the
10 motion to sever from each of the three of us before you rule
11 and then the individual motions after that for reinstating
12 pleas or motions in limine.

13 THE COURT: All right. So all three Defendants have a
14 motion to sever?

15 MS. PRATT: Yes. Yes, Your Honor. We do.

16 MR. FOX: Yes, Your Honor.

17 THE COURT: All right. What order do we want to go in?
18 It doesn't really matter to me. Mr. Wilson.

19 MR. WILSON, JR.: Your Honor, I'd be happy to go first.
20 Judge, we served a memorandum of law in support of a
21 Defendant's motion for severance of the Defendants in this
22 matter on the State, as well as I think we provided a copy for
23 the Court.

24 This motion is based on several things. I'm not going
25 to belabor the point of what's actually written in the motion,

State v. Saitta, et al. (Motions)

6

1 Judge. The most important thing I think that I can tell the
2 Court is that I think because of the interrelationship between
3 the group of Co-Defendants, not just simply the State's
4 witnesses that are going to testify, that's Carl Thomas and I
5 believe that the other witness's name is Brittany or, excuse
6 me, Paige Martin, that the relationships with the actual
7 victims in this matter, the former relationships, the
8 relationships between these Co-Defendants as well, Judge, and
9 the nature of the actual allegations that are coming out that
10 are to be made against the Co-Defendants are antagonistic in
11 nature and I think that because of all of the antagonistic
12 allegations that have to be made in this case to protect the
13 actual constitutional rights of my client I would presume,
14 based on the other motions that I've read, that the other
15 lawyers are going to do the same thing, you're going to have
16 people firing back and forth, and I think there are going to
17 be a lot of Bruton issues, possibly, Lyle issues as well,
18 Judge, in this case, and I think it's just going to be a
19 gallery shooting back and forth.

20 THE COURT: Give me some specifics. I apologize for
21 interrupting.

22 MR. WILSON, JR.: Certainly.

23 THE COURT: But every appellate case I've seen that's
24 generally the case, you've got everybody pointing the finger
25 at somebody else. So how does it prejudice your client's

State v. Saitta, et al. (Motions)

7

1 right to a fair and impartial trial?

2 MR. WILSON, JR.: I'll give you an example, not to give
3 our defense away too much and that's obviously the Court's
4 aware that's the danger of doing these types of motions, there
5 is an allegation in this case that the folks that went inside
6 were talking black, that they were speaking urban. Well, we
7 have some evidence which may tend to prove which we may decide
8 to put in at a later time that there are some folks that are
9 going to testify for the State that actually talk urban and
10 have done that on Facebook and also that there's some of the
11 Co-Defendants who have done that and engaged in activity, that
12 there are possible gang ties. There are a possibility that
13 some people may have tattoos that we can identify that
14 identify other people that might protect my client and
15 exculpate him, and again, not to give away too much, but we
16 know for sure, at least we believe that we can prove that
17 there is an actual another person that is identified that was
18 identified as my client and it's not particularly my client
19 that was actually the person that committed this crime, and
20 again, I have to bring that out, and that's going to be
21 against one of the Co-Defendants.

22 THE COURT: Yeah, but I mean, that, but how does that
23 prejudice your client the fact that he brings it out against
24 one of the Co-Defendants?

25 MR. WILSON, JR.: It prejudices him because it becomes

State v. Saitta, et al. (Motions)

8

1 antagonist, and again, then you have all lawyers going back
2 and forth trying to then prove what really is the State's
3 burden that each Defendant did commit this particular crime.
4 So instead of having the State carry the burden, what happens
5 is by natural effect of us being in trial together and the
6 fact that obviously that these Co-Defendants know each other
7 intimately I might add, you're going to have a shooting
8 gallery going back and forth, Judge, and I don't, I don't
9 think that obviously, you know, I know the Court wants and the
10 interest is in protecting judicial economy, I understand that,
11 and trying the Defendants together. I just don't see how the
12 Court can protect each individual Defendant's right to a fair
13 trial when the -- that something may be said, something may be
14 brought out on the stand and I can't necessarily contradict it
15 or go after it because my client he'd have to be forced to get
16 on the stand and testify. He'd have to literally get up and
17 say, "That is not true." Give you an example, if I said right
18 now that Ms. Barbara Pratt's client said, you know, that this
19 happened, that this happened that way, and I've brought that
20 out during cross examination, how is she going to contradict
21 that? If I said in open court she has a tattoo that says Dloc
22 on it and then she -- and if I say that to her or to another
23 person who knows, has intimate knowledge of Ms. Kyla or her,
24 her, excuse me, her client, if I say that to someone on the
25 stand she can't then come back and say, "Well, I didn't say

State v. Saitta, et al. (Motions)

9

1 that." She would have to get on the stand and testify and
2 say, "Look, this is why I have Dloc testified or," excuse me,
3 "tattooed on my body," and we know for sure that that's going
4 to be an issue.

5 THE COURT: Well, but I'm bound by the appellate
6 decisions, and every appellate decision that you pretty much
7 have Co-Defendants that are pointing the finger at the other
8 Co-Defendant and what I have to do is balance how does it
9 prejudice -- so distinguish this case from the appellate
10 decisions that say it's not an abuse of discretion to try Co-
11 Defendants in one trial without severing them when they're
12 pointing the finger at the other.

13 MR. WILSON, JR.: I simply think that because of and I
14 know that Your Honor -- I'm not going to bore you with the
15 facts. There are serious issues with the interrelationships
16 between these Co-Defendants. There is sex going back and
17 forth. There is trading girlfriends going back and forth.
18 There are lies going back and forth. There are backstabbing
19 lies going back and forth, not simply between these Co-
20 Defendants, Judge, but as well as again the Co-Defendants that
21 are choosing to testify for the State, and again, these
22 relationships are intermingled so much that I think that what
23 you're going to have on the stand, again, is a shooting
24 gallery. Again, it's going to be he said, she said. It's
25 going to be my client's rights having to be put on, on display

State v. Saitta, et al. (Motions)

10

1 in my opinion because --

2 THE COURT: Well, let, and excuse me for interrupting
3 again.

4 MR. WILSON, JR.: Yes, sir.

5 THE COURT: But how do we avoid that by severing the
6 trials?

7 MR. WILSON, JR.: At that point in time there'll be no
8 issues because then if my client's sitting here, and again,
9 and, and one of the other Co-Defendants' lawyers gets up and
10 says, "Well, isn't it true that, you know, he was known as
11 Dloc or he was identified as speaking black," well, then it
12 doesn't force my client to get up and get on the stand and
13 say, "No. I don't speak black. That's not how I am. That's
14 not what I speak. That's not how I engage."

15 THE COURT: Wait a minute. I'm not, I'm not following
16 your argument. If we sever these trials from these three
17 Defendants --

18 MR. WILSON, JR.: Yes.

19 THE COURT: -- how, number one, how do you avoid that?

20 MR. WILSON, JR.: Because each individual Defendant
21 doesn't have to get up, they're not forced to get on the stand
22 to actually testify and to defend exactly what's being said
23 about them on the stand because I promise you we're going to
24 run into that issue in this case. It's going to happen, and
25 again, I can't give away my client's, you know, defense

State v. Saitta, et al. (Motions)

11

1 entirely. I've given you quite a bit to tell you that
2 obviously if someone gets on the stand and they are
3 identifying, the State's witness in their proffered statements
4 identify my client as Dloc.

5 THE COURT: Right.

6 MR. WILSON, JR.: Well, we have information that there
7 is another Dloc out there, and I am going to have to bring
8 that out. I may ask one of the witnesses on the stand if they
9 know Dloc, and if they say, "Yes. I know a Dloc, and I know
10 that Ms. Kyla dated a Dloc," then, again, that's going to
11 force her to have to get on the stand and to defend that
12 because now I'm --

13 THE COURT: Why does it force her to get on the stand
14 --

15 MR. WILSON, JR.: Because --

16 THE COURT: -- and defend it with regard to your
17 client?

18 MR. WILSON, JR.: Because she's now implicated now
19 herself in an interpersonal relationship.

20 THE COURT: All right. Let's -- excuse me -- let's
21 sever the trials. We're trying them separately --

22 MR. WILSON, JR.: Yes.

23 THE COURT: -- that same testimony comes out, she
24 hasn't been tried yet. She's -- I mean, I don't see how
25 you're avoiding that issue.

State v. Saitta, et al. (Motions)

12

1 MR. WILSON, JR.: Because the only interest, the only
2 person who at this table who has an interest in worrying about
3 the identification of my client, Judge, is my client. Eric's
4 not going to be worried about that. Ms. Barbara's not going
5 to be worried about that for her client. I --

6 THE COURT: But I mean, I -- and I don't see how trying
7 them together is going to change that.

8 MR. WILSON, JR.: It changes because they now have to
9 come in to defend my accusations. They almost have to
10 literally be forced to get on the stand and avoid their right
11 to the Fifth Amendment to remain silent to actually -- if they
12 don't testify in this case they would actually have a real
13 problem with evidence that's going to come in regarding the
14 accusations regarding the relationships, regarding, you know,
15 identifying factors, you know, motives for lying, etcetera. I
16 mean, it --

17 THE COURT: But I mean I don't see how you don't have
18 that in every case where you have Co-Defendants tried in one
19 case.

20 MR. WILSON, JR.: When you, when you hear the facts
21 they'll delve into in this particular matter, when the State's
22 witnesses get on the stand I think Your Honor would be really
23 understanding of why it is that we're jumping up and down
24 saying that we need severance in this matter. It's not like a
25 typical case. To give an example, if I -- I've tried other

State v. Saitta, et al. (Motions)

13

1 cases before where you've had Co-Defendants who basically have
2 a simple relationship. They've known each other for a couple
3 of years and/or a few years since high school or whatever and
4 they do a crime together. That's not the case in this matter.
5 You have literally everyone in this particular matter who has
6 either slept with, slept with each other, had, you know,
7 friendships, backstab each other. There are Facebook statuses
8 that we pulled that we may introduce to the Court that show
9 that they have ulterior motives for bringing these charges for
10 saying what they said, and again, these statements and these,
11 these materials, again, are against the Co-Defendants, not
12 simply the State's Co-Defendants, but also these Co-
13 Defendants. My client has a right to trial, and if we say
14 what's prejudicial, well, the prejudicial factor is is that
15 he's still got to get up now and he's going to antagonize
16 every single one of the Co-Defendants in trial, and then
17 they're going to antagonize him back because that's what's
18 going to happen.

19 THE COURT: But if you sever it he's still going to
20 antagonize them.

21 MR. WILSON, JR.: No. Because then you'll only have
22 the State's witnesses who are on the stand who are saying that
23 my client, you know, did X, Y and Z, and then if I bring in
24 something regarding Ms. Barbara Pratt's client or Eric Fox's
25 client they're not going to be prejudiced and vice versa, I'm

State v. Saitta, et al. (Motions)

14

1 not going to be prejudiced by what they bring in against my
2 client.

3 THE COURT: Okay.

4 MR. WILSON, JR.: And that's where I'm going with that,
5 Judge.

6 THE COURT: All right. Who wants to argue next?

7 MS. PRATT: Your Honor, maybe I can give you a more
8 concrete example. I certainly agree with the theme and theory
9 of what Mr. Wilson is saying. There is an allegation, for
10 example, in the testimony, the statements given by Co-
11 Defendants that the State is going to present that Mr. Cooper
12 had previously robbed Mr. Kapalka. That's information that's
13 out there. That would be a Lyle issue; correct? I mean,
14 normally in a trial against Mr. Cooper no prior allegation of
15 a, of a bad act, which was not a conviction, would be allowed
16 in. However, the involvement of other testifying witnesses
17 such as Brittany Long, Chris Kapalka, who may be a witness,
18 possibly Paige Martin, that would be good cross examination
19 against them for what if they would be -- their bad behavior
20 as well, but if you make a ruling as to Lyle as to that then I
21 can't raise it for my client, who was not involved in that
22 particular incident, and there's many others. As Mr. Wilson
23 says, these people have -- they are a group that has kind of
24 fluidly done things because of their heroin addictions all
25 over the county and in different groups. Sometimes it's

State v. Saitta, et al. (Motions)

15

1 Paige, and, and Dloc. Sometimes it's Brittany and Chris, and
2 you know, there's a whole combination, and because two of them
3 are testifying Co-Defendants and the other three of us are
4 sitting here, I think that the Bruton problems and the Lyle
5 problems are the biggest reason that, that these cases should
6 be severed.

7 THE COURT: So when did you get that information about
8 that testimony? I mean, these cases have been kicking around
9 since 2013, and we had a status conference. So you're saying
10 you just found out last week when these motions were filed
11 that they were going to be offering testimony that there was a
12 prior robbery?

13 MS. PRATT: Well, certainly we didn't have Mr. Thomas's
14 statement. That was the one that we just got given to us on
15 either the 30th or the 31st.

16 THE COURT: So you had no idea that they were going to
17 say that there was a prior robbery between one of these Co-
18 Defendants and one of the victims?

19 MS. PRATT: I, I will not -- I don't want to lie to the
20 Court and give it bad information. I'm not sure when that
21 information came to my attention. I will say that when my
22 client was arraigned back last year in July and Mr. Terrell
23 and I had a discussion, he told me then that he was planning
24 to try my client separately because of Bruton issues. I have
25 it in my notes. Now, that wasn't -- he wasn't being committed

State v. Saitta, et al. (Motions)

16

1 to that.

2 THE COURT: All right.

3 MS. PRATT: But that was the intent at that time. My
4 client also, Your Honor, is differently situated than these
5 two. If the facts that the State is going to present are --
6 well, what -- when they present their facts, what they are
7 going to say, as I understand it, is that these two Defendants
8 are the ones that went in and actually did whatever they did
9 to the victim and robbed the house. My client at the very
10 most in the light most favorable to the State comes to the
11 door, is a differently situated Defendant. By being at the
12 table with them, she is being tarred by that brush, and there
13 is -- there's going to be an argument about the scope of plan
14 and all of the involvement in a hand of one situation which if
15 I put my client up or we do the argument that we do makes
16 their job almost impossible, and I'll give you an example, and
17 I know what you're talking about with the appellate court
18 situation. I understand the Court's concern. My client has
19 no record. She may decide to testify. She has given
20 statements to Detective Frebowitz, one unfortunately she asked
21 for a lawyer three times and he keeps talking to her for, you
22 know, unfortunately for her, but in her statement she talks
23 about other people who were involved and what they did. So if
24 she decides to testify the State has the right to cross
25 examine her about that. It's not a Bruton issue anymore, but

State v. Saitta, et al. (Motions)

17

1 it's certainly prejudicial to these two Defendants, and I
2 can't tell her not to testify to tell her story because that
3 harms her defense. She at the very least needs to be
4 separated from these two. I don't know if there's a good
5 reason to have these two together, but I believe that her
6 situation is so different and the Lyle and the Bruton issues
7 that are implicated by it, that a trial of her separately is
8 in her best interest and, and certainly the least prejudicial
9 way to handle this.

10 THE COURT: All right. Mr. Fox.

11 MR. FOX: Thank you, Your Honor. Again, I would echo
12 and share everything that Mr. Wilson and Ms. Pratt -- it was
13 Wilson. I wanted to say Wilson again, but Ms. Pratt have said
14 and I agree with all of those arguments.

15 Judge, with particular to Mr. Cooper, we also have a
16 Lyle issue directly specifically. There are allegations from
17 some of the witnesses that Mr. Cooper may have robbed the
18 victims in this incident before, but there's also implication
19 that Mr. Merino may have been a part of that or separately.
20 It's unclear whether they might have done it together or
21 separately but so that's a Lyle issue. If I'm sitting next to
22 Mr. Wilson's client at trial that would be furtive or fertile
23 cross examination material but would more than likely be out
24 of bounds if he's a Defendant, just like I would object to any
25 suggestion of that. It's not substantiated, never resulted in

State v. Saitta, et al. (Motions)

18

1 an arrest or a complaint but there'd be these allegations of
2 prior bad acts against my client. Mr. Wilson, of course, is
3 going to make the same objection, I believe would be granted,
4 to prevent any discussion of that, but that's something if we
5 are separate that I would certainly be able to go after and,
6 in fact, throw the suspicion on, on Mr. Merino, but that's
7 something that will not be available. That's a very specific
8 situation that would be unavailable to me.

9 Judge, to me, I'm very aware of the appellate -- the
10 appellate courts and how they've ruled on these things, and
11 they've said there's got to be a specific right at stake, and
12 I think there is just with the Lyle issue alone. Judge,
13 certainly if you have a right to a trial you have a right to a
14 fair trial, and certainly if you have a right to a fair trial
15 that's why we have lawyers in the courtroom, after Gideon,
16 just having the right to a lawyer without the ability to
17 actually have one next to you doesn't amount to anything. If
18 I have the right to a trial as a Defendant then certainly I
19 have the right to direct my own defense. If I'm sitting with
20 one or two other lawyers, many basic trial strategy decisions
21 that I and my client would make are taken out of my hands.
22 From the very beginning, striking jurors, the rules say we're
23 going to be limited to 20. If I were sitting here alone I've
24 got ten that myself and my client and only ourselves
25 determine. Judge, I've got a four-inch binder full of juror

State v. Saitta, et al. (Motions)

19

1 information that may or may not do me any good. I can study
2 that thing and have it memorized and have all my decisions,
3 but if Ms. Pratt or Mr. Wilson say, "Nope, strike that juror,"
4 I don't have a say and I can't do anything about it. So I'm
5 limited, I sacrifice the number of strikes I'd normally be
6 entitled to and I also sacrifice the ability to choose or at
7 least have a say in the jurors that I would seat. The Lyle
8 issues in terms of the decision whether my client testifies or
9 we put up any testimony, that effects last close at the end.
10 That may be a very specific strategy that my client and I
11 have. We may follow the course of the trial, see the State's
12 case and decide all things considered Mr. Cooper would better
13 not -- would rather not testify and preserve last close, but
14 again, that decision is taken completely out of my hands if
15 Mr. Wilson or Ms. Pratt offer any testimony or if their
16 clients testify. Any one of these by themselves I don't think
17 would be enough, Judge, but if it's not an abuse of discretion
18 for Your Honor to decline to sever then that implies that it
19 is within your discretion to sever, and I think when you take
20 the whole constellation, all these issues together, the Lyle
21 issues, the confrontation issues, potential Bruton issues that
22 still may come up, the conduct of the trial being taken out my
23 client's hands.

24 THE COURT: Well, and I apologize for interrupting
25 again.

State v. Saitta, et al. (Motions)

20

1 MR. FOX: No, sir.

2 THE COURT: But this was all common knowledge when we
3 statused it. Why wasn't this issue addressed then?

4 MR. FOX: Well --

5 THE COURT: Why was it just brought up a week ago
6 because I'm going to be honest with you to me it just seems
7 like a tactic to delay the trial because all of this
8 information was available and has been available since 2013.
9 It's been forced to trial pretty much by the Court because the
10 case is over two years old. Now, the week, less than ten days
11 prior to trial we get the motions to sever. We've known this
12 about the joint strikes, multiple Defendants, Co-Defendants
13 and things of that nature, so why -- I mean, and, and, and I
14 still have not heard the specific prejudice to any individual
15 Defendant that is unique to this case or that distinguishes
16 this case from any appellate decision where there was a joint
17 trial of Co-Defendants.

18 MR. FOX: Well, without going back through it, Judge,
19 I'd just say again I think the specific is the Lyle issue. In
20 terms of the timing of the motions, I filed it when I did.
21 I'm not seeking any delay. If Your, if Your Honor does sever
22 these trials I'm happy to be the first one. I'm ready to try
23 it, and if Your Honor does grant that motion, Mr. Cooper and
24 myself we'll be happy to remain and try this case. So it's
25 not part of any effort on my part to delay this trial. We've

State v. Saitta, et al. (Motions)

21

1 been ready, are ready, and so that's not an issue from our
2 end, Judge.

3 THE COURT: All right. What's the State's position?

4 MR. TERRELL: See if I can't address all these for Your
5 Honor. First off with the Lyle issue, the prior bad acts, the
6 State, of course, would not try to elicit any testimony that
7 there have been prior bad acts. We're going to focus our
8 testimony solely on this trial or else I'm sure we would hear
9 from the Defense. We're, we're not planning on eliciting
10 testimony about any prior break-ins. I don't believe that
11 would be proper, appropriate, nor is it necessary.

12 As far as any Bruton issues, the only Defendant who's
13 seated before Your Honor ready for trial who gave a statement
14 is Ms. Saitta. She did -- gave a statement. The State is not
15 planning on using that statement. Bruton, therefore, would
16 not and should not be triggered if we're not planning on using
17 anything that she said against her for her, against anybody
18 else or for anybody else. So I don't think that carries the
19 day either, Your Honor.

20 Essentially what, what I'm understanding them to say
21 for the, the rest of it, the alleged prejudice would be that
22 their, their clients have become so intertwined with their,
23 with their misdoings and, and wrong, evil deeds and what have
24 you that it -- that they should sever and, and it seems to me
25 that becoming so intertwined with, with your dirty deeds would

State v. Saitta, et al. (Motions)

22

1 be a perfect reason not to sever, to try it as one trial.
2 Your Honor, essentially if you -- the, the same testimony
3 would come out when trying all three of these from, from the
4 State's point of view as trying any one of them individually.
5 That means you're going to have instead of one trial where X
6 number of witnesses are called, you'll have two or even three
7 trials where the same witnesses are going to be called, the
8 same testimony'll be elicited and that would result in
9 prejudice to the State in having to, one, try the case
10 multiple times, having a new record for each trial. Things
11 inherently change as far as the small things. So that's,
12 that's at least some prejudice trying to have the same trial
13 three times at, at least to get out the same testimony.
14 That's why we have joint trials so we wouldn't need to be put
15 through that situation, Your Honor.

16 THE COURT: All right. Anything in reply?

17 MS. PRATT: Your Honor, if I might address what Mr.
18 Terrell said about the Bruton issue, while he may be correct
19 that he's not intending to use my client's statement in his
20 case in chief, if I put my client on the witness stand he
21 certainly is not going to stop himself from asking her, "Well,
22 isn't it true that you gave a statement to the detective and
23 you told the detective that," for example, "these two people
24 were the ones that went in the house?" That directly effects
25 --

State v. Saitta, et al. (Motions)

23

1 THE COURT: Yeah. But we don't know that that's going
2 to happen. He says it's not going to happen. He says he's
3 not going to use any of her prior statement.

4 MS. PRATT: So he's not going to impeach her with it
5 either. That would be a ruling and an agreement that he's not
6 going to impeach her with her own statement if she takes the
7 witness stand?

8 MR. TERRELL: Your Honor, if she takes the witness
9 stand the State would be entitled to use her prior, any prior
10 inconsistent statement that she makes.

11 THE COURT: Yeah. But I mean --

12 MS. PRATT: Which is exactly the problem.

13 THE COURT: Well, no. It also gives them the
14 opportunity to cross examine her as well. So as long as she
15 is taking the stand to testify I don't see where there is a
16 Bruton issue if the Co-Defendants, likewise, can cross examine
17 her on her testimony. It's only if they use her prior
18 statement to identify the Defendants and she's not available
19 subject to cross examination by the Defendants is when you
20 have a Bruton issue. If she's on the stand and testifying
21 then she's open game, not just to the State but to the Co-
22 Defendants as well. So I don't think you've got a Bruton
23 issue there.

24 All right. Anything else?

25 MR. WILSON, JR.: Your Honor, I just want to add this,

State v. Saitta, et al. (Motions)

24

1 the Court talked about the timeliness of this motion, during
2 status conference I specifically told the Court that I was
3 going to file the motion for severance at that time. This was
4 three or four weeks ago. I then forwarded an e-mail to the
5 Court letting the Court know that I would not -- that I would
6 not file the actual motion for severance till I got the
7 statement which the State has had since July of last year.

8 THE COURT: Which statement?

9 MR. WILSON, JR.: The statement from Carl Thomas.

10 THE COURT: Okay.

11 MR. WILSON, JR.: And so my motion was actually timely.
12 I let the Court know in a timely fashion that I wanted to go
13 and I thought that in my opinion that this was highly
14 prejudicial to my client, his right to confrontation as well
15 as obviously his right to a fair trial, and I still believe
16 that the combination, again, I will join the other Co-
17 Defendants in their motions as well to sever this case, but I
18 think the combination, again, of factors that we're going to
19 face in this trial, when you add that all up at the end of the
20 day I think those things are going to be the appealable
21 issues that the appellate court's going to be concerned about,
22 the aggregate effect of having these three Defendants at the
23 table together and then also having the two Co-Defendants
24 testify and the possibility that my client may get up, Shannon
25 Cooper may get up, Ms. Kyla may get up, all that together is

State v. Saitta, et al. (Motions)

25

1 tantamount in my opinion, it, it, it's really prejudicial,
2 highly prejudicial to the rights of this client to have a fair
3 and equitable trial because of everything that we know is
4 going to come out. Now, I know the Court doesn't know all the
5 facts in this case, but I promise you, Your Honor, when we get
6 to that point, and I know you're saying, "Well, we don't know
7 yet," but by the time we get to it it'll be too late.

8 THE COURT: Well, give me a specific. That's what I'm
9 telling you. I've got to rule on this motion now. I can't
10 rule on a motion based upon your argument of, "Judge, I know
11 something's going to happen to prejudice my client, but I
12 can't tell you what that prejudice is," and that's what I'm
13 hearing.

14 MR. WILSON, JR.: I'll give you another example, Judge,
15 and again, we're going to go through this anyway with the jury
16 I assume at some point in time whether it's today or another
17 day, and what we're fully prepared to go forward today, but
18 there is allegations that there were the shotgun. This
19 evidence comes in because there was an allegation by one of
20 the witnesses from the State that a shotgun was used in this
21 particular matter. The State's witnesses say that these
22 Defendants, if they went inside, they go inside with a
23 shotgun, that they went inside with handguns. That shotgun
24 was in view later on by someone else. Our information tells
25 us that one of the Co-Defendants, possibly one of the State's

State v. Saitta, et al. (Motions)

26

1 Co-Defendants, possibly one of the Co-Defendant's here, stole
2 that shotgun from the victim before, and that issue is going
3 to be brought in, and so again, you have a prejudice to one of
4 the Co-Defendants, and if I then am forbidden from bringing it
5 up, which could exculpate my client, it becomes prejudicial to
6 him, and the Court may rule and say, "Look, Mr. Wilson, you
7 can't bring that up because, again, you're trying to now
8 identify with a" --

9 THE COURT: Let me -- excuse me.

10 MR. WILSON, JR.: Yes, sir.

11 THE COURT: And I apologize again for interrupting.

12 MR. WILSON, JR.: Yes, Your Honor.

13 THE COURT: But I'm assuming you would say you would
14 bring it up by your client testifying.

15 MR. WILSON, JR.: Not necessarily, Judge.

16 THE COURT: So how are you going to bring it up?

17 MR. WILSON, JR.: Because the actual State's witness is
18 on our witness list, I can call him to the stand. He's
19 subpoenaed. I have a -- an agreement from Mr. Terrell. I can
20 call him to the stand and say, "Look, did you -- were you
21 missing a shotgun?" "Yes, I was missing a shotgun the last
22 time somebody broke in the house." "Do you know who stole
23 that shotgun?" "Yes. I know who stole the shotgun." "How do
24 you know?" "Well, this is how I know," and then point to the
25 person in court who did it.

State v. Saitta, et al. (Motions)

27

1 THE COURT: But I mean, I don't -- I still don't see
2 --

3 MR. WILSON, JR.: It's a, it's a prior bad act. So if
4 someone else does that and says that my client was the one
5 that stole the shotgun or if someone else says it then I'm
6 going to ask for a mistrial, and again, you run a -- again
7 it's going -- again, you're running into each other with the
8 right to confrontation. It is an issue. I promise you it's
9 going to be an issue, and, and the Court -- because I'm
10 letting the Court know that this is going to be an issue I
11 think that we'll have a right to eventually stop this trial
12 because I think it's going to happen if we all stay together.
13 Eventually one of us is going to stop this trial and say, "I
14 want a mistrial," and then motions for it, and then we're
15 going to be back in, in this, in this situation again if the
16 Court of Appeals says, "Well, this was just too much
17 prejudice."

18 THE COURT: Okay. All right. Mr. Fox, anything in
19 reply?

20 MR. FOX: Judge, I just agree, the Lyle issue that Mr.
21 Wilson is bringing up, I mean, what he's talking about almost
22 certainly is, is Mr. Cooper and the shotgun, and obviously,
23 I'm going to object to any talk about anything previously that
24 happened, and I believe there's a good argument for Your Honor
25 to exclude that, but then that hamstringing Mr. Wilson from

State v. Saitta, et al. (Motions)

28

1 being able to bring that information out whether his client's
2 testifying or not, and I'm going to be in the same situation
3 with different matters with regard to Mr. Merino, things that
4 I want to bring out that Mr. Wilson almost certainly will
5 object to.

6 Judge, the only last thing I would say just very
7 generally, I don't think there's any prejudice to the State.
8 We were just in chambers this morning talking about the case
9 that might follow this one, and Mr. Hixson indicated, well,
10 because Ms. Pratt was in this trial that he wouldn't make her
11 try the next case where she has a co-Defendant and they would
12 just do those separately. They would just have two trials.
13 They do it all the time when it suits. There's no prejudice.
14 Yes. It'll be repetitive, but the rights that we have
15 certainly trump any convenience that the State might lose out
16 on.

17 THE COURT: All right. All right. Your motion's
18 noted, but I haven't heard anything that specifically points
19 to prejudice any of the Co-Defendants' trials, prejudices them
20 in this case or the -- at least to any extent that
21 distinguishes it from the appellate decisions where it has
22 allowed a joint trial of Co-Defendants. So I'm going to deny
23 the motion to sever.

24 All right. What do we have next?

25 MR. WILSON, JR.: Your Honor, if it please the Court?

State v. Saitta, et al. (Motions)

29

1 THE COURT: Okay.

2 MR. WILSON, JR.: Judge, I have a motion that I filed
3 for motion to enforce a previous plea offer in this matter.
4 This is related to the Carl Thomas audio that we received from
5 the Solicitor's Office. There was an audio or an interview
6 done with, I believe it was Detective Cox last year in July,
7 was it July last year or 2013.

8 MR. FOX: That's correct.

9 MR. WILSON, JR.: Last year of July, and before that
10 the State had extended an offer for my client to plead guilty
11 to 13 years. That offer was, I think, to be terminated or it
12 expired, I think, in February sometime. There were also
13 subsequent offers that were made verbally to me by Mr. Terrell
14 as well as Nancy Livesay and Donna Elder and I've delineated
15 all of that actually inside of the motion, Judge.

16 Our issue is this, and I have a couple of issues, but
17 my issue is fair dealing with the Defendant. The Prosecutor
18 in this matter withheld that evidence until March 30th of this
19 year, and they've had it for nine months beforehand, and
20 during that time, obviously, I am advising my client, not to
21 get in too much detail, and I'm telling him certain things
22 about the status of his case and we're working on case
23 strategy, we're working on whether or not he should plead
24 guilty or not. We're working on the common things that
25 attorneys work on with their clients. He's been incarcerated.

State v. Saitta, et al. (Motions)

30

1 So every time I've gone out to J. Reuben Long I've gone to see
2 him there, and we've had multiple discussions about the case
3 matter, about the evidence in this case. My concern here are
4 two things, one, that the Prosecutor didn't turn that evidence
5 over which is exculpatory in nature. The very fact that the
6 actual witness says that he's on drugs at the time of the
7 crime itself is impeachable. It's something I can impeach him
8 on. I can ask him about it on the stand. It tends to prove
9 that he may not be credible, and there is specific case law,
10 and I'm sure the Court's aware of it, that goes directly to
11 his credibility. So it was exculpatory. I think the State
12 would argue that it's not exculpatory, but I disagree firmly,
13 and on top of that, too, that evidence I should have had a
14 chance to discuss that with my client before he's facing a day
15 in court where he's now got to deal with a statement which
16 inculcates him as well as I think has some exculpatory
17 ramifications for him, but again it inculcates him. You have
18 a Co-Defendant who sat in jail for six months at a time, well,
19 several, excuse me, there were nine months at the time, never
20 said a word, then he makes a statement. Then on top of that,
21 too, I have a question about PCR. I am concerned about that.
22 It goes to the effectiveness that I have for my client, and
23 I'll be honest with you, it'd difficult to be effective as a
24 lawyer if you don't have all of the discovery when you issue a
25 Brady motion to the Prosecutor's Office, and again, I will

State v. Saitta, et al. (Motions)

31

1 tell the Court, I think it is ineffective of me based on what
2 the Prosecutor did in this matter by not turning it over it
3 makes me ineffective because I can't tell him, "Look, you need
4 to consider doing X, Y and Z, or you need to consider the fact
5 that you're going to now have not just one State's witness
6 testifying against you but now two," and again, he only found
7 out on March 30th because I had to go out to the jail once we
8 got the actual statement itself and tell him that's what was
9 going on.

10 THE COURT: Well, do you have any authority that says
11 the State has to turn over all inculpatory and exculpatory
12 evidence prior to withdrawing a plea bargain?

13 MR. WILSON, JR.: Your Honor, it's in the actual Brady
14 and I have the actual cases listed.

15 THE COURT: No. That says that that has to be done
16 before withdrawing a plea offer.

17 MR. WILSON, JR.: That's, that's correct. That's
18 correct. It has to be done before withdrawing a plea offer.
19 What I'm telling the Court is that the State extended other
20 plea offers during this time, and I --

21 THE COURT: Well, wait a minute. So you're saying that
22 the law is they have to turn everything over prior to
23 withdrawing a plea offer?

24 MR. WILSON, JR.: The only thing they don't have to
25 turn over is if it's completely exculpatory. If it's

State v. Saitta, et al. (Motions)

32

1 completely -- excuse me, inculpatory. If it's completely
2 inculpatory they don't have to turn it over.

3 THE COURT: Now, I'm talking about -- I'm not talking
4 about whether they have to turn it over or not turn it over.
5 I'm talking about something that says they have to leave a
6 plea bargain open until --

7 MR. WILSON, JR.: Yes.

8 THE COURT: -- everything is turned over.

9 MR. WILSON, JR.: Yes, Your Honor. The actual and if
10 you'll look at number 11 on the actual -- my apologies, Judge
11 -- motion to enforce the previous plea offer, the actual
12 memorandum that came down from Chief Justice Toal dated March
13 1st, 2004, the Chief Justice specifically said and talked about
14 the issue of, of Prosecutors taking plea offers off the table
15 and saying, "Look, we're not going to give you this piece of
16 evidence, and if we don't give you this piece of evidence or
17 excuse me, if we do give it to you we're going to take then
18 the plea offer off the table." So again, that's an example of
19 actually --

20 THE COURT: Let me see that case. What is the case?

21 MR. WILSON, JR.: It's just a memorandum.

22 THE COURT: Oh, it's a memorandum. I'm talking about
23 legal authority that mandates the State has to turn everything
24 over because there's no constitutional right to a plea
25 bargain.

State v. Saitta, et al. (Motions)

33

1 MR. WILSON, JR.: No, no. And I agree with that.

2 THE COURT: So they don't have to give -- extend an
3 offer at all.

4 MR. WILSON, JR.: I agree a hundred percent.

5 THE COURT: And they can withdraw an offer --

6 MR. WILSON, JR.: Absolutely.

7 THE COURT: -- if it is not accepted. The only thing is
8 they cannot withdraw an offer after the Defendant accepts the
9 offer.

10 MR. WILSON, JR.: That's right.

11 THE COURT: My question is what is the legal authority
12 that mandates they leave a plea bargain open until all Brady
13 and Rule 5 disclosures have been made?

14 MR. WILSON, JR.: The Supreme Court, Chief Justice came
15 down with an order for solicitors to abide by. The order
16 specifically said that prosecutors were not to remove -- they
17 were not to remove plea offers and then -- and then say,
18 "Well, we're going to take it away from you, but then we're
19 going to introduce other evidence," and that's --

20 THE COURT: Okay. That's the order I need to see.
21 Have you got that order?

22 MR. TERRELL: I believe a copy of that was attached to
23 Ms. Pratt's motion.

24 MR. WILSON, JR.: I believe it was, Judge.

25 MS. PRATT: It is, Your Honor, and I think I handed it

State v. Saitta, et al. (Motions)

34

1 up to your clerk this morning.

2 MR. WILSON, JR.: My apologies, Judge.

3 THE COURT: Okay. Oh, it's right here. Here we go.

4 No. This is a memorandum. I thought you said there was a
5 court order by Judge Toal that mandated that.

6 MR. WILSON, JR.: No. What I'm saying to the Court is
7 that her memo it was sent down for solicitors to follow.

8 That's what her memo says, Judge.

9 THE COURT: This is the practice of -- [as read], "I
10 believe that it is unethical to premise a plea agreement on
11 the Defendant relinquishing the right to discovery. It has
12 come to my attention that solicitors in some circuits are
13 offering plea agreements to Defendants on the condition that
14 they forego discovery." So you're saying that was done in
15 this case?

16 MR. WILSON, JR.: No. What I'm saying in this case,
17 Judge, is that in the spirit of her memorandum that she issued
18 and in the spirit of Rule 5 and fair play that this Defendant
19 was offered an actual plea bargain. Then the State had the
20 actual evidence at the time in their possession that they
21 offered these other plea agreements, these plea bargains.
22 What I'm saying is is that how can I effectively advise my
23 client as to whether he should take a plea offer if he's not
24 being fairly dealt with in my opinion, and again, it goes to
25 my effectiveness as a counsel. If I don't have a statement

State v. Saitta, et al. (Motions)

35

1 which obviously the aggregate effect of having one person then
2 having another person together now testify that he was
3 involved in a caper to commit an armed robbery or burglary or
4 murder or whatever it is, obviously at that point in time I
5 have real concerns about how effective I can be, and I think
6 that it prejudices him, and I think that the prosecutor
7 because they are the gatekeepers, and again, that's one of the
8 things that the order speaks to, the spirit of the order
9 speaks to the fact that they're the gatekeepers and they
10 should honestly if they have that evidence turn it over to us
11 in a timely fashion and the Court has gone on at length as
12 well as the prosecutor about the timeliness of our motions..
13 Well, the prosecutors have an indeed ethical and, and urgent
14 responsibility to make certain that they turn over evidence in
15 a timely fashion, and if they don't do that, I don't think
16 that, one, they should be able to use it, but also I don't
17 think it should be used to prejudice my client.

18 THE COURT: Okay. All right. I note your motion, but
19 I don't think the memorandum says that. I'm going to deny
20 your motion.

21 MR. WILSON, JR.: Thank you, Judge.

22 THE COURT: All right. Any other motion? All right.
23 Ms. Pratt, you've got yours?

24 MS. PRATT: Yes, Your Honor. And my client is slightly
25 differently situated again --

State v. Saitta, et al. (Motions)

36

1 THE COURT: Okay.

2 MS. PRATT: -- than Mr. Cooper and Mr. Merino. My
3 client actually was the -- I think the only one that was
4 arraigned. We did consent findings of arraignment that were
5 signed by Judge John on July 23rd, but the arraignment was
6 actually on July 22nd, and at that time we were aware of the
7 statement of Ms. Martin, and Mr. Terrell told me that there
8 was a Co-Defendant that was going to testify and corroborate
9 everything that Ms. Martin said, a male Co-Defendant, but
10 would not tell me who it was. It was a matter of there were
11 four. There, obvious, there are four different male Co-
12 Defendants. Depending on which one it was would have made a
13 big difference in regards to my client's decision because
14 obviously if it were Co-Defendant Mr. Corey Kai, who was not
15 even there, that statement has a different effect on my
16 client's decision, but we were called to be arraigned that day
17 and, and they served her with the indictment for the armed
18 robbery, the direct indictment on that day, on July 22nd, and
19 we did consent findings on the arraignment. I'm asking that
20 the Court set those findings aside and allow her to plead to
21 the offer of the ten years simply because of the situation of
22 the State's knowledge of what the witness -- who the witness
23 was but not being willing to allow us to know that. It
24 certainly would have had a material effect on whether or not
25 she would have taken that plea offer, and without that

State v. Saitta, et al. (Motions)

37

1 information and in turning it down, she was certainly
2 prejudiced by the State's decision to do that. I have
3 detailed notes of that. This is a conversation that Mr.
4 Terrell and I actually had in this courtroom back in the back
5 corner, and I'm just concerned because I think that the
6 practice of withholding information until late, while there
7 may be some State's purposes involved with it, implicate the
8 Defendants' rights much more strongly, and there is no
9 question that in this situation we actually gave up a plea
10 offer without knowing of something that the State knew that
11 they would not tell us, and I think that that's an important
12 right that my client had, and we ask that the Court set aside
13 those arraignment findings and allow her to plead without
14 having to go to trial to the ten years that was offered to her
15 on January the 9th of 2014.

16 THE COURT: All right.

17 MS. PRATT: And I think I attached to my motion the
18 arraignment findings.

19 THE COURT: Yeah.

20 MS. PRATT: I, I will point out to the Court that those
21 were actually signed on the 22nd. There's a bond order that's
22 in the file that shows that she was directly -- served with a
23 direct indictment and the arraignment findings both happened
24 on that day, the 22nd.

25 Now, the actual interview of Mr. Thomas was taken by

State v. Saitta, et al. (Motions)

38

1 Todd Cox on the 23rd in the morning at 9:23. No question the
2 State, Mr. Terrell knew who the Co-Defendant was but did not
3 report that, that information to us.

4 THE COURT: All right. Your motion's noted. I'm going
5 to deny it.

6 MR. FOX: Your Honor, I have the same motion in front
7 of the Court. Judge, it's, it's the same reasons. It all
8 relates to the Carl Thomas' interview, and again, Judge, I
9 don't know how I can possibly adequately advise my client
10 without having as much information as possible. I certainly
11 recognize sometimes things will, will come late in the day.
12 We use the collective, when we say the State, I don't know a
13 situation why it didn't come from the Solicitor's Office to
14 myself. I didn't get it until April the 2nd, so less than
15 three weeks ago. We had a status conference on March 23rd with
16 Your Honor. We discussed issues, what was out there. We were
17 told at that time that we would have it in a day or two, did
18 not get it for ten more days. I don't know where the fault
19 lies, and frankly, I don't care. The State is responsible for
20 the actions or inaction of law enforcement, to call it the
21 prosecutors. The State is a collective. So I have no direct
22 knowledge that this was done deliberately by the Solicitor's
23 Office, but frankly I don't care --

24 THE COURT: Okay.

25 MR. FOX: -- because collectively they have the

State v. Saitta, et al. (Motions)

39

1 responsibility and an ongoing responsibility to provide
2 discovery as it comes in. We filed our discovery motion
3 October the 9th of 2013. We received some on October the 24th.
4 Mr. Thomas' interview with Detective Cox was July of 2014, and
5 from July 2014 until April the 2nd of this year we did not
6 receive it. We did not receive a summary. We did not receive
7 really any indication that it even existed. I agree with Mr.
8 Wilson there's certainly material that's very impeachable in
9 terms of the, the witness's own testimony. It's certainly --
10 that makes it material under Kyles v. Whitley, under Brady,
11 under Rule 5. It's certainly something that was discoverable
12 and should have been provided. Judge, the last thing I would
13 say in addition to Judge Toal's longstanding order about
14 providing discovery and not basing plea offers on incomplete
15 discovery, we still have an administrative order from Judge
16 John dating back three or four years. It has not been
17 rescinded that says that no case be placed on the trial roster
18 until all discovery has been transmitted, and I would argue
19 that has not been done in this case, and we'd ask that either
20 the plea offer remain open or that Mr. Thomas' testimony and
21 statements be excluded.

22 THE COURT: Okay. Well, now, we're just dealing with
23 the motion to enforce the prior offer from the State. I'm
24 assuming your client had the same offer as the other Co-
25 Defendant?

State v. Saitta, et al. (Motions)

40

1 MR. FOX: My -- Mr. Cooper's was for 13 years to
2 kidnapping, Your Honor, with the other charges to be
3 dismissed.

4 THE COURT: I see.

5 MR. FOX: I believe that was the same as Mr. Merino's.

6 THE COURT: All right. All right. Well, I'm going to
7 deny your motion to enforce the prior plea offer from the
8 State.

9 All right. Any other motions?

10 MR. WILSON, JR.: Yes, Your Honor, just two brief
11 motions, Judge. This is a motion in limine to exclude any
12 conversation or any discussion by any State's witnesses
13 whether it be law enforcement or otherwise of any murder
14 conspiracy. There are no allegations of murder in this case,
15 and the only reason I point that out is because Detective
16 Frebowitz's actual report he, for whatever reason, says that
17 there was an allegation out there murder conspiracy. I just
18 ask the Court to exclude that because it is highly
19 prejudicial. It's probative value is nil to zero of the
20 elements of the crime that's -- well, the crimes that are
21 actually alleged by the State. I would just ask that that be
22 excluded.

23 THE COURT: All right. Any arguments, Mr. Fox, Ms.
24 Pratt, regarding that or you all just joining Mr. Wilson in
25 that motion?

State v. Saitta, et al. (Motions)

41

1 MR. FOX: I would join as far, and as far as any such
2 statements would touch on, on Mr. Cooper then we would join
3 that motion.

4 THE COURT: All right.

5 MS. PRATT: And we also, Your Honor.

6 THE COURT: All right. What's the State's position?

7 MR. TERRELL: Your Honor, this is the, the first I've,
8 I've heard anything about a conspiracy to commit murder. I
9 don't intend to elicit such information.

10 THE COURT: All right. I'll grant that motion then.

11 MR. WILSON, JR.: Thank you, Your Honor.

12 And Your Honor, the last motion that I have, Judge, is
13 also a motion in limine to limit or exclude any discussion
14 from any member of law enforcement about the Defendant being
15 on probation, discussion from any member of law enforcement
16 about the Defendant handcuffed by parole officers and
17 discussion with any, any member of law enforcement about
18 seeing shotguns or a large television in the home of Corey
19 Kai. Those things were not recovered by probation. What
20 happened was the next day after which is, again, is another
21 issue, the next day after this incident allegedly occurred
22 there was a, a witness or a State's witness or someone who was
23 charged as a Co-Defendant named Corey Kai who parole and
24 probation went to his house. Incidentally, when they go in,
25 they go in looking for Mr. Shannon Cooper at the time. My

State v. Saitta, et al. (Motions)

42

1 client happened to be there and they say they saw shotguns,
2 they saw a television which are some of things that were
3 alleged to have been taken from the residence the night
4 before. I am asking the Court to exclude that because those
5 things weren't --

6 THE COURT: Well, wait a minute. Wait a minute. All
7 right. A motion to suppress any reference to your client
8 being on probation and what else?

9 MR. WILSON, JR.: And handcuffed that particular day,
10 Judge, as well as, and it's a combination of things, as well
11 as the fact that they say, probation and parole says that they
12 saw some shotguns there that day but the shotguns, I guess,
13 were claimed by the homeowner and that so they let those
14 shotguns or guns remain in the home at that point in time, and
15 they never recovered those things. So --

16 THE COURT: All right.

17 MR. WILSON, JR.: -- they can't identify what it was is
18 my point. --

19 THE COURT: All right. What's the State's position?

20 MR. TERRELL: Your Honor, at this point the State does
21 not intend to call the probation and parole officers. They
22 are limited as to what they would be able to testify to in the
23 first place by statute. I don't -- right now I don't foresee
24 the need to, to call them at all. If I should I would ask the
25 Court maybe to consider hold off ruling on this until we

State v. Saitta, et al. (Motions)

43

1 decide if it's necessary. Right -- as of right now I do not
2 plan on calling the probation, parole and public -- and pardon
3 service agents, Your Honor, and they would be the only law
4 enforcement officers who would testify that way.

5 MR. WILSON, JR.: Judge --

6 MR. FOX: Your Honor, I don't mean to interrupt but
7 this touches on Mr. Cooper as well, particularly the situation
8 the next day. He was, in fact, on probation. In fact, the
9 agents were looking for him, and my understanding is aside
10 from law enforcement who might testify about, there is a
11 witness, Paige Martin, who is going to testify, who was
12 present, and who told Detective Frebowitz during her
13 interview, "I was there. Law enforcement came," and then they
14 have a discussion, "Well, were they county police, were they
15 City of Conway police, what was it," and then they determined,
16 in fact, it was probation officers that were there. So that's
17 information that may come from another source than the
18 probation agents, and our motion, I would join in Mr. Wilson's
19 motion as it relates to Mr. Cooper but to exclude any such
20 testimony from Ms. Paige Martin who is going to testify.

21 THE COURT: Okay. I'll, I'll grant the motion to the
22 extent that there can't be any reference to any of the
23 Defendants being on probation or handcuffed as a result of
24 alleged violations of probation. I'm denying your motion as
25 to any references to shotguns at the time of the arrest or

State v. Saitta, et al. (Motions)

44

1 seeing shotguns because I just don't know how that's going to
2 play out. Raise your objection when and if it's offered and
3 then we'll address it at that time. Okay?

4 MR. WILSON, JR.: Thank you, Your Honor.

5 THE COURT: All right.

6 MR. WILSON, JR.: Your Honor, and one last thing, I
7 just want to also for the record join my co-counsels for the
8 Co-Defendants in all their motions that are appropriate and
9 proper, Judge.

10 THE COURT: All right

11 MR. WILSON, JR.: Thank you.

12 THE COURT: Anything else?

13 MR. TERRELL: Yes, sir, Your Honor.

14 THE COURT: All right.

15 MR. TERRELL: I feel it unfortunately necessary to
16 place on the record in defense of what I've done as
17 allegations were made of misconduct of my prosecutorial
18 duties, Your Honor, and --

19 THE COURT: The only thing I've heard is -- well, as a
20 result of the status conference did I set a deadline for
21 turning over information --

22 MR. TERRELL: No, sir.

23 THE COURT: -- that was violated? Okay. All right.

24 MR. WILSON, JR.: Your Honor, to my knowledge there was
25 no deadline for Solicitor Terrell to turn over anything.

State v. Saitta, et al. (Motions)

45

1 THE COURT: Okay.

2 MR. WILSON, JR.: And, and just so the Court knows and
3 on the record I'll say there we're not asking for sanctions
4 against Solicitor Terrell. We're just simply arguing for our
5 clients and their positions.

6 THE COURT: I got you. All right.

7 MR. TERRELL: When they start talking about
8 withholding, purposely withholding material information.

9 THE COURT: All right, sir. Go ahead.

10 MR. TERRELL: Thank you, Your Honor.

11 This statement was taken in July to law enforcement.
12 It was in preparation of trial. Originally this trial was
13 scheduled for, I believe it was August. We started talking to
14 the Co-Defendants. All six of the seven Co-Defendants were
15 arrested. All the -- around the same time and were all
16 initially charged with the same charges. They -- one of them
17 wound up alibiing out and becoming an accessory after the
18 fact. The final person who was a principal in this was
19 recently arrested. It was either the end of last month or the
20 beginning of this month. The statement was made to Detective
21 Cox by Dean Mureddu's client Carl Thomas. Mr. Mureddu was
22 there at the interview with, with his, with his client and
23 with the detective out at the J. Reuben Long Detention Center.
24 Pursuant to Rule 5, which statutorily governs discovery, we're
25 required to turn over any material that would -- any

State v. Saitta, et al. (Motions)

46

1 statements by each of the attorneys' Defendants, their
2 Defendants' records, reports and tangible objects and allow
3 them access to those things. We complied completely with that
4 when we got a copy of this interview between Carl Thomas and
5 Detective Cox. It was quickly handed over to Carl Thomas'
6 attorney, Dean Mureddu. It's the State's contention that
7 nothing in -- nothing that was said in there is exculpatory or
8 impeachment material. The -- as we get closer to, to this
9 trial, Your Honor, last month it became an issue of whether
10 this was impeachment or exculpatory. They were all arrested
11 together. They were all doing the same things. The part
12 about him saying something that was otherwise discoverable in,
13 in his interview, these, these Defendants would already have
14 knowledge of that because they were there, Your Honor.

15 Pursuant to Brady v. Maryland and its --

16 THE COURT: Wait a minute. Say that -- what do you
17 mean they were there?

18 MR. TERRELL: Your Honor, if, if their -- I believe it
19 was Mr. Wilson who said that one, one of the things that Carl
20 Thomas stated in his interview to Detective Cox was that he
21 was on drugs and that's certainly something that can be used
22 to impeach him. The -- that, that would have been known other
23 ways other than through this testimony.

24 THE COURT: How?

25 MR. TERRELL: By the Defendants all acting in concert,

State v. Saitta, et al. (Motions)

47

1 Your Honor.

2 THE COURT: Well, that's the State's allegations.

3 MR. TERRELL: Yes, sir.

4 THE COURT: Their defense is they didn't know that
5 because they weren't acting in concert.

6 MR. TERRELL: Yes, sir.

7 THE COURT: Okay. All right. Go ahead.

8 MR. TERRELL: Thank you, Your Honor.

9 Moreover, pursuant to Brady v. Maryland and its
10 progeny, Your Honor, the, the State's required to turn over
11 anything that would mitigate guilt or punishment of these
12 Defendants. There's, there's nothing in his statement that
13 would mitigate any one of these particular Defendants, their
14 involvement or their potential punishment afterwards. Mr.
15 Thomas implicates himself just as much as the rest of these
16 people, these Defendants. We, we have -- I have complied,
17 Your Honor, and, and exceeded the expectations of Rule 5 and
18 of Brady and the, the statement itself pursuant to Rule 5,
19 5(a)(2), Your Honor, information not subject to disclosure
20 specifically covers potential testimony of State witnesses and
21 that is only required to be turned over once that witness
22 testifies. The, the State saw -- I, I saw this coming, Your
23 Honor, and in an effort to smooth any ruffled feathers,
24 because I'm, I'm not trying to hide anything, I went ahead
25 and, and handed it over after that status conference that we

State v. Saitta, et al. (Motions)

48

1 had back in March and, and, and it was available to them well
2 in advance of testimony without being ordered to turn it over.
3 I, I, I do feel that I have complied in this instance with
4 Rule 5 and with Brady, Your Honor.

5 THE COURT: All right.

6 All right. Anything else?

7 MR. WILSON, JR.: Judge, Judge, just briefly, the State
8 simply just let the Court know what they were doing and that's
9 why I stood up and I apologized to the Court, but again, the
10 issue for us is that he admitted on the record that they were
11 basing this based on their perspective of the case, that they
12 actually believe that these Defendants committed this crime,
13 and so without adjudication, and I don't recall that the power
14 of adjudication belonged to the State at all. The trier of
15 fact is the jury. So based on their perspective, they're
16 saying, "Okay, well, they were there. They would have known
17 that this guy was on drugs." He clearly says on the audio
18 under, under interrogation by Detective Cox he says, "I was on
19 drugs at the time." He clearly says that. Judge, that is
20 exculpatory and required under Rule 5 to be turned over to the
21 Defendants in a timely fashion, and while I agree Prosecutor
22 Terrell did turn it over on the 30th, that doesn't give us
23 enough time to actually prepare, and I would again reiterate
24 and ask the Court to --

25 THE COURT: Well, why -- how does that not give you

State v. Saitta, et al. (Motions)

49

1 enough time to prepare?

2 MR. WILSON, JR.: Judge, what he said. There is
3 another, another Co-Defendant that actually says or the things
4 that differ from what this Co-Defendant, excuse me, yeah, what
5 this Co-Defendant says. It takes literally time to go and
6 investigate some of the things and investigate this young man.
7 Now, in the belief that, that they were there is telling me
8 that the State's obviously operating from the notion that
9 they're already guilty. So there's no need to turn it over.

10 THE COURT: Well, that is the State's position.

11 MR. WILSON, JR.: Absolutely.

12 THE COURT: Is that they're guilty, but there is still
13 -- they have to prove it to a jury.

14 MR. WILSON, JR.: They do have to prove it to the jury.

15 THE COURT: Okay.

16 MR. WILSON, JR.: But turning over evidence in a timely
17 fashion is something that Rule 5, you know, clearly states
18 that the Prosecutor had a responsibility to do it, not two
19 weeks before trial or a week before trial or, you know, 15
20 days before trial when they've had it literally for nine
21 months, but to give us a chance to actually investigate it,
22 see what he says, go and, and question my client, question
23 witnesses about what he said.

24 THE COURT: Okay. I understand, but I mean, I don't
25 know if there's a pending motion or anything but I'm going to

State v. Saitta, et al. (Motions)

50

1 go ahead and, I mean, you --

2 MR. WILSON, JR.: My motion, Judge, is to reconsider
3 the issue of setting aside the actual, the, the repeal of --
4 from the prosecutor's office the repeal of the actual plea
5 offers.

6 THE COURT: Okay.

7 MR. WILSON, JR.: As well as --

8 THE COURT: No. I'm not going to, I'm not going to do
9 that. I apologize for interrupting, but --

10 MR. WILSON, JR.: And also to reconsider the severance
11 in this matter, Judge --

12 THE COURT: All right.

13 MR. WILSON, JR.: -- based on that.

14 THE COURT: All right.

15 MR. WILSON, JR.: Thank you, Your Honor.

16 THE COURT: Your motions are noted. I'm going to deny
17 it.

18 MR. WILSON, JR.: Thank you, Judge.

19 THE COURT: All right. Anything else?

20 MR. FOX: Yes, Your Honor. As I hadn't been,
21 specifically now I would make the motion, touched on it
22 before, with regard to the plea offer, but I would make the
23 motion to exclude any testimony from Carl Thomas, won't go
24 through all the dates again, but again, this is the witness
25 whose statement was given in July. The State had a notice of,

State v. Saitta, et al. (Motions)

51

1 knowledge of, and I say State in the collective, not impugning
2 Mr. Terrell individually, but it is his responsibility to
3 garner all that stuff from law enforcement, and he was very
4 aware that the statement had been taken because I'm sure he
5 was in touch with Mr. Thomas' attorney, Mr. Mureddu, and
6 Judge, it's not just Rule 5. Rule 5 is exculpatory, and it's
7 true, they don't have to give us any witness' statements until
8 a person testifies. Of course, I've been practicing close to
9 25 years and I've never seen that happen for the simple reason
10 that judges don't want to stop a trial in the middle, have the
11 witness testify, give us a transcript that might be pages and
12 pages and pages long and let us go through that with our
13 client. Maybe the rule says they could do that, but in
14 practice I've never seen that done because it just isn't
15 practical, but Rule 5, in the end Brady, the United States
16 versus Brady, due process bars the State from withholding
17 evidence that is favorable to the Defense and material to the
18 Defendant's guilt or punishment, and there are case law that
19 talks about materiality involving impeachment.

20 THE COURT: But I mean, you've got that information.
21 They haven't withheld it. I think your argument is the
22 timeliness of disclosing it.

23 MR. FOX: Yes. Well, there is because, and I don't
24 mean to be frivolous, but without it, we -- and I need to make
25 an Ed Chrisco motion, which is to have this trial reconvene in

State v. Saitta, et al. (Motions)

52

1 a, in a ravine somewhere to get trial by ambush at some point.
2 I don't know when that magic time is, but that's what all our
3 rules, that's what Langford is all about, that's why we have
4 status conferences, that's why, you know, we -- the very goal
5 is to avoid dropping things on a defense at the last minute
6 that frankly might have led to a plea, but to avoid us having
7 to scramble around at the end, this isn't the only case any of
8 us have, and the rules taken as a whole are designed to avoid
9 that, and the only way that's going to stop is if sometimes
10 this evidence is excluded. So for all those reasons, and
11 we've discussed the details, Judge, we would ask that Mr.
12 Thomas' testimony be excluded.

13 THE COURT: All right.

14 MR. WILSON, JR.: And I would join, Your Honor, in that
15 motion.

16 THE COURT: All right. What's the State's reason in
17 the delay?

18 MR. TERRELL: Your Honor, I have no good reason for the
19 delay. To be quite honest with the Court, I believe -- I
20 thought that I had turned over the statement when I initially
21 got it in. When we started talking about it the end of March
22 with the Defense attorneys, I realized that if, if I had sent
23 it over then I didn't have the documentation showing that we
24 sent it, which led me to believe that while I did send it to
25 Mr. Mureddu, I did not send it to these defense attorneys.

State v. Saitta, et al. (Motions)

53

1 After that I, you know, I looked. As far as I'm, I'm aware I
2 tried and I complied with the rule and I even exceeded the
3 expectations by providing it back at -- in the end of March.
4 It was there, and it, and it was available. I'm not -- I
5 don't have any, any reason for the delay other than I don't
6 believe that they're entitled to it, Your Honor.

7 THE COURT: All right. I'm going to deny your motion.
8 I'm going to allow it. Anything else?

9 MR. FOX: And just one further, Judge, I think we -- if
10 we've touched on this already, I don't think we have
11 specifically with Mr. Cooper, you've talked about probation,
12 but I would also -- I anticipate they're based on statements
13 that we have been provided from and a witness, Chris Kapalka,
14 who is under subpoena, in his statement he is the one that
15 refers to and he's the person that, that allegedly they were
16 sent to rob, his -- although not his -- it's where he was
17 living, not his home but where he was living, Mr. Kapalka with
18 his girlfriend at the time and her grandmother. That was the
19 target of this robbery. He tells law enforcement that he
20 believes Mr. Cooper may be involved because he's pretty sure
21 Mr. Cooper has robbed him before, and we'd certainly move to
22 exclude any testimony about any prior allegations of
23 robberies, difficulties, illegal conduct on Mr. Cooper's part
24 toward Mr. Kapalka.

25 MR. WILSON, JR.: And Judge --

State v. Saitta, et al. (Motions)

54

1 THE COURT: All right. Yes.

2 MR. WILSON, JR.: -- I, I was going to be at a -- I
3 would be in opposition to that motion because that's one of
4 the things that obviously that I want to bring out in this
5 particular matter which I believe tends to prove that my
6 client wasn't operating with this modus operandi.

7 THE COURT: All right. I'm going to deny the motion in
8 limine. We'll -- they're going to have to certainly address
9 Lyle issues. I mean, certainly if it's for identification or
10 any of the other Lyle factors then we'll address that when it
11 comes up.

12 MR. FOX: Well, I think, Judge, we need to -- so that
13 it doesn't spill out, we need to -- it's a rule of exclusion I
14 think the State's going to have to or Mr. Wilson, frankly, is
15 going to have to justify which exception it falls into.

16 THE COURT: And I agree with that

17 MR. FOX: It's a rule of exclusion. It's not up to me
18 to keep it out. It's up to them to show it comes in.

19 THE COURT: Well, I mean, do we need -- are you going
20 to be using that prior identification in a prior robbery?

21 MR. TERRELL: No, sir, Your Honor. As already
22 addressed, I would not be eliciting that testimony from Mr.
23 Kapalka.

24 THE COURT: All right. That's what I thought. All
25 right. Anything else?

State v. Saitta, et al. (Motions)

55

1 MR. FOX: But Judge, and again, I don't -- I'm sorry,
2 but Mr. Wilson has indicated his intention to, and frankly, I
3 intend to do the same with his client because there's some
4 suggestion that there may have been prior contact with Mr.
5 Merino, and if so it's going to come up.

6 THE COURT: When he, when he tries to use it then raise
7 your objection and we'll deal with it then.

8 MR. FOX: Yes, sir.

9 THE COURT: All right.

10 MS. PRATT: Your Honor, I'd just like to make a motion
11 to sequester the witnesses.

12 THE COURT: Okay. Any objection?

13 MR. TERRELL: Just that it be made reciprocal, Your
14 Honor.

15 THE COURT: Right. Okay. All witnesses will be
16 sequestered with the exception of the Defendants, and who is
17 the chief investigating officer that you'll have in here or do
18 you have one that'll be sitting in?

19 MR. TERRELL: Your Honor, that would be Detective Cox.

20 MS. PRATT: And also, Your Honor, I have a motion in
21 limine.

22 THE COURT: All right.

23 MS. PRATT: My client was -- there is mention in
24 interviews that my client was in the juvenile facility with
25 one of their witnesses, Brittany Long. Again, that's part of

State v. Saitta, et al. (Motions)

56

1 all of these interrelationships. I would ask that that not be
2 used.

3 THE COURT: What's the State's position?

4 MR. TERRELL: No objection, Your Honor.

5 THE COURT: All right. I'll grant that.

6 MS. PRATT: Thank you, Your Honor.

7 THE COURT: Anything else?

8 MR. TERRELL: Your Honor, might -- I -- Your Honor, I
9 did a memorandum of law in response to the motion to reinforce
10 the plea offer. If I could make that a part of the Court's
11 Exhibit, Your Honor, just for --

12 MR. WILSON, JR.: Your Honor, I would -- I'm sorry. I
13 would object, Judge. Your Honor gave specific instructions
14 that if they wanted to turn it in, I thought the Judge gave a
15 deadline for everyone to turn that in. We had to complete
16 ours by a particular deadline.

17 THE COURT: I mean, you turned -- you sent it to me.
18 Is that the one you're talking about that you sent to me?

19 MR. TERRELL: I, I sent -- this is a motion to enforce
20 the previous plea offer. That was never addressed by Your
21 Honor.

22 THE COURT: Oh, okay. Well, no. We're not going to
23 make it a part of the record. You've argued your motion.

24 MR. TERRELL: Thank you.

25 THE COURT: All right. Anything else?

57

State v. Saitta, et al. (Motions)

57

1 MR. FOX: No, Your Honor.

2 THE COURT: All right. We've got 50 minutes to eat
3 before we pull a jury.

4 MR. TERRELL: Thank you, Your Honor.

5 THE COURT: All right. Thank you.

6 MR. WILSON, JR.: Thank you, Judge.

7 (Adjourned.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

58

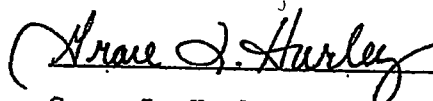
State v. Saitta, et al. (Motions)

58

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the motions held in the case of State versus Shannon De Vante Cooper, State versus Domenic John Merino, and State versus Kyla Toni Saitta held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on April 20, 2015.

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



Grace L. Hurley, CVR-CM-M

Official Reporter

October 21, 2016.

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY)

The State,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	2013-GS-26-04764
	)	2013-GS-26-04765
Kyla Toni Saitta,	)	2015-GS-26-00359
	)	
Defendant.	)	
 The State,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	2013-GS-26-04759
	)	2013-GS-26-04760
Shannon De Vante Cooper,	)	2015-GS-26-00360
	)	
Defendant.	)	
 The State,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	2014-GS-26-00322
	)	2014-GS-26-00323
Domenic John Merino,	)	2015-GS-26-00361
	)	
Defendant.	)	

Transcript of Record
April 20, 2015

B E F O R E :-

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

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

Thomas G. Terrell, III, Esquire
Attorney for Plaintiff

Barbara Pratt, Esquire
Attorney for Defendant,
Kyla Toni Saitta

J. Eric Fox, Esquire
Attorney for Defendant,
Shannon De Vante Cooper

Ralph J. Wilson, Jr., Esquire
Attorney for Defendant,
Domenic John Merino

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

E X H I B I T S

2 (There were no exhibits marked during the hearing.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (On the record, April 20, 2015.)

2 THE COURT: All right. What are we doing?

3 MR. TERRELL: Your Honor, this case has turned into a
4 plea.

5 THE COURT: All right.

6 MR. TERRELL: Should I call the case?

7 THE COURT: Is this the one that we -- you're talking
8 about the Shannon De Vante Cooper, Domenic John Merino and
9 Kyla Toni Saitta?

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

11 THE COURT: All right. And those were the -- all the
12 indictments that we were going to go to trial on?

13 MR. TERRELL: On Shannon Cooper, indictment 2013-GS-26-
14 04759, 2013-GS-26-04760 and 2015-GS-26-00360.

15 THE COURT: Wait a minute, 00360. Oh, that's for armed
16 robbery. Okay. I had 2014-GS-26-326, but it's 2015-GS-26-
17 360?

18 MR. TERRELL: Yes, sir, Your Honor. And I believe that,
19 that would be the same issue on each of these Defendants.
20 There's a 2000 --

21 THE COURT: All right.

22 MR. TERRELL: -- there's a 2015 armed robbery indictment
23 and a 2013.

24 THE COURT: All right. Because this is different than
25 what's on the website. Let's go down and make sure we've got

1 them all because the armed robbery that's on the, on the
2 roster and the web, website says 2014-GS-26-326.

3 MR. TERRELL: That would be my mistake, Your Honor.

4 THE COURT: For De Vante Cooper. I mean, yeah, Shannon
5 De Vante Cooper.

6 MR. TERRELL: All right.

7 THE COURT: So.

8 MR. TERRELL: The -- do you want me to read those again,
9 Your Honor?

10 THE COURT: Yeah.

11 MR. TERRELL: For Shannon De Vante Cooper, indictment
12 2013-GS-26-04759 --

13 THE COURT: All right.

14 MR. TERRELL: -- that's a burglary for first degree or,
15 I'm sorry, that's burglary in the first degree.

16 THE COURT: All right.

17 MR. TERRELL: Indictment 2013-GS-26-04760, that's an
18 indictment for kidnapping.

19 THE COURT: All right.

20 MR. TERRELL: Indictment 2015-GS-26-00360, and that would
21 be for armed robberies.

22 THE COURT: All right. So on Mr. Cooper, 2014-GS-26-326
23 for armed robbery, that one's being dismissed?

24 MR. TERRELL: Nolle prossed, yes, sir, Your Honor.

25 THE COURT: Nolle prossed, and 2013-GS-26-4761,

1 possession of a weapon during the commission of a violent
2 crime?

3 MR. TERRELL: Also nolle prossed, Your Honor.

4 THE COURT: All right. All right. Domenic John Merino?

5 MR. TERRELL: We'll be going forward on indictments 2014-
6 GS-26-00322, that's for burglary in the first degree;
7 indictment 2014-GS-26-00323, that being for kidnapping; and
8 indictment 2015-GS-26-00361, that being for armed robbery.

9 THE COURT: So 2014-GS-26-329 for armed robbery --

10 MR. TERRELL: Nolle prossed, Your Honor.

11 THE COURT: -- nolle prossed. All right. Kyla Toni
12 Saitta?

13 MR. TERRELL: That would be indictment 2013-GS-26-04764
14 for burglary first degree; 2013-GS-26-04765 for kidnapping;
15 and 2015-GS-26-00359 for armed robbery.

16 THE COURT: And the 2014-GS-26-328 for armed robbery is
17 being nolle prossed?

18 MR. TERRELL: That's correct, Your Honor.

19 THE COURT: Okay. All right.

20 MR. TERRELL: Your Honor, these Defendants are before you
21 to plead guilty to each of these charges. They're pleading
22 without negotiation or recommendation from the State. All of
23 these charges are violent and most serious as indicated on the
24 sentencing sheet. If I could approach?

25 THE COURT: All right. All right. All right. On any of

1 these kidnappings is the State's position that the kidnappings
2 involved a sexual offense requiring sexual offense registry?

3 MR. TERRELL: No, sir, Your Honor.

4 THE COURT: Okay. All right. If I could get all the
5 Defendants and their attorneys to stand, please.

6 (Complies with request.)

7 THE COURT: All right. Mr. Fox, you represent Shannon De
8 Vante Cooper on the charges of burglary in the first degree,
9 kidnapping and armed robbery?

10 MR. FOX: Yes, sir. I do.

11 THE COURT: All right. Mr. Wilson, you represent Domenic
12 John Merino on the charges of burglary in the first degree,
13 armed robbery and kidnapping?

14 MR. WILSON: Yes, Your Honor.

15 THE COURT: All right. And Ms. Pratt, you represent Kyla
16 Toni Saitta on the charges of burglary in the first degree,
17 armed robbery and kidnapping?

18 MS. PRATT: I do, Your Honor.

19 THE COURT: All right. These first questions are geared
20 towards the attorneys. Have you discussed with your
21 respective clients the charges against them, their rights as a
22 Defendant and the consequences of being convicted of these
23 crimes? We'll just start with Mr. Wilson, then Mr. Fox, then
24 Ms. Pratt:

25 MR. WILSON: Yes, Your Honor, I have.

1 MR. FOX: I have, Your Honor.

2 MS. PRATT: I have, Your Honor.

3 THE COURT: In your opinion, does your client understand
4 the charges against them, their rights as a Defendant and the
5 consequences of being convicted of these crimes?

6 MR. WILSON: I believe he does, Your Honor.

7 MR. FOX: I believe he does, Your Honor.

8 MS. PRATT: Yes, Your Honor.

9 THE COURT: And do your clients wish to plead guilty or
10 not guilty?

11 MR. WILSON: He wishes to plead guilty at this time,
12 Judge.

13 MR. FOX: Guilty, Your Honor.

14 MS. PRATT: Guilty, Your Honor.

15 THE COURT: Do you agree with your respective client's
16 decision to plead guilty on these charges?

17 MR. WILSON: I do, Your Honor.

18 MR. FOX: Yes, sir. I do.

19 MS. PRATT: Yes, Your Honor.

20 THE COURT: Based upon the information you have, if this
21 case proceeded to trial, do you feel that the State could
22 prove your client's guilt beyond a reasonable doubt?

23 MR. WILSON: Yes, Your Honor.

24 MR. FOX: Yes, sir.

25 MS. PRATT: Yes, Your Honor.

1 THE COURT: Has your client received a competency
2 evaluation?

3 MR. WILSON: He has not, Judge, and, and during my
4 conversations I didn't believe that he needed one.

5 MR. FOX: No, Your Honor. I never felt that one was
6 necessary.

7 MS. PRATT: My client has not had a competency
8 evaluation. I don't think one is necessary.

9 THE COURT: All right.

10 All right. Let's place the Defendants under oath,
11 please.

12 (All Defendants sworn by clerk.)

13 THE COURT: All right. Ms. Saitta, did you respond to
14 the oath?

15 MS. SAITTA: Yes, sir.

16 THE COURT: Okay.

17 All right. Shannon De Vante Cooper, Mr. Cooper, and
18 Domenic John Merino --

19 MR. MERINO: Yes, sir.

20 THE COURT: -- and Kyla Toni Saitta, now, each of you
21 have been charged and indicted by the Grand Jury on the
22 charges of burglary in the first degree, kidnapping and armed
23 robbery, and according to your attorneys you wish to plead
24 guilty to these charges. Is that correct, Mr. Merino?

25 MR. MERINO: Yes, sir.

1 THE COURT: Is that correct, Mr. Cooper?

2 MR. COOPER: Yes, sir.

3 THE COURT: And is that correct, Ms. Saitta?

4 MS. SAITTA: Yes, sir.

5 THE COURT: All right. Now, before I can accept your
6 guilty plea, I've got to go over some questions with you, and
7 the purpose of my questioning is to be sure that you
8 understand the charges against you, that you understand your
9 rights as Defendants, that you understand the consequences of
10 pleading guilty, and I must be sure that you're pleading
11 guilty voluntarily. Now, during the past 72 hours, have you
12 taken any medication, consumed any alcohol or drugs or been
13 under any influence that would affect your ability to know why
14 you're here? Mr. Merino?

15 MR. MERINO: No, sir. No, sir.

16 THE COURT: All right. Mr. Cooper?

17 MR. COOPER: No, sir.

18 THE COURT: Ms. Saitta?

19 MS. SAITTA: No, sir.

20 THE COURT: All right. Do you understand why you're
21 here, Mr. Merino?

22 MR. MERINO: Yes. I do, sir.

23 THE COURT: Do you understand why you're here, Mr.
24 Cooper?

25 MR. COOPER: Yes, sir.

1 THE COURT: And do you understand why you're here, Ms.

2 Saitta?

3 MS. SAITTA: Yes, sir.

4 THE COURT: Is there anything about this hearing that you
5 want to ask your lawyer or ask me before we proceed, Mr.

6 Merino?

7 MR. MERINO: No, sir.

8 THE COURT: Mr. Cooper?

9 MR. COOPER: No, sir.

10 THE COURT: And Ms. Saitta?

11 MS. SAITTA: No, sir.

12 THE COURT: All right. If at any time you don't
13 understand what's going on or you have any questions let me
14 know. Okay?

15 All right. Now, even though you have been indicted by
16 the Grand Jury on these charges, under the constitution of the
17 United States you're presumed innocent of these crimes, and
18 you have the right to have your guilt or innocence determined
19 by a jury trial of your peers. The State bears the burden of
20 proving your guilt beyond a reasonable doubt. You do not have
21 to prove your innocence and you cannot be compelled to testify
22 against yourself. You also have the right to confront and
23 cross examine anybody who testifies against you. If you
24 choose, you can present a defense to these charges, but when
25 you plead guilty you give up all of those rights. Do you

1 understand that, Mr. Merino?

2 MR. MERINO: Yes, I do, sir.

3 THE COURT: And do you understand that, Mr. Cooper?

4 MR. COOPER: Yes, sir.

5 THE COURT: And do you understand that, Ms. Saitta?

6 MS. SAITTA: Yes, sir.

7 THE COURT: And do you want to give up those rights and
8 plead guilty to these charges, Mr. Merino?

9 MR. MERINO: Yes. I do, sir.

10 THE COURT: And Mr. Cooper?

11 MR. COOPER: Yes, sir.

12 THE COURT: And Ms. Saitta?

13 MS. SAITTA: Yes, sir.

14 THE COURT: All right. Now, for burglary in the first
15 degree I could send you to prison for life. For armed robbery
16 I could send you to prison for 30 years, and it also carries a
17 mandatory minimum sentence, which means the least amount of
18 time that can be given to you is 10 years. For kidnapping I
19 could send you to prison for 30 years. So if I impose the
20 maximum sentence allowed by law, I could send each of you to
21 prison for the rest of your life without the possibility of
22 parole. Do you understand that, Mr. Merino?

23 MR. MERINO: Yes. I do, sir.

24 THE COURT: Do you understand that, Mr. Cooper?

25 MR. COOPER: Yes, sir.

1 THE COURT: And do you understand that, Ms. Saitta?

2 MS. SAITTA: Yes, sir.

3 THE COURT: Excuse me?

4 MS. SAITTA: Yes.

5 THE COURT: Okay.

6 THE COURT: And do you understand that the mandatory
7 minimum sentence that each of you must receive is a mandatory
8 minimum sentence of 10 years in prison? Do you understand
9 that, Mr. Merino?

10 MR. MERINO: Yes, sir.

11 THE COURT: And Mr. Cooper?

12 MR. COOPER: Yes, sir.

13 THE COURT: And Ms. Saitta?

14 MS. SAITTA: Yes, sir.

15 THE COURT: Excuse me?

16 MS. SAITTA: Yes, sir.

17 THE COURT: All right.

18 MS. SAITTA: I'm sorry.

19 THE COURT: Now, do you understand that all -- burglary
20 in the first degree, yeah, all of these charges, burglary in
21 the first degree, armed robbery and kidnapping, they're all
22 classified as violent crimes. Now, what that means is if
23 you're ever convicted of another violent crime then that
24 subsequent violent crime conviction, you would not be eligible
25 for probation and you would not be eligible for parole. You

1 understand that, Mr. Merino?

2 MR. MERINO: Yes. I do, sir.

3 THE COURT: You understand that, Mr. Cooper?

4 MR. COOPER: Yes, sir.

5 THE COURT: And do you understand that, Ms. Saitta?

6 MS. SAITTA: Yes, sir.

7 THE COURT: And do you also understand that regardless of
8 the sentence I impose for these crimes you would not be
9 eligible for parole on these charges. Do you understand that,
10 Mr. Merino?

11 MR. MERINO: No.

12 THE COURT: Okay. You're not going to be eligible --
13 burglary in the first degree, you're not eligible for parole,
14 kidnapping, you're not eligible for parole, and armed robbery,
15 you're not eligible for parole, which means that you're going
16 to have to serve -- you'll probably serve 100 percent of the
17 sentence that I impose. You'll definitely have to serve at
18 least 85 percent of the sentence that I impose. Do you
19 understand that?

20 MR. MERINO: I understand, sir.

21 THE COURT: All right. Do you understand that, Mr.
22 Cooper?

23 MR. COOPER: Yes, sir.

24 THE COURT: And do you understand that, Ms. Saitta?

25 MS. SAITTA: Yes, sir.

1 THE COURT: All right. Now, do you also understand that
2 all of these crimes are classified as most serious crimes?
3 Now, what that means is if you're ever convicted of another
4 most serious crime or if you're ever convicted of two more
5 serious crimes, then the sentence you could get for that
6 second serious crime conviction or that next most serious
7 crime conviction it can be -- the sentence can be enhanced to
8 life in prison without the possibility of parole, and the
9 State will use this guilty plea against you for each of you to
10 have three most serious crime convictions on your record. Do
11 you understand that, Mr. Merino?

12 MR. MERINO: Yes. I do, sir.

13 THE COURT: And do you understand that, Mr. Cooper?

14 MR. COOPER: Yes, sir.

15 THE COURT: And do you understand that, Ms. Saitta?

16 MS. SAITTA: Yes, sir.

17 THE COURT: All right. Knowing all of that, do you wish
18 to plead guilty or not guilty to burglary in the first degree,
19 Mr. Merino?

20 MR. MERINO: Plead guilty.

21 THE COURT: Mr. Cooper?

22 MR. COOPER: Guilty.

23 THE COURT: Ms. Saitta?

24 MS. SAITTA: Guilty.

25 THE COURT: Do you wish to plead guilty or not guilty to

1 armed robbery? Mr. Merino?
2 MR. MERINO: Guilty.
3 THE COURT: Mr. Cooper?
4 MR. COOPER: Guilty.
5 THE COURT: Ms. Saitta?
6 MS. SAITTA: Guilty.
7 THE COURT: Do you wish to plead guilty or not guilty to
8 kidnapping, Mr. Merino?
9 MR. MERINO: Guilty.
10 THE COURT: Mr. Cooper?
11 MR. COOPER: Guilty.
12 THE COURT: And Ms. Saitta?
13 MS. SAITTA: Guilty.
14 THE COURT: Has anybody promised you anything or
15 threatened you in any way to get you to plead guilty to these
16 charges, Mr. Merino?
17 MR. MERINO: No, sir.
18 THE COURT: Mr. Cooper?
19 MR. COOPER: No, sir.
20 THE COURT: Ms. Saitta?
21 MS. SAITTA: No, sir.
22 THE COURT: Are you pleading guilty to these charges
23 voluntarily?
24 MR. MERINO: Yes, sir.
25 MR. COOPER: Yes, sir.

1 MS. SAITTA: Yes, sir.

2 THE COURT: Excuse me?

3 MS. SAITTA: Yes, sir.

4 THE COURT: All right. Are you satisfied with the
5 services of your respective attorneys, Mr. Merino?

6 MR. MERINO: Yes, sir.

7 MR. COOPER: Yes, sir.

8 MS. SAITTA: Yes, sir.

9 THE COURT: Are you pleading guilty to these crimes
10 because you committed these crimes?

11 MR. MERINO: Yes, sir.

12 MR. COOPER: Yes, sir.

13 MS. SAITTA: Yes, sir.

14 THE COURT: All right. I need you to listen carefully
15 while the Solicitor gives me the facts or the allegations as
16 to what they're saying you did in these cases. Okay. All
17 right, sir.

18 MR. TERRELL: Thank you. Your Honor, and just out of an
19 abundance of caution, I believe the mandatory minimum on
20 burglary first is 15 years.

21 THE COURT: Let's see.

22 MR. TERRELL: I just want the record to be --

23 THE COURT: Yeah. You're right. So, let me back up.
24 That was right. Burglary first degree carries a mandatory
25 minimum sentence of 15 years in prison, which means that the

1 absolute minimum sentence that must be imposed is 15 years in
2 prison. Do you understand that, Mr. Merino?

3 MR. MERINO: Yes, sir.

4 THE COURT: And knowing that, do you still wish to plead
5 guilty?

6 MR. MERINO: Yes, sir.

7 THE COURT: Do you understand that, Mr. Cooper?

8 MR. COOPER: Yes, sir.

9 THE COURT: And knowing that, do you still wish to plead
10 guilty?

11 MR. COOPER: Yes, sir.

12 THE COURT: And do you understand that, Ms. Saitta?

13 MS. SAITTA: Yes, sir.

14 THE COURT: And knowing that, do you still wish to plead
15 guilty?

16 MS. SAITTA: Yes, sir.

17 THE COURT: All right. All right, sir.

18 MR. TERRELL: Thank you, Your Honor.

19 THE COURT: If you'll give us the facts of the case.

20 MR. TERRELL: Yes, sir. This occurred on September 4th,
21 2013, in the Longs Section of Horry County. The three
22 Defendants before you and other Co-Defendants, Carl Thomas and
23 Paige Martin, all got together. The testimony would show that
24 they were doing drugs, drinking, smoking, and they came up
25 with a plan. That plan was to do an armed robbery on a one

1 Mr. Christopher Kapalka. Mr. Kapalka, at the time, was living
2 in Longs with the victim, who is present in the courtroom
3 today, Ms. Katy Smith. They shared the same residence. They
4 were -- the Co-Defendants all got together, and after having
5 devised this plan, they were on their way up to Longs to, to
6 carry out their plan. When Mr. Kapalka started to dodge their
7 phone calls and couldn't be reached, they decided to go by his
8 house. When they went by his house, they found that there was
9 not a car in the driveway. They figured he wasn't there, and
10 with that understanding, the three of these Defendants, Ms.
11 Martin and Mr. Thomas, decided that they would just break into
12 the house instead. When they broke through the side door of
13 Ms. Smith's house, this, this was at the nighttime, Your
14 Honor. Ms. Smith was in, in her bed. She didn't understand
15 what all the commotion was. She thought it was Chris and the
16 other person who was living with them, Brittany, she thought
17 it was them coming through the door.

18 Just shortly thereafter, the door to her room was busted
19 open. She was confronted by masked, armed individuals who
20 pointed guns to her head, made her lie flat, face down on the
21 ground while they tied her up. They did drag her from room to
22 room. They kept asking her things like, "Where's the money?
23 Where's the money?"

24 While they were in there, they took, they took all of Ms.
25 Smith's money that she had in her purse. It was about \$220.

1 They took a large flat screen TV. They also took a rifle and
2 an Xbox, Your Honor, from the house.

3 As they were leaving from the house shortly thereafter,
4 they passed Mr. Kapalka in the street. After a brief
5 confrontation from about 70 yards apart in the dark of night,
6 Mr. Kapalka was able to recognize Ms. Saitta's voice from
7 prior relationship they had had, and from there all the pieces
8 kind of fitting together and the law enforcement officers were
9 able to determine that all these individuals conspired
10 together to commit the burglary and the armed robbery and the
11 kidnapping as a, as a natural result of the armed robbery on
12 Mr. Kapalka.

13 THE COURT: All right. All right. Mr. Merino, you
14 understand what the allegations are against you?

15 MR. MERINO: Yes, sir.

16 THE COURT: Is that what happened in this case?

17 MR. MERINO: Yes, sir.

18 THE COURT: All right. Mr. Cooper, you understand what
19 the allegations are against you?

20 MR. COOPER: Yes, sir.

21 THE COURT: Is that what happened in this case?

22 MR. COOPER: Yes, sir.

23 THE COURT: All right. Ms. Saitta, you understand what
24 the allegations are against you?

25 MS. PRATT: Your Honor, if I could interject just for a

1 moment, so that her answer will be truthful, she is not one of
2 the two that went into the house. She was part of the plan
3 certainly, but her facts are different. Her plea would be
4 under the theory of hand of one is the hand of all, and she
5 does understand that that is -- what the legal theory is about
6 in regards to that.

7 THE COURT: All right. Well, what is it she's saying she
8 did?

9 MS. PRATT: Your Honor, she was part of the original plan
10 to rob Mr. Kapalka. She did go to the scene. She was -- she
11 and Paige Martin went up to the stoop to see why the guys were
12 taking so long, and then when Mr. Kapalka, later when they
13 confronted Mr. Kapalka slightly down the road, it is her voice
14 saying, "No, no, don't." There was a potential for some
15 altercation between those parties. So she certainly is
16 present at the scene and involved. She was not -- it was not
17 her intent in any way to kidnap or harm the grandmother of her,
18 friend, Brittany, but she knows that that was -- is part of
19 the hand of one is the hand of all.

20 THE COURT: Okay. All right. Ms. Saitta, is that what
21 happened in this case?

22 MS. SAITTA: Yes, sir.

23 THE COURT: Okay. All right. Any particular order or
24 are we going to keep going in the order we are?

25 MR. FOX: The same order is fine.

1 THE COURT: All right. Mr. Wilson, anything in
2 mitigation?

3 MR. WILSON: Your Honor, if it please the Court, Judge, I
4 want to take some time to talk about the relationships that
5 were going on with these individuals, which was so venomous at
6 the time. There was a lot of drug use going back and forth.
7 There were relationships. I'm not going to get into the
8 different relationships. I will tell you that Paige Martin
9 was dating this particular Defendant, my client. They had had
10 a relationship before. There was, you know, relationships
11 between some of the victims, as well as some of the Co-
12 Defendants that, you know, went back some time, and there was
13 some scorn that was happening back and forth between
14 Christopher, as well as some of the Co-Defendants, and
15 Brittany as well as some of the Co-Defendants, and again,
16 Judge, obviously, that does not excuse their behavior, and
17 obviously to Ms. Smith we would like to extend our apologies.
18 I want to, on, on behalf of my client I want to say obviously
19 it's, it's a, a bad thing, a really bad thing, a horrific
20 event that occurred, and we don't minimize that, Judge, at
21 all, and my client is here today to accept responsibility for
22 his actions at that point in time.

23 I do want to say also on his behalf, Judge, his family is
24 here, and at the appropriate time, they would like to speak on
25 his behalf. They love him. They care for him, and they're

1 here to support him, Judge. He also has a niece that he was
2 caring for actually during this time, and he was responsible
3 for taking care of her while his brother went to work. Both
4 his mom and both of his brothers work for the same company,
5 Family Dollar. They've been working there for some time. He
6 was at the time, Judge, in school, also, getting his GED, and
7 was trying to complete that obviously before this all
8 happened, but on the night this happened they all were high,
9 every last one of them. They were on either Oxycodone or
10 Roxies or heroin, all of them, and that includes the State's
11 witnesses, Carl Thomas and Paige, Paige Martin, who, you know,
12 there's testimony that they shot up in the van together,
13 heroin, and all of these Co-Defendants were, I think, on tons
14 of drugs at the time, Judge, of this, this incident. I don't
15 believe for a second that they went into the house thinking
16 that they were going to hurt anybody. This originally was,
17 and want to -- I agree with Barbara what she said earlier,
18 this originally was supposed to be just a smash and grab, if
19 you will. They were supposed to meet with Mr. Kapalka and
20 then just take the drugs. That's what this was about, getting
21 drugs, and Mr. Kapalka was, at the time, known to sell drugs
22 in the neighborhood. So that's what they were doing. I think
23 that what happened is is that when Carl Thomas came to pick
24 everybody up that the plan then changed because Mr. Kapalka
25 obviously wouldn't answer the phone or refused to talk with

1 one of the Co-Defendants because he had a previous
2 relationship with them, and that's how all this spiraled way
3 out of control, and again, I would say to the Court, also, in,
4 in my client's defense, you know, he never intended, never
5 intended for this to go bad, and there's still some issue
6 about who actually went into the house. I don't know who
7 actually went in the house. I'm not certain. I do know this,
8 there were -- there's Carl Thomas there and there was
9 allegedly obviously my client who's pleading guilty, Shannon
10 Cooper, and there was some mention of Corey Kai. I don't know
11 who was in the house. I have not delved into that. What I do
12 know is that my client knew from the beginning that there was
13 something that was, you know, obviously nefarious going on
14 because there was a conversation that took place before they
15 actually went to the house and before they actually met with
16 or were trying to meet with Mr. Kapalka, who they were trying
17 to get drugs from. I would ask the Court, because he is
18 pleading guilty, I would ask the Court for mercy, and one of
19 the reasons I'm asking for that is there comes a time when you
20 have to admit what you did was wrong as a man or a woman, and
21 I think at this point in time he understands that what
22 happened was horrific and wrong, and I would ask the Court to
23 impose the minimum sentence in this matter, which is 15 years,
24 so that he will have a chance at life again, and you know, he
25 understands that's a long time, but to his credit he is here

1 taking responsibility, and that's what justice is about. It's
2 about taking responsibility and knowing when, obviously,
3 you've done wrong and you need to, you know, fess up and tell
4 the Court, "Look. I did wrong," but he has contrition, and
5 over the past two years as I've represented him, Judge, I have
6 noticed a change in his personality since he's been off drugs.
7 When I first met him, he was still on drugs, bad, addicted to
8 Roxies, Oxycodone and, and methadone, and but his mind is a
9 lot clearer. He understands that this is not the way to act
10 in society, and I really think that 15 years is a fair and
11 appropriate sentence, you know, for him in this matter. You
12 know, he's going to be locked away for a long time. There's
13 no doubt about that, and he understands, you know, that this
14 is not a parolable offense. He understands that as well, and
15 he, again, apologizes to this victim for what he put her
16 through, and it was never his intention, and I don't believe
17 to be honest with you, and I'm not speaking for the other
18 attorneys, I don't believe it was anyone's intention to ever
19 go into that house and to harm anyone. I don't believe that.
20 I believe that they got high and that they were trying to get
21 drugs from this boy. For whatever reason they thought that
22 the way to do it was to rob him, and obviously, that was the
23 wrong idea. You know, and I would ask the Court for mercy,
24 for leniency, and we just pray to the Court that the Court
25 would see past, obviously, his serious transgression and allow

1 him to serve a 15-year sentence, Judge.

2 THE COURT: All right.

3 MR. WILSON: And I think, Your Honor, at the appropriate
4 time he'd like to say something as well to the Court.

5 THE COURT: I'll give him an opportunity a little bit
6 later. All right. Mr. Fox, anything you want to say?

7 MR. FOX: Thank you, Your Honor. I agree with Mr. Wilson
8 a hundred percent. I represented, at least in terms of the
9 characterization and how this all came to occur, I represented
10 Mr. Cooper since shortly after his arrest in October of 2013.
11 He's been in jail, Judge, since September. They were
12 identified, and he was arrested almost immediately within a
13 couple of weeks after this incident, and he's been in jail
14 ever since. No question, everybody involved, other than Ms.
15 Smith, who was the woman inside the house, every other person
16 involved, whether they are Defendants in this courtroom,
17 Defendants that were to testify, there's been another
18 individual recently arrested who was identified late in the
19 day, Mr. Kapalka, who was the target of this robbery, his
20 girlfriend who was there, all of them knew each other. All of
21 them knew each other very well. All of them had done drugs
22 together. Many of them had slept together at different times.
23 There is zero doubt in my mind that the original plan
24 conceived while they were high as a kite was to go and get
25 more drugs. Mr. Kapalka was known to have drugs. He used

1 drugs. He was their drug dealer. They had sold drugs to him.
2 They figured he was someone likely to have drugs, and that was
3 the plan was to go and basically steal his drugs so they could
4 continue to get high. I don't think they thought one bit past
5 that. When he wasn't there then it became, "Well, I bet you
6 he might have something inside his house." Didn't appear to
7 be anybody home, and of course, there was, and of course,
8 they're responsible, Mr. Cooper's responsible for all of the
9 consequences, everything that happened once they went in that
10 house, but I'm absolutely convinced nobody ever dreamed, I
11 don't think they'd had the gumption to do it if they'd thought
12 someone might be there, but there was, unfortunately, somebody
13 there, and all of those things happened afterwards.

14 Judge, Mr. Cooper is 23 years old. He grew up in Horry
15 County, graduated from Carolina Forest High School. His
16 family is here. He has a mother, sister, four brothers, lives
17 with his mother and sister off 501 near the new Wal-Mart down
18 there.

19 Judge, he, as I say, graduated high school. He went to
20 Horry Georgetown Tech for a while till money became an issue,
21 has over a semester of college credit under his belt. He
22 worked at McDonalds. He was doing productive things, aside
23 from these other things. He became involved in drugs, became
24 deeply involved with all of the people that you've heard
25 about, including those in the courtroom today, and that took

1 him in a very different direction.

2 Judge, he does have, from two or three years ago, a
3 receiving stolen goods conviction. He received a Youthful
4 Offender sentence. He's actually on YOA parole. He
5 understands that we can't address that here today. He
6 understands the consequences.

7 THE COURT: He's on YOA parole now?

8 MR. FOX: Parole, not probation, parole. He understands
9 that's something that will have to be addressed at a later
10 date, but that this will, almost without question, be a
11 violation, his conviction today.

12 THE COURT: Well, let me go ahead and question him --

13 MR. FOX: Yes, sir.

14 THE COURT: -- on that then. All right. Mr. Cooper,
15 you're on YOA parole?

16 MR. COOPER: Yes, sir.

17 THE COURT: All right. And you understand that by
18 pleading guilty here today that will probably be a violation
19 of your Youthful Offender Parole status?

20 MR. COOPER: Yes, sir.

21 THE COURT: Which means that you'll have to go back and
22 finish your Youthful Offender sentence before they even start
23 computing your time on these sentences. Do you understand
24 that?

25 MR. COOPER: Yes, sir.

1 THE COURT: All right. And do you know how much time
2 you've got left under your Youthful Offender Sentence?

3 MR. COOPER: No, sir.

4 THE COURT: All right. Do you have any idea?

5 MR. FOX: I'm not sure, Your Honor.

6 THE COURT: Do you know -- what was the original, not to
7 exceed what?

8 MR. COOPER: Five years.

9 MR. FOX: Five rather than six.

10 THE COURT: Five years? And do you know how much time
11 you've served? Well, whatever the remaining time is you're
12 going to have to finish that before they even start this
13 sentence. Do you understand that?

14 MR. COOPER: Yes, sir.

15 THE COURT: So if you have the full five years remaining
16 on that sentence, you're going to have to do those five years
17 before they even start computing the time on this. You
18 understand that?

19 MR. COOPER: Yes, sir.

20 THE COURT: And knowing that, do you still wish to plead
21 guilty to these charges?

22 MR. COOPER: Yes, sir.

23 THE COURT: Okay.

24 MR. WILSON: Your Honor.

25 THE COURT: All right. Mr. Fox.

1 MR. WILSON: I apologize. My client is in the same
2 situation. He was on a YOA as well, Judge.

3 THE COURT: All right. Well, Mr. Merino, do you
4 understand, like I just questioned Mr. Cooper, you understand
5 that this will probably be a violation of your Youthful
6 Offender parole?

7 MR. MERINO: Yes, sir.

8 THE COURT: And that, that -- you'll have to complete
9 that sentence before they even start computing the time on
10 this sentence. You understand that?

11 MR. MERINO: Yes, sir.

12 THE COURT: And knowing that, do you still wish to plead
13 guilty to these charges?

14 MR. MERINO: Yes. Yes, sir.

15 THE COURT: Okay. All right. Mr. Fox, anything further?

16 MR. FOX: Judge, you know, I would just echo what Mr.
17 Wilson has already said. Mr. Cooper, my impression in
18 representing him these last 18 months is that he did not want
19 to be in a position of potentially having to testify against
20 any of these what are his friends, and once it became clear
21 this morning that he may not be in that position, then he was
22 prepared to do what he is doing now, which is admit full
23 responsibility for his role, plead without any recommendations
24 to very, very, very serious charges. We simply ask Your
25 Honor's mercy in that regard.

1 THE COURT: All right. All right. Ms. Pratt?

2 MS. PRATT: Thank you, Your Honor. Your Honor, my client
3 is 20 years old. She is pregnant. She is due on May the 12th
4 of this year. So she has a little less than a month to go
5 before she has a baby boy.

6 Your Honor, she has a prior record of only a simple
7 possession of marijuana. She was the first one to be arrested
8 and to talk to Detective Frebowitz, and at that time she gave
9 the names of the other people that were involved, at least for
10 Paige and for Mr. Thomas and Shannon Cooper. I'm not sure if
11 she gave the other names then in that first statement, Your
12 Honor, so that without her stating anything, this may not
13 have, have -- the State may not have had the information that
14 they had to go ahead and arrest Paige and then have the other
15 interviews.

16 Your Honor, my client was 18 at the time that this
17 happened. She did have a heroin addiction. She was employed
18 by beachwear stores and was working on and off. She, as the
19 other attorneys have said, everyone in this case had been
20 involved with other people. She had actually dated Chris
21 before, but she wasn't dating him then. Brittany, Chris's
22 girlfriend, had been her good friend, and she had actually
23 lived with Brittany and her grandmother in a different house,
24 not in this house, for a couple of months because my client's
25 had a very difficult time. Since -- when she was 14 she --

1 her father decided to have her come up to Myrtle Beach from
2 Florida and to live with her mother. That was a bad decision
3 as her father would have -- would say to the Court, and he has
4 been to a couple of the bond hearings and has expressed just
5 how sorry he is that that happened because if he had not
6 allowed that to happen perhaps we wouldn't be here today.
7 Kyla's mother, Kelly, had drug addiction problems. They lived
8 on and off with people out in Longs. They lived with their
9 grandfather, who was very ill. He was on disability and from
10 COPD and but he was also an alcoholic, and so they lived in
11 that house, they lived with Kelly. She lived with Brittany.
12 She was living with a fellow named Tyler at the time that this
13 incident occurred.

14 Since she's been in jail, she was arrested September 23rd
15 of 2013, she stayed in jail till January 2014. She was
16 released on a GPS monitor. She then was -- had different
17 modifications of bond. The GPS was removed, but she stayed on
18 home detention. Then she had a curfew violation, which
19 happened right around the time that her mother went into
20 McLeod Hospital. Her mother subsequently died December the
21 9th. Kyla was in jail at the time that her mother died, could
22 not go to the funeral. She was -- did not come back out on
23 bond or on her GPS. Judge Alford had allowed her to come out
24 and live with her grandfather, but her grandfather was so ill
25 with his COPD and trying to take care of her little brother,

1 Collin, and deal with Kelly's death, that Kyla could not go
2 live with him. Her grandfather passed away on February the
3 4th. Her brother, Collin, is now in New Jersey with Kyla's
4 aunt, but there's nobody out there for her, except her father
5 who's going to try and take care of the baby when the baby is
6 born.

7 My client's original plan, and I'm not saying that, that
8 was a plan where they all sat down and planned it out, "This
9 is what we're going to do," but there was no question that
10 they said, you know, "Chris sells drugs. This is who we buy
11 from. Let's go rip him off. Let's grab the drugs and not pay
12 for it," and as the other attorneys have said, it came from
13 there. My client is different from them in that she did not
14 enter the house. She and Paige approached the stoop of the
15 house. There's a side stoop and a front door, and even Carl
16 Thomas says that that was somewhat after the other two are --
17 entered the, the dwelling place, but I don't think anybody
18 knew that Ms. Katy Smith was going to be present and if Katy
19 -- if Kyla had known that, I'm not sure how she would have
20 changed things, but I know she would have changed what had
21 happened because she loved Ms. Smith, and, and had lived with
22 her and was appreciative of what she had done for her.

23 My client was the one whose voice was recognized because
24 when the van stopped at the stop sign, and this happened out
25 in the Glade, stopped at the stop sign, Chris Kapalka was

1 there. The -- one of the Co-Defendants came out and my client
2 said, "No. No. Don't. Stop," and that's from Chris's
3 testimony. So my client was, even then, trying to do some
4 things that would reduce what was going on. She had by then
5 heard from the other guys that there had been someone in the
6 house and that it had been her best friend's mother. So this
7 was just a situation that was horrible for her. It was hard
8 for her to accept a guilty plea when the plea was offered
9 because she really felt like she had not been part of this.
10 That wasn't the original plan. We've talked a lot about the
11 hand of one is the hand of all, and the fact that if she was
12 there for the plan, then the natural and foreseeable
13 consequences are things that she is responsible for, too, but
14 from a point of fact that was never where she was at.

15 What I'm asking the Court to do, besides give her the
16 bare minimum that you can, is to give her credit for the time
17 that she's been on the GPS monitor, as well as the time that
18 she's been in jail. She was in jail, as I said, from
19 September 2013 until January 2014, then back in jail September
20 of 2014 until the present time. That will at least give her
21 some relief from the situation, and Your Honor, she, she is
22 very, very sorry for what happened to Ms. Smith. That was
23 never in the plan.

24 THE COURT: All right. All right. Mr. Merino, anything
25 you want to say or does anybody want to speak on your behalf?

1 MR. MERINO: I would also like to speak, too, before my
2 family gets up here and speaks. I would just like to say I'm
3 really sorry, you know what I'm saying, for the actions that
4 occurred that night. It was never my intentions to even hurt
5 or harm anybody. It was never my intentions to actually go
6 inside the house. You know, all we was trying to do was just
7 get some drugs and then just go back, make some money and get
8 high at the same time. Yes, I did have a drug problem, and
9 look where it landed me. I'm not only hurting myself, but I'm
10 also hurting my family, also, and I just didn't hurt me and my
11 family, I hurt a lady that had nothing to do with anything
12 that I had going on, and you know, I realize that I have to
13 take responsibilities not just because I got caught, but as a
14 man, and fess up and tell everybody what I did, and what I did
15 was wrong, and I'm sorry for everything that happened, and I
16 wish I could take back everything that happened that night,
17 but I feel like me having to do this time I feel like that's,
18 that's me giving back for what I did to that poor lady, and I
19 never meant for any of this to happen because I dragged my
20 friends into it, too. We all dragged each other into it, and
21 I'm real sorry that anything that has happened, and my family
22 is going to be up here today and it's going to hurt them more
23 than it's going to hurt me, and it hurts me because I failed
24 them.

25 THE COURT: All right, sir. Thank you. Does anybody

1 want to speak on his behalf? You need to come forward to a
2 microphone and give the court reporter a name. There you go.
3 Yes, ma'am, your name?

4 MS. MERINO: Ruth Merino.

5 THE COURT: All right. Ms. Merino, what would you like
6 to say?

7 MS. MERINO: I know none of this should have happened. I
8 know everybody involved. I'm sorry. I'm really sorry to the
9 lady that it happened to, but I know my son. He's a good kid,
10 believe it or not. If you don't know him and just look at
11 him, yeah, you might think differently. I know him better
12 than I know myself, and I knew he had to be high because
13 normally the kid just walks a straight line and just laughs
14 and jokes and he's a good kid, and if he says he's sorry, and
15 I could tell because it's hard for him to cry. I don't even
16 know how to say this, but could you just give him, I guess,
17 the minimum or just lenient and it's more so for my mom. She
18 doesn't have too much time left and that's her baby. She
19 raised him. So I don't know how that's going to affect her.
20 Like I said, she's old. I don't know how much time she has
21 left. It's more so for her, and she's the one I worry about.
22 I guess that's it. I just --

23 THE COURT: Thank you, ma'am. Anyone else? All right.
24 Mr. Cooper, anything you want to say or does anybody want to
25 speak on your behalf?

1 MR. COOPER: I just want to say I'm sorry. I take full
2 responsibility for my actions. I never meant for any of this
3 to happen the way it did. We was all just high trying to get
4 it. That's all.

5 THE COURT: All right. Ms. Saitta, anything you want to
6 say or does anyone want to speak on your behalf?

7 MS. SAITTA: Can I talk to her?

8 THE COURT: No. You can speak to the Court.

9 MS. SAITTA: I just want her to know that I didn't want
10 that to happen to her and I'm sorry.

11 THE COURT: All right. Thank you. Does the victim wish
12 to say anything? You need to come to the podium. Okay. All
13 right. Prior records?

14 MR. TERRELL: Yes, sir, Your Honor. As it pertains to
15 Domenic Merino, he's got a 2009 discharging of a firearm in
16 public, 2009 unlawful carrying of a handgun, 2011 -- I'm
17 sorry, 2012 burglary third degree first offense.

18 For Mr. Cooper, he has a 2012 breaking and entering motor
19 vehicle and a couple of property offenses, Your Honor.

20 For Ms. Saitta, it was just the simple possession of
21 marijuana that Ms. Pratt alluded to.

22 THE COURT: All right.

23 MR. WILSON: Your Honor.

24 THE COURT: Yes.

25 MR. WILSON: If it please the Court, Judge, just before

1 you impose sentence, Your Honor, I just want to reiterate for
2 the record 2014-GS-26-00324, possession of a weapon during a
3 violent offense, is being nolle prossed by the State. I just
4 wanted to put it on the record, Judge.

5 THE COURT: All right. All right. Mr. Merino, Mr.
6 Cooper and Ms. Saitta, I will accept your guilty pleas. I
7 find that they're made knowingly, voluntarily, fully advised
8 of your rights as a Defendant and the nature of the charge
9 against you and the consequences of your guilty plea. I also
10 find that there is a factual basis to support these charges
11 against you.

12 Mr. Merino and Mr. Cooper, for each of the charges
13 against you, the sentence of the Court is that you be confined
14 to the State Department of Corrections for 22 years. Ms.
15 Saitta, I'm sentencing you to the State Department of
16 Corrections for 15 years. All of your sentences will run
17 concurrently. You'll be given credit for any time served thus
18 far. No -- on the -- I'm just going to let the Department of
19 Corrections figure out what her pre, pretrial time is. If you
20 don't get it for being out on GPS then she doesn't get that.
21 Okay?

22 MS. PRATT: It's my understanding it's discretionary.
23 Then you are saying no? Am I correct on that?

24 THE COURT: Yeah. That's right. That's right.

25 MS. PRATT: Thank you, Your Honor.

1 THE COURT: Then I am putting on there that there is to
2 be no sex offender registry because the, the kidnapping did
3 not involve a sex crime. All right.

4 MR. WILSON: Your Honor, may my client get credit for
5 time served, Judge?

6 THE COURT: Whatever the department -- yeah, by statute,
7 whatever pretrial detention he has served he gets credit for
8 that. Okay? All right. Thank you very much. Thank you.

9 (Adjourned.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

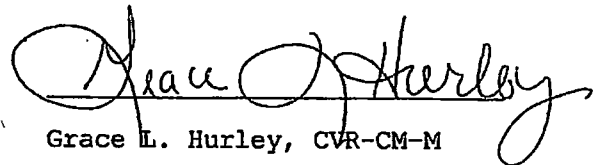
24

25

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the guilty pleas held in the case of State versus Shannon De Vante Cooper, State versus Domenic John Merino, and State versus Kyla Toni Saitta held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on April 20, 2015.

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



Grace L. Hurley, CVR-CM-M

Official Reporter

September 17, 2015.

EXHIBIT

201

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE GENERAL SESSIONS COURT
FIFTEENTH JUDICIAL CIRCUIT
Warrants 2013A2610700933, 934, 935 &
2015GS2600361

THE STATE SOUTH CAROLINA,)

Plaintiff,)

v.)

DOMENIC JOHN MERINO,)

Defendant.)

**MOTION TO ENFORCE THE
PREVIOUS PLEA OFFER**

NOW COMES the defendant, Domenic Merino, by and through his undersigned counsel, and moves for an Order of this Court enforcing the plea offer extended by the Fifteenth Circuit Solicitor's office on January 9, 2014 whereby the Defendant would plead guilty to a charge of kidnapping with a negotiated 13 year sentence. This motion is based upon all applicable statutes and case law, as well as any testimony or evidence offered at the hearing and the following:

1. On or about October 16, 2013, the defendant was arrested and charged with Burglary First degree, Kidnapping and Possession of a weapon during a violent crime.
2. Defendant through his counsel of record received correspondence from Assistant Solicitor Tomas Groom Terrell, III dated January 9, 2014, extending an offer for the defendant to plead guilty to kidnapping for a negotiated sentence of 13 years. The correspondence stated the offer must be accepted by February 28, 2014, or it is considered rejected. This plea offer was extended again verbally by Senior Assistant Solicitor Donna Elder on July 16, 2014. A subsequent offer to plead to Armed Robbery with no recommendation was extended by Senior Assistant Solicitor Nancy Livesay on August 4, 2014.

3. Defendant served a Motion for Rule 5 Disclosure and Brady Material on the state by and

through Assistant Solicitor Terrell on February 11, 2014.

4. Defendant through his counsel received the State's response to the discovery request dated February 11, 2014, enclosing 80 pages of documents and one (1) CD. In this discovery material was statements from the alleged victims, various witnesses, codefendant Paige Martin, codefendant Kyla Saitta.
5. On March 30, 2015, Defendant was served with a supplemental Brady response enclosing a DVD of a recorded interview of Carl Thomas dated July 23, 2014.
6. The July 23, 2104 statement of Carl Thomas is exculpatory in nature. Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. The duty to disclose material exculpatory evidence is a matter of the due process clause. Porter v. State, Opinion No. 26121 (SC 3/6/2006) (SC, 2006).
7. That the state should not have the ability to decide what, if any, materials are utilized by the defendant in his defense.
8. The state, by and through Assistant Solicitor Terrell, has since informed the defendant he will not allow the defendant to plead guilty and receive the agreed upon sentences.
9. That Defendant was not given the opportunity to review the evidence in possession of the state at the time the offer was given. Had the defendant had the statement of Carl Thomas while the plea was offered, the defendant would have accepted.
10. That Assistant Solicitor Terrell stated in an email to defendant's counsel he thought the defendant was in possession of the statement.
11. Not allowing the defendant to plea under the previously extended offer goes against the spirit of the Memorandum of Chief Justice Toal dated March 1, 2004.
12. The undersigned would state that he has attempted to resolve this matter with the Fifteenth

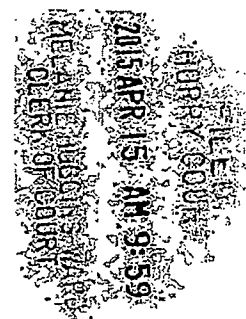
Circuit Solicitor's Office prior to the filing of this Motion but was unsuccessful.

THEREFORE, Defendant request this court grant his motion and allow the defendant to plead guilty under the previously extended offer with a recommended sentence of 13 years.

Respectfully submitted this 14th day of April, 2015,



Ralph J. Wilson, Jr.
WILSON & WILSON LAW GROUP
P.O. Box 2460
Conway, S.C. 29526
P (843) 381-0765 F(843) 381-0767
Attorney@RalphWilsonLaw.com
Attorney for the Defendant



STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.
Domenic John Merino

AKA:

Race: WHITE Sex: M Age: 27DOB: [REDACTED] SS# [REDACTED]Address: [REDACTED]City, State, Zip: Myrtle Beach, SC 29579DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Kidnapping (0-3)in violation of § 16-3-0210 of the S.C. Code of Laws, bearing CDR Code # 0095☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Terrell, III, Thomas Groves

SC100776

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 22 days/months/years or ☐ under the Youthful Offender Act not to exceed X yearsand/or to pay a fine of \$ X; provided that upon the service of X days/months/years and/or paymentof \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 4/20/2015☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-15-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-35-13

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-61 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$30	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2014GS2600323A/W#: 2013A2610700934Date of Offense: 9/4/2013S.C. Code § : 16-03-0910CDR Code #: 0095

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADSFTUP days/hours Public Service/EmploymentObtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 25.00 beginning 4/20/2015\$ paid to Public Defender Fund

Other:

No Sex offender Registry.

Presiding Judge

Judge Code: 2148Sentence Date: April 20, 2015

Clerk of Court/ Deputy Clerk

Court Reporter: Groce Hurley

SCCA/217 (03/2011)

STATE OF SOUTH CAROLINA

COUNTY OF Henry
STATE VS.
Domenic John Merino
AKA:
Race: WHITE Sex: M Age: 27
DOB: [REDACTED] SS#: [REDACTED]
Address: [REDACTED]
City, State, Zip: Myrtle Beach, SC 29579
DL#: [REDACTED] SID#: [REDACTED]

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2015GS2600361
A/W#: 2015GS2600361
Date of Offense: 9/4/2013
S.C. Code § : 16-11-0330(A)
CDR Code #: 0139

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was
TO: Armed Robbery (62-25)

☐ CONVICTED OF or ☒ PLEADS

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GFS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature] SC100776 [Signature] 76716
Terrell, H. Thomas Green SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 2-2 days/months/years or ☐ under the Youthful Offender Act not to exceed X years
and/or to pay a fine of \$ X; provided that upon the service of X days/months/years and/or payment
of \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 4/20/2015
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-63 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ Set by SCDPPPS

PTUP _____ days/hours Public Service/Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 2500 beginning 4/20/2015
\$ _____ paid to Public Defender Fund
Other: _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(j) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)		\$ <u>3.95</u>
TOTAL		\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk Melanie Higgins Ward
Court Reporter: [Signature]
SCCA/217 (03/2011)

Presiding Judge [Signature]
Judge Code: 2148
Sentence Date: April 20, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
STATE VS.
Domenic John Merino

INDICTMENT/CASE#: 2014GS2600322

AKA:
Race: WHITE Sex: M Age: 27

A/W#: 2013A2610700933

Date of Offense: 9/4/2013

S.C. Code § 16-11-0311

CDR Code #: 0079

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Myrtle Beach, SC 29579

DL#: [REDACTED] SID#: [REDACTED]

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

In disposition of the said indictment comes now the Defendant who was

☐ CONVICTED OF or ☒ PLEADS

TO: Burglary, 1st degree (GUILTY)

in violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079

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

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

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

ATTEST:

Terrill, III, Thomas Green

SC100776

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 22 days/months/years or ☐ under the Youthful Offender Act not to exceed X years

and/or to pay a fine of \$ X; provided that upon the service of X days/months/years and/or payment

of \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

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

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

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

SPECIAL CONDITIONS:

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

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114(BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$ <u>1240</u>

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

April 20, 2015

 days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 2500 beginning 4/20/2015

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel.

§ 47.12 requires \$500 be paid to Clerk during probation.

FILED
Horry County
APR 20 2015
CLERK OF COURT
Melanie Huggins Ward

WITNESSES
Thomas Kelliher Horry County Police Department

ARREST WARRANT NUMBER

2013A2610700933
CDR: 0079 16-11-0311
DOA: 10/16/2013

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JAN 28 2014

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-26- 00322

The State of South Carolina
County of Horry

Thomas Groom Terrell, III
13H05341

COURT OF GENERAL SESSIONS

JANUARY, 2014 TERM

THE STATE

vs.

Domenic John Merino
W/M

Myrtle Beach, SC 29579

ATTORNEY: Taylor, R. Paul

Indictment for
BURGLARY, FIRST DEGREE

Jimmy A. Richardson, II, Solicitor

FILED
HORRY COUNTY
2015 APR 20 PM 4:33
CLERK OF COURT
MELODY B. BARNARD
PLED GUILTY/TRIAL

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

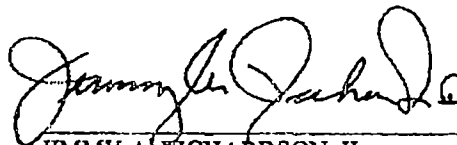
At a Court of General Sessions, convened on January 23, 2014, the Grand Jurors of Horry County present upon their oath:

BURGLARY, FIRST DEGREE

CDR: 0079 16-11-0311

That Domenic John Merino did in Horry County, on or about September 4, 2013 enter the dwelling of Kathy Smith without consent and with the intent to commit a crime therein and the entering or remaining occurred in the nighttime and/or when in effecting entry or while in the dwelling or in immediate flight, and/or he or another participant in the crime was armed with a deadly weapon, and/or caused physical injury to non-participant in the crime, and/or used or threatened use of dangerous instrument, and/or displayed what was or appeared to be a knife or firearm, in violation of Section 16-11-0311(A), S. C. Code of Laws, 1976, as amended.

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



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR