

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

GERRY BRENT JAMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001498

APPENDIX

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S.C. SUPREME COURT

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The State of South Carolina,)
)
 Plaintiff,)
)
 vs.) Transcript of Record
)
 Gerry Brent James,)
)
 Defendant.)
)
)

June 20, 2016
Columbia, South Carolina

B E F O R E:

The Honorable L. Casey Manning, Judge

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

Joseph L. Leventis, Esquire, Assistant Solicitor
Attorneys for the State

Tivis C. Sutherland, IV, Esquire
Attorneys for the Defendant

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

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E X H I B I T S

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1 (PRIOR TO HEARING, THE DEFENDANT IS SWORN.)

2 (COLLECTION OF DOCUMENTS MARKED INTO EVIDENCE AS
3 DEFENDANT'S EXHIBIT NUMBER 1.)

4 THE COURT: I see you've got shoplifting for ten.
5 You've got malicious injury. That's five?

6 MR. SUTHERLAND: Yes.

7 MR. LEVENTIS: Yes, sir.

8 THE COURT: And then safecracking is still -- what is
9 that? Up to life? No, it's not up to life.

10 MR. LEVENTIS: Zero to thirty.

11 THE COURT: Thirty? All right, we ready? Yes,
12 Solicitor.

13 MR. LEVENTIS: Thank you, Judge. Joe Leventis
14 standing in for Vance Eaton. Standing before you is Gerry
15 James represented by his attorney, Tivis Sutherland of the
16 private bar. Mr. James is here today to plead guilty to
17 safecracking, malicious injury to personal property 2 to
18 \$10,000, and shoplifting third. There is no recommendation
19 from the state.

20 THE COURT: Okay, Mr. Sutherland, you represent Mr.
21 Gerry James?

22 MR. SUTHERLAND: Yes, I do, Your Honor.

23 THE COURT: Have you explained to Mr. James the
24 charges contained in these three indictments, the possible
25 punishments and his rights, including his constitutional

1 right to a jury trial?

2 MR. SUTHERLAND: Yes, sir.

3 THE COURT: In your opinion, does Mr. James understand
4 the charges, the punishments, and his rights?

5 MR. SUTHERLAND: He does, Your Honor.

6 THE COURT: How does he indicate to you he wishes to
7 plead, guilty or not guilty?

8 MR. SUTHERLAND: Guilty, sir.

9 THE COURT: Do you agree with his decision to plead
10 guilty?

11 MR. SUTHERLAND: Yes, sir.

12 THE COURT: From your investigation of the facts and
13 circumstances surrounding these cases, do you feel that the
14 state could produce sufficient evidence to convince a jury
15 here in Richland County of Mr. James's guilt beyond a
16 reasonable doubt, and if he were to stand trial on these
17 charges, his convictions would be probable?

18 MR. SUTHERLAND: Yes, sir.

19 THE COURT: Now, has Mr. James been ordered to submit
20 to a mental examination to determine his competency to
21 stand trial?

22 MR. SUTHERLAND: He has not, Judge.

23 THE COURT: Any question in your mind, Mr. Sutherland,
24 that Mr. James is, in fact, competent to enter this guilty
25 plea?

G. JAMES - EXAMINATION BY THE COURT

5

1 MR. SUTHERLAND: I've known him for years. Not at
2 all.

3 EXAMINATION BY THE COURT:

4 Q. You are Gerry James. Is that correct?

5 A. Yes, sir.

6 Q. Mr. James, before I can accept your plea of guilty,
7 it's necessary for me to make sure you're making this plea
8 freely and voluntarily. To do that, sir, I need to ask you
9 a series of questions. At any point during my questioning
10 of you, if you do not understand anything I say or the
11 words that I use, please stop me; I'll be more than happy
12 to repeat or explain anything I say, Mr. James.
13 Additionally, I'll be more than happy to stop this plea and
14 allow you as much time as you feel you may need to consult
15 with your lawyer, Mr. Sutherland.

16 A. Yes, sir.

17 Q. Do you understand, sir?

18 A. Yes, sir.

19 Q. How old are you, Mr. James?

20 A. Forty-one years old.

21 Q. Forty-one. How far did you go in school?

22 A. Ninth grade. I got my GED.

23 Q. All right. What kind of work have you done?

24 A. Landscaping, floor technician.

25 Q. Okay. Mr. James, have you ever been treated for the

1 abuse of alcohol or drugs or for mental illness?

2 A. No, sir.

3 Q. Have you taken any medications, drugs, or alcohol in
4 the past twenty-four hours?

5 A. No, sir.

6 Q. Are you today aware of any physical, nervous, or
7 emotional problem that might keep you from understanding
8 what you're doing here today?

9 A. No, sir.

10 Q. You know what you're doing, Mr. James. Is that fair
11 enough?

12 A. Yes, sir.

13 THE COURT: You agree, Mr. Sutherland, that Mr. James
14 knows, understands, appreciates what he's doing here this
15 afternoon?

16 MR. SUTHERLAND: Yes, sir.

17 BY THE COURT:

18 Q. Now, Mr. James, you heard your lawyer, Mr. Sutherland,
19 tell me that he has explained to you the charges contained
20 in these three indictments, the possible punishments, and
21 your rights, including your right to a jury trial, and that
22 you understand these things. Is that correct?

23 A. Yes, sir.

24 Q. Mr. James, you're first before me on indictment
25 2016-3962, the *State vs. Gerry James*. This is an

G. JAMES - EXAMINATION BY THE COURT

7

1 indictment for shoplifting, an indictment for shoplifting
2 third and above. Do you understand this charge, sir?

3 A. Yes, sir.

4 Q. This indictment, Mr. James, alleges that you did here
5 in Richland County on or about June 22nd of 2015 take and
6 carry away, transfer to another area of the store, alter,
7 transfer, or remove some merchandise offered for sale by
8 the Home Depot. Let's see, lead tape and dog alarm, which
9 was offered for sale by Home Depot that you either stole or
10 tried to steal. You understand that allegation?

11 A. Yes, sir.

12 Q. And you want to plead guilty to shoplifting or trying
13 to shoplift these items from Home Depot. Is that correct?

14 A. Yes, sir.

15 Q. Mr. James, you realize that by pleading guilty to
16 shoplifting third or above, sir, you could go to jail for
17 ten years?

18 A. Yes, sir.

19 Q. Knowing, Mr. James, that you could go to prison for
20 ten years by pleading guilty to this charge, do you still
21 wish to plead guilty to it?

22 A. Yes, sir.

23 Q. All right. Next, Mr. James, I have before me
24 indictment number 2015-3579, the *State vs. Gerry James*.
25 This is an indictment for burglary/safecracking. I think

1 you are technically charged with safecracking. Do you
2 understand this charge?

3 A. Yes, sir.

4 Q. This indictment, Mr. James, alleges that you did here
5 in Richland County on or about April 13th of 2015 use
6 tools, explosives, or other implements in or about the safe
7 used for keeping money or other valuables owned by AllSouth
8 FCU located at 7844 Garners Ferry Road. AllSouth Federal
9 Credit Union, I do believe. Is that correct?

10 A. Yes, sir.

11 Q. With the intent to commit larceny and any other crime.
12 You tried to steal an ATM machine or something like that.
13 That's what you're accused of. Is that right?

14 A. Yes, sir.

15 Q. And that's what you want to plead guilty to?

16 A. Yes, sir.

17 Q. The safecracking. You realize that by pleading guilty
18 to safecracking, Mr. James, that you could go to jail for
19 thirty years? You understand that?

20 A. Yes, sir.

21 Q. Knowing then, sir, that you can go to prison for
22 thirty years by pleading guilty to safecracking, do you
23 still wish to plead guilty to it?

24 A. Yes, sir.

25 Q. All right. Next, Mr. James, I have before me

G. JAMES - EXAMINATION BY THE COURT

9

1 indictment number 2015-3578, *State vs. Gerry James*. Once
2 again, this is an indictment for malicious injury to
3 personal property. Do you understand this charge?

4 A. Yes, sir.

5 Q. This indictment, Mr. James, alleges that you did here
6 in Richland County on or about April the 13th of 2015
7 willfully and maliciously cut, mutilate, deface, or
8 otherwise injure the real property of AllSouth Federal
9 Credit Union. That you destroyed an ATM machine with a
10 concrete saw. You understand this allegation?

11 A. Yes, sir.

12 Q. And this is what you want to plead guilty to?

13 A. Yes, sir.

14 Q. You realize that by pleading guilty to malicious
15 injury to personal property ---

16 THE COURT: It says third or subsequent. Would that
17 make it ten? It says third or subsequent. This is what
18 the indictment ---

19 MR. LEVENTIS: It would be, but I would be fine
20 amending the indictment to fit this.

21 THE COURT: Okay. All right.

22 BY THE COURT:

23 Q. Anyway, so it's just malicious injury to personal
24 property first offense, but this is what you want to plead
25 guilty to, destroying this ATM machine. You realize that

1 by doing so, Mr. James, that you could go to jail for five
2 years?

3 A. Yes, sir.

4 Q. Knowing then, sir, that you could go to jail for five
5 years by pleading guilty to malicious injury to personal
6 property, you still wish to plead guilty to it?

7 A. Yes, sir.

8 Q. Now, Mr. James, are you currently on probation or
9 parole for any prior offenses?

10 A. No, sir.

11 Q. Mr. James, I could run, I can run the sentences on
12 these three charges consecutively, consecutively. That is,
13 put one after the other, add one to the other. If I did
14 so, Mr. James, you would be looking at forty-five years in
15 the penitentiary. Do you understand that?

16 A. Yes, sir.

17 Q. Knowing then, sir, that you could go to prison for
18 forty-five years by pleading guilty to these three charges,
19 do you still wish to plead guilty to them?

20 A. Yes, sir.

21 Q. Now, Mr. James, when you plead guilty, you have to
22 give up certain basic rights. First of all, you have to
23 give up your right to remain silent. Now, this is your
24 right against self-incrimination, Mr. James, your right to
25 say nothing at all. No one can compel you to come into

G. JAMES - EXAMINATION BY THE COURT

11

1 court to provide evidence or to testify against yourself.

2 Do you understand this, sir?

3 A. Yes, sir.

4 Q. Secondly, Mr. James, when you plead guilty, you have
5 to give up your right to a jury trial jury. That is your
6 right for a jury here in Richland County to decide whether
7 or not you're guilty of these charges beyond a reasonable
8 doubt. A jury would base its decision on whatever evidence
9 the state would introduce at trial against you and also on
10 whatever evidence you and your lawyer, Mr. Sutherland, may
11 wish to introduce.

12 Now, Mr. James, I emphasize may wish to introduce,
13 sir, because in a trial, you would be presumed innocent.
14 Would not have to prove anything, and you could not be
15 convicted unless the state convinced all twelve jurors of
16 your guilt beyond a reasonable doubt. The jury's decision
17 would have to be unanimously. All twelve would have to
18 agree that you are guilty on these charges. Do you
19 understand that, sir?

20 A. Yes, sir.

21 Q. Thirdly, Mr. James, when you plead guilty, you give up
22 your right to confront and to be confronted by the
23 witnesses against you. That is your right to see, hear,
24 and cross-examine any of the witnesses the state may call
25 to testify against you during a trial. In addition, Mr.

1 James, by pleading guilty, you're giving up your right to
2 subpoena and call witnesses on your own behalf. That is
3 someone who may testify for you. Do you understand this,
4 sir?

5 A. Yes, sir.

6 Q. Fourthly, Mr. James, indictment number 2016-3962, the
7 shoplifting charge, this indictment has not been presented
8 to or considered by the Richland County grand jury. After
9 hearing evidence, twelve of the eighteen members of the
10 grand jury would have to agree that you are probably guilty
11 of trying to shoplift this stuff from Home Depot, these
12 items, before a true bill of indictment could be returned
13 indicating that this particular indictment or case would be
14 ready for trial. It's possible, Mr. James, that the grand
15 jury could no bill this indictment, which would mean that
16 the case against you could be dismissed. Now, do you want
17 the grand jury to consider this indictment of the
18 shoplifting charge, or do you want to waive presentment and
19 continue with your guilty plea here and now?

20 A. I would like to waive presenting.

21 Q. You're sure about that?

22 A. Yes, sir.

23 Q. Now, do you understand these rights I just mentioned
24 to you, Mr. James?

25 A. Yes, sir.

G. JAMES - EXAMINATION BY THE COURT

13

1 Q. Do you understand, sir, that when you plead guilty,
2 you have to give up these constitutional rights?

3 A. Yes, sir.

4 Q. Now, is that what you want to do?

5 A. Yes, sir.

6 Q. You want to give up your constitutional rights?

7 A. Yes, sir.

8 Q. Now, you realize you will not receive a jury trial on
9 any of these three charges by pleading guilty to them?

10 A. Yes, sir.

11 Q. Once again, Mr. James, you're pleading guilty to
12 safecracking; that carries a prison sentence of up to
13 thirty years. You're pleading to malicious injury to
14 personal property, five years, and you're pleading guilty
15 to shoplifting third or above. That carries up to ten
16 years. I've already explained to you that you're facing
17 forty-five years in jail by pleading guilty to these three
18 charges.

19 Now, you're giving up all your constitutional rights,
20 Mr. James. Considering what I just said to you, sir, I'll
21 ask you once again. How do you wish to plead to these
22 charges, guilty or not guilty?

23 A. Guilty.

24 Q. You realize, Mr. James, that when you plead guilty,
25 you admit the truth of the allegations contained in the

1 three indictments against you. You understand that?

2 A. Yes, sir.

3 Q. I tell you that, sir, because you may have some
4 defenses to these charges, Mr. James. Of course I have no
5 way of knowing that, but you need to realize that by
6 pleading guilty here today, you give up any defense you
7 might have. Do you understand that, sir?

8 A. Yes, sir.

9 Q. I tell you that, Mr. James, because additionally when
10 you were arrested by the Columbia Police Department and the
11 Richland County Sheriff's Department, you may have given
12 some type of incriminating statements. That is, made some
13 admissions or confession about your guilt. You need to
14 realize that by pleading guilty here today, you waive your
15 right to later on challenge or contest if you gave any
16 statements, whether or not they were taken or obtained from
17 you freely and voluntarily in accordance with your
18 constitutionalist rights. Do you understand that?

19 A. Yes, sir.

20 Q. Now, Mr. James, I'll ask you once again. Did you
21 commit these offenses?

22 A. Yes, sir.

23 Q. So once again, Mr. James, you're telling me you're
24 pleading guilty to indictment 2015-3579, safecracking, and
25 3578, malicious injury to personal property, because you

G. JAMES - EXAMINATION BY THE COURT

15

1 did, in fact, here in Richland County back on April the
2 13th of 2015, you destroyed an ATM machine belonging to
3 AllSouth Federal Credit Union when you were trying to steal
4 it. That was the safecracking. You tried to steal the ATM
5 and you damaged the ATM in the process of trying to steal
6 it. That's why you're pleading guilty to malicious injury
7 to personal property and safecracking. Is that correct?

8 A. Yes, sir.

9 Q. And once again, Mr. James, in connection with
10 indictment number 2016-3962, shoplifting, back on June 22nd
11 of 2015, you tried to steal some lead tape and a dog alarm
12 held for sale by Home Depot?

13 A. Yes, sir.

14 Q. Pleading guilty once again because you are guilty. Is
15 that fair enough?

16 A. Yes, sir.

17 THE COURT: You said no plea negotiations. Is that
18 correct?

19 MR. LEVENTIS: There were none.

20 THE COURT: I think there had been some discussions
21 that went away. Is that fair enough?

22 MR. SUTHERLAND: Yes, sir.

23 MR. LEVENTIS: I would like to put something on the
24 record. I would like to put some of the plea negotiations
25 on the record after the facts.

1 THE COURT: You want to go ahead and do it now?

2 MR. LEVENTIS: I would, Your Honor.

3 THE COURT: Have there been any plea negotiations or
4 any recommendations? Go ahead.

5 MR. LEVENTIS: About three or four weeks ago, Mr.
6 Eaton and Mr. Sutherland were both in here. The
7 recommendation was he was going to plead to -- or Mr. Eaton
8 offered a ten-year recommendation. Mr. Sutherland was
9 going to ask for less than that. At that point, defendant
10 declined. Turned down the ten-year recommendation offer.
11 That's why at this point the state is ---

12 THE COURT: The recommendation is off the table.

13 MR. LEVENTIS: It's off the table, but the state has
14 expended resources getting this case ready for trial. At
15 this point, the state would be asking for at least ten
16 years.

17 THE COURT: All right. That's the recommendation.
18 You were asking for ten. The recommendation was ten. He
19 rejected it. We're all on the same page, right?

20 MR. LEVENTIS: Yes, sir.

21 THE COURT: And he's pleading without any specific
22 recommendations.

23 BY THE COURT:

24 Q. You understand all this, Mr. James?

25 A. Yes, sir.

G. JAMES - EXAMINATION BY THE COURT

17

1 Q. Do you still wish to continue to plead guilty?

2 A. Yes, sir.

3 Q. Now, sir, are you fully satisfied with the manner in
4 which your lawyer here, Mr. Sutherland, the way he has
5 advised and represented you on these charges?

6 A. Yes, sir.

7 Q. Have you talked with him for as long as and for as
8 often as you feel it necessary for him to properly
9 represent you?

10 A. Yes, sir.

11 Q. You need any more time to talk to him?

12 A. No, sir.

13 Q. Have you understood your talks with him?

14 A. Yes, sir.

15 Q. Mr. James, has Mr. Sutherland done everything for you
16 you feel he should do or could do on your behalf in
17 advising and representing you on these charges?

18 A. Yes, sir.

19 Q. Has he done anything you feel he should not have done?

20 A. No, sir.

21 Q. Are you completely satisfied with his services?

22 A. Yeah.

23 Q. You have any complaints, Mr. James, against anyone at
24 the Richland County Sheriff's Department or the Columbia
25 Police Department?

1 A. No, sir.

2 Q. Any complaints against anyone working here in the
3 solicitor's office?

4 A. No, sir.

5 Q. Have you understood my questions, Mr. James?

6 A. Yes, sir.

7 Q. Is there anything you want to ask me about what I just
8 went over with you, anything at all?

9 A. No, sir.

10 Q. Mr. James, you realize that you have a right to appeal
11 this guilty plea and whatever sentence I may impose upon
12 you, but if you're going to appeal, you need to file a
13 notice of intent to appeal within ten days of today's date.
14 Do you understand that, sir?

15 A. Yes, sir.

16 Q. Additionally, Mr. James, it may not mean much to you
17 now, but it could later on. Once you're in the Department
18 of Corrections -- because you realize I'm probably going to
19 send you, don't you?

20 A. Yes, sir.

21 Q. Yeah. I know. If you later on find when you're in
22 the Department of Corrections that you have some complaints
23 against the Columbia Police Department, the Richland County
24 Sheriff's Department, the solicitor's office, Mr.
25 Sutherland, your lawyer, or anybody else, you need to make

1 those complaints known by filing a post-conviction relief
2 application within one year of today's date. Do you
3 understand that, sir?

4 A. Yes, sir.

5 THE COURT: Very well.

6 Solicitor, be happy to hear about it.

7 MR. LEVENTIS: Thank you, Judge. I'll start with the
8 safecracking and malicious injury. This incident occurred
9 on April 13, 2015, when at 4:03 am Ms. Maude Goodson, who
10 is present in the courtroom, received an alert that the
11 AllSouth Federal Credit Union kiosk/safe had been broken
12 into or was attempting to be broken into. At that point
13 the Richland County Sheriff's Department was alerted, and
14 they all responded to the scene. I know Ms. Goodson spent
15 about thirteen hours on the scene, and the sheriff's
16 department had to come out twice.

17 But in the first incident, they came out and took
18 several photographs, and nothing was uncovered because it
19 was dark. Later on Ms. Goodson was walking around the
20 parking lot area and did observe a saw, a pickax, and a
21 fishing hat outside about 100 to 150 feet away. The saw
22 came back as rented by this defendant, who provided his
23 driver's license and information to Sunbelt Rentals. It
24 had not been returned within the proper time. Furthermore,
25 that led the investigator to check with probation, who --

1 or parole, who determined that this defendant was in that
2 exact location at that exact time based on his GPS ankle
3 monitor.

4 What happened when he got to the -- what happened when
5 the defendant got to the kiosk itself, he went and he first
6 cut the fusion cord to -- which cut off the alarm. He then
7 ripped out the power gas cap or power gas meter cap which
8 cut off the power, cutting off the lights and cutting off
9 the cameras. When he did that, he took a pickax, ripped
10 open the bottom of the door, and crawled underneath it.
11 What he didn't account for was there is a motion alarm in
12 there that is cellularly activated, which alerted Ms.
13 Goodson and which alerted the Richland County Sheriff's
14 Department.

15 At that point, whenever they checked out, found out
16 the safe was -- I mean, he did actually try to saw into the
17 safe. There were saw marks on the inside of the safe.
18 Ultimately the damage -- the repair itself, estimates of
19 6727, hourly 168.75, \$530 additional dollars, and that was
20 it. So, total about 8 to \$9000 worth of damage, but he did
21 rip apart the kiosk. He did try to get into the safe and,
22 yeah, that was it. Probation placed him on the scene.

23 THE COURT: All right. What, did he have a GPS
24 monitor?

25 MR. SUTHERLAND: He's had a GPS since he was a

1 teenager, sir.

2 THE COURT: What's his prior record, Solicitor?

3 MR. LEVENTIS: '91 ABHAN. He received eight years
4 suspended on five years' probation. '92 four counts of
5 attempting to commit a lewd act on a minor, ten years
6 suspended on five years' probation. '94 shoplifting. '95
7 auto breaking, parole revocation. '96 possession of crack,
8 possession of a stolen motor vehicle greater than \$5000
9 where he did receive an active sentence. '98 possession of
10 stolen motor vehicle above \$5000, auto breaking, forgery,
11 possession of cocaine, petit larceny, false swearing.

12 '03 possession of stolen vehicle two counts, 1 to
13 \$5000. '04 possession of stolen motor vehicle, 1 to \$5000
14 in value, and FTC theft. '06 unlawful carrying of a
15 weapon, possession of crack second offense, receiving
16 stolen goods. '07 failure to register as a sex offender
17 first offense. '09 burglary in the second degree, and a
18 prop third where he got a five years suspended on three
19 years' probation sentence. 2010 failed to register as a
20 sex offender again, and he got a, I'm guessing a probation
21 violation. He got a thirty-month active sentence based on
22 his SLED rap sheet. 2013 giving false information, DUS
23 second, failure to stop for blue lights, and a willful
24 violation of electronic monitoring, where he got a two-year
25 active sentence.

1 EXAMINATION BY THE COURT RESUMES:

2 Q. Is that your prior record, Mr. James?

3 A. Yes, sir.

4 THE COURT: Do you agree, Mr. Sutherland?

5 MR. SUTHERLAND: Yes, sir.

6 BY THE COURT:

7 Q. And what the solicitor told me is substantially how
8 this whole matter unfolded? Is that fair enough?

9 A. Yes, sir.

10 MR. SUTHERLAND: Yes, sir.

11 THE COURT: Very well. I find that there's a
12 substantial factual basis for your plea, Mr. James. I
13 further find your decision to plead guilty to be freely,
14 voluntarily, knowingly, and intelligently made, that you've
15 had advice of competent counsel whom you indicate to me
16 you're completely satisfied with. Therefore, I'll accept
17 his plea.

18 This young lady is from AllSouth Federal Credit Union?

19 MS. GOODSON: Yes, sir.

20 THE COURT: Anything you'd like to tell me, ma'am?

21 MS. GOODSON: No, sir.

22 THE COURT: You sure about that?

23 MS. GOODSON: I'm very pleased. Thank you.

24 THE COURT: And what's your name for the record?

25 MS. GOODSON: I'm sorry. Maude Goodson.

1 THE COURT: Ma'am?

2 MS. GOODSON: Maude, M-a-u-d-e, Goodson.

3 THE COURT: Oh, Maude.

4 MS. GOODSON: Maude, like the TV show.

5 THE COURT: Where are you from originally?

6 MS. GOODSON: Columbia.

7 THE COURT: Where did you go to high school?

8 MS. GOODSON: L.R. Crossing.

9 THE COURT: You mean Lower Richland?

10 MS. GOODSON: Lower Richland.

11 THE COURT: Okay. You're from the creek?

12 MS. GOODSON: Yeah.

13 THE COURT: You remember Mooney Player?

14 MS. GOODSON: I do.

15 THE COURT: Okay. We won't say how long ago he
16 coached there.

17 Very well, Mr. Sutherland, I'll be happy to hear from
18 you, sir.

19 MR. SUTHERLAND: Thank you, Your Honor. May it please
20 the court? I'll just right out of the box go ahead and
21 address the elephant in the room: the issue is Gerry's
22 record in this case. You know, it had been certainly ---

23 THE COURT: Well, they say the best predictor of
24 future behavior is past behavior. Go ahead, Mr.
25 Sutherland.

1 MR. SUTHERLAND: Yes. Yes, sir, and ultimately this
2 is the first time that I've represented Gerry, but I've
3 known him for a number of years. And I've known him -- I
4 have family members who have addiction problems and go
5 through the same thing essentially night, night and day. I
6 have a nephew who is a heroin addict, and he is a wonderful
7 kid. Go get him a chicken sandwich or something, it's
8 fine, but if he's -- when he's hooked on this stuff, I'm
9 looking in my truck to see what he took when he gets out.
10 I mean, this is the sort of hold that this stuff has over
11 people.

12 Now, now, Gerry, when he was a teenager, he got these
13 lewd acts. He got the sex offender registry. He got this
14 ankle monitor issue from the get -- as far as for the rest
15 of his life. Every couple of years for the most part, it's
16 possession of stolen motor vehicle or an auto breaking or
17 shopliftings or something in the -- things along the line
18 that feed this habit of his.

19 While I've known him, I've known him sort of in both
20 phases. I mean, I've had beers with him before when, you
21 know, he wasn't using crack cocaine, and then I've spoken
22 with him when he is.

23 THE COURT: Well, you want me to sentence you instead
24 of Mr. James?

25 MR. SUTHERLAND: No, sir.

1 THE COURT: Go ahead.

2 MR. SUTHERLAND: I'd be happy to help him out with his
3 recovery. So, I know, you know, I know that that's a
4 punitive aspect to the sentence and it's got to be. Also
5 what I'm hoping for is some sort of rehabilitative aspect
6 to it as well. That's why I've passed up in the form of
7 exhibits which I've shared with the solicitor's office
8 about the Christ Central Recovery Support program, which is
9 a ten-month program.

10 Pastor Kerry Breen is in charge of it. He has written
11 a letter to the court which is a part of the package which
12 I passed up. He just couldn't be here today. He's really
13 busy with people, with people who OD or people who have
14 these various crises that -- who are addicted. It's got
15 all the rules and regimentation of the programs. You know,
16 there's a thirty-day phase where you're detoxing and you're
17 just cleaning up. Then there are three ninety-day phases
18 with different -- there's literally a full page of rules
19 where you can get kicked or you can be disqualified from
20 the program on the basis ---

21 THE COURT: But you're telling me about a program that
22 he's not going to.

23 MR. SUTHERLAND: Well, what I was hoping was that he
24 could receive an active and also a probationary, since it
25 is suspendable, on the back of the active sentence, which

1 one of the requirements could be that he participate in, in
2 Pastor Breen's program because ultimately something's got
3 to be done because it's -- you know, I know from my family
4 members, I from knowing him and knowing other people that,
5 you know, that the addiction has got to be dealt with.
6 It's got to be dealt with or it's going to be the same old
7 thing.

8 He's certainly a capable, smart, intelligent, smart
9 human being. On the dope, he's just a different person.
10 Again, my nephew is no different when he's on this stuff.
11 I knew when I was first approached about this case, I knew
12 that he was in a substantial amount of trouble because he
13 finally had an 85 percent charge. Everything before was
14 the nonviolent stuff where you sit down in jail for a
15 couple of years and then, you know, everything gets sorted
16 out because it's not really that much trouble.

17 Ultimately it went to Mr. Eaton, and he had told me
18 that he had decided he wanted to take a hard line with the
19 case. Truly we were put in a position where I went back
20 and actually went through the legislative history of the
21 statute and the case law and everything and actually came
22 up with a defense that might have worked but for the second
23 round of pictures that Joe was talking ---

24 THE COURT: In discovery you saw scratches on the ATM
25 machine.

1 MR. SUTHERLAND: Yes, sir.

2 THE COURT: Am I right so far?

3 MR. SUTHERLAND: Yes. Yes, sir.

4 THE COURT: Go ahead.

5 MR. SUTHERLAND: Because initially this was a sort of
6 freestanding structure with a door with a punch code not
7 unlike our doors used to be back here, and what I was aware
8 of from the discovery that I had, that this door was pried
9 open, and it said in the incident report that he never got
10 to the vault. And so the defense that I came up with
11 looking at everything -- I won't get into the long and
12 short of it -- was that this was more akin to what the
13 responding officer had put on his report, which was
14 vandalism, or as far as the structure goes may be
15 potentially a strange sort of burglary but never having
16 reached the vault.

17 In light of the case law, there was no case law that
18 was really on point. It was all about these ATM actual
19 machines with people taking pieces off of it here that --
20 all of that dealt with that. None of that ever really
21 dealt with what the root of this was, which if you go back
22 and you review the statute and the legislative history of
23 it, you have robbing a train by stopping, robbing a train
24 by entering, robbing a motor vehicle for hire, which is
25 just replacing the stagecoach. Then you have bank robbery

1 and then you have safecracking. This was not the James
2 Gang. Initially it was about dynamite and these sorts of
3 things.

4 On the scale of safecrackings compared to the James
5 Gang and, and dynamite and things like this, this actually
6 -- there is a significant monetary component of this, but
7 this doesn't really fit into the design of the statute and
8 what it was meant to prevent, which was just sort of the
9 general lawlessness. And you had the late 19th century and
10 the early 20th century and, you know, with the Dillingers
11 and just everybody just going wild, running around blowing
12 up banks and blowing everything up. That's really what
13 this was about.

14 And what this was with him was he had rented a power
15 saw in February, never returned it for whatever reason, and
16 got this bright idea that he was going to feed his
17 addiction by going into this ATM. The moment I saw the
18 picture of the hat there, I knew the hat, so I knew him and
19 I knew where he was with, with this, which is not, not
20 where he is much of the time.

21 It is my sincere hope that, that Your Honor would
22 break the sentence into a punitive portion of active time
23 and would be hoping for three or four years. This is 85
24 percent time, so if he were to get three, four years, he
25 would do 85 percent of that, to be followed by a

1 probationary sentence wherein he could attend this ten
2 month and make it, you know, part of a condition of
3 probation where he has to complete, complete this program
4 because never -- it's never been about treatment with him.
5 It's about him feeding his addiction and being incarcerated
6 for doing these things that you cannot do. I mean, they're
7 unlawful.

8 But, you know, he wasn't out there robbing trains and
9 blowing things up. It was initially -- it looked
10 defensible as a vandalism-type case until again a couple of
11 weeks ago those photos came in of the cuts on the vaults
12 which kind of destroyed the defense even though I would
13 have went forward with it somehow. But I do believe,
14 Judge, it would be helpful to him certainly but just help
15 to everybody at large either -- I guess you can deal with
16 an addict by just incarcerating them until the end or, or
17 try to punish him but also to rehabilitate him in that
18 sense, sir.

19 And also part of the package that I've handed up to
20 the court is a letter from his mom. She could not be here;
21 she has trouble getting around. Now his common-law wife,
22 Lawanda, would like to address the court even though she's
23 pretty nervous, and certainly Gerry would like to address
24 the court also.

25 THE COURT: All right, Lawanda, I'll be happy to hear

1 from you.

2 MS. COUNTS: Thank you, Your Honor.

3 MR. SUTHERLAND: Lawanda Counts, full name.

4 MS. COUNTS: My name is Lawanda Counts, speaking on
5 behalf of Gerry James. Gerry is a kind of person. You
6 know, he has this demon that eats at him, which is a drug
7 addiction to crack cocaine that causes him to do the things
8 that he does. It's not like he intends on doing them, you
9 know? He has this habit and he goes out and do things that
10 he's not supposed to. And at the end, he sits and think
11 about it, and he's just apologetic, you know? He doesn't
12 mean to do, you know?

13 He's been dealing with this since 1991. And it puts
14 him in a state of depression where he feels as if he has
15 to, okay, go out and do something he's not supposed to do.
16 He is the kind of person who's never physically hurt anyone
17 or harmed anyone. He's the type of person if you need
18 help, he's there for you regardless of the situation. You
19 don't have to like him. He's going to go out and help you.
20 He don't have to know you. He's going to help you, you
21 know? But this demon, he definitely needs to get treatment
22 for, you know.

23 THE COURT: All right. Thank you, ma'am.

24 MS. COUNTS: Thank you.

25 THE COURT: Yes, sir, Mr. James, I'll be happy to hear

1 from you, sir.

2 DEFENDANT: Like my family and, and my attorney said,
3 this is something I've been dealing with since I was a
4 child, and all that, you know, I have been through this
5 countless times, and the end result is just incarceration.
6 I mean, I've really never been -- I know I could have found
7 help on my own but when you're dealing with it, it's easy
8 to say that. You know, I've never been given a opportunity
9 to get my life back since my youth.

10 On behalf of my family, my efforts, and my attorney,
11 we found a place that would accept me, deal with my, my, my
12 registry situation. A lot of programs wouldn't accept me;
13 we found one that will. It's inpatient, you know. It's a
14 year. It's not like I would just be walking out of here.
15 It's not Morris Village, a couple days, a couple weeks, and
16 I, I honestly think it's something that can help structure
17 my life, you know? I've been an addict for over twenty
18 years. This is, like, this is all I knew.

19 I'm just asking for an opportunity to live my life
20 clean and sober as a man, something I haven't had the
21 opportunity to do. It's like I've just been living in a
22 childhood for nearly thirty years. I know there's no
23 excusing me, you know, committing crime. There's no, no
24 just cause for it. I'm not asking to turn around and walk
25 out of this courtroom and go home. I know I need help, and

1 I'm just throwing myself on the mercy of the court asking
2 for that.

3 THE COURT: All right. Thank you, sir.
4 Anything further?

5 MR. SUTHERLAND: No, sir. Thank you.

6 MR. LEVENTIS: Your Honor, if you're inclined to grant
7 probation to incentivize this program ---

8 THE COURT: Just relax. I've got it all under
9 control. I've heard enough from both sides.

10 SENTENCE OF THE COURT:

11 THE COURT: Been around a long time, seen a lot of
12 things, Mr. James. My obligation, my duty, my job as the
13 judge is to treat everybody fairly. It's sort of like you
14 become the conscience of this community, in my community.
15 You must reflect its values. Not necessarily my personal
16 values but the values of Richland County.

17 So, on indictment 2015-3578, malicious injury to
18 personal property, five years. On indictments 2016-3962,
19 shoplifting, and 2015-3979, safecracking, sentence is nine
20 years, credit for time served. Good luck to you, Mr.
21 James.

22 MR. SUTHERLAND: Thank you, Your Honor.

23 THE COURT: Mr. Sutherland, how many days has he been
24 in jail?

25 MR. SUTHERLAND: Your Honor, he's been in jail 357

1 days.

2 THE COURT: 357?

3 MR. SUTHERLAND: Yes, sir.

4 THE COURT: Concurrent, it's all concurrent.

5 You did a real good job, Mr. Sutherland. You just had
6 a tough case, and I gave him every benefit of the doubt. I
7 think I was as fair as I could be on the low end, and like
8 I said, it's not this particular case. It's his prior
9 record.

10 MR. SUTHERLAND: Yes, sir.

11 THE COURT: That gets him where he is, but you did a
12 good job, and I thank you for the job you did for Mr.
13 James.

14 And, Mr. Leventis, I thank you for the job you did for
15 the people of South Carolina. Good luck to everybody.

16 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 20TH DAY OF JUNE, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

MAY 10TH, 2018

WITNESSES

(S) Gilbert Gallegos
- Richland County Sheriff

ARREST WARRANT NUMBER

2015A4011200100

ACTION OF GRAND JURY

TRUE BILL

Deann Gardner
Foreperson of Grand Jury
Date: **JUL 16 2015**

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS4003578

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JULY TERM 2015

105

**THE STATE
vs.**

Gerry Brent James

**Indictment for
MALICIOUS/MALICIOUS INJURY TO TREE,
HOUSE; TRESPASS UPON REAL
PROPERTY, INJURY VALUE MORE THAN
2000 BUT LESS THAN 10,000**

SC Code: **16-11-520 (A)**
CDR Code: **3600**

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

Defendant

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

Defendant

Witness:

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

SCANNED
CERTIFIED TRUE COPY
ORIGINAL FILED
JUL 16 2015
C.C.C. PLS. AND G.S.
RICHLAND COUNTY
SOUTH CAROLINA
35

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on July 15, 2015, the
Grand Jurors of Richland County present upon their oath:

MALICIOUS INJURY TO REAL PROPERTY
THIRD OR SUBSEQUENT OFFENSE

That Gerry Brent James did in Richland County on or about April 13, 2015, willfully and maliciously cut, mutilate, deface, or otherwise injure the real property of ALL SOUTH FCU, to wit: he destroyed an ATM machine with a concrete saw, in violation of Section 16-11-520, S. C. Code of Laws, 1976, as amended, such being the defendant's third or subsequent offense for which the penalty is contingent upon the value of the property involved, in violation of Section 16-01-0057, 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.



DAN JOHNSON, SOLICITOR

WITNESSES

(S) Gilbert Gallegos
- Richland County Sheriff

ARREST WARRANT NUMBER

2015A4011200101

ACTION OF GRAND JURY

TRUE BILL

Deavon Gardner
Foreperson of Grand Jury
Date: JUL 16 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS4003579

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JULY TERM 2015

105

THE STATE
vs.

Gerry Brent James

Indictment for
BURGLARY / SAFECRACKING

SC Code: 16-11-0390
CDR Code: 0141

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

Defendant

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

Gerry James
Defendant

Witness: *W. McBride*
C.C.C. PLS. AND G.S.

37
RICHLAND COUNTY
SOUTH CAROLINA
C.C.C.P.&G.S.
ORIGINAL FILED
CERTIFIED TRUE COPY
SCANNED

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on July 15, 2015, the
Grand Jurors of Richland County present upon their oath:

SAFE CRACKING

That Gerry Brent James did in Richland County on or about April 13, 2015,
use tools, explosives, or other implements in or about the safe used for
keeping money or other valuables owned by the ALL SOUTH FCU located
at 7844 Garners Ferry Rd, with intent to commit Larceny, or any other
crime, in violation of Section 16-11-0390, 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.



DAN JOHNSON, SOLICITOR

WITNESSES

(S) Jonathan Krieger
– Columbia Police Department

ARREST WARRANT NUMBER

2015A4021601483

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2016GS4003962

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JULY TERM 2016

105

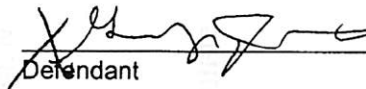
**THE STATE
vs.**

Gerry Brent James

**Indictment for
SHOPLIFTING / ENHANCEMENT FOR 3RD
OR SUB. OFFENSE. VALUE \$2000 OR
LESS (SEE 16-01-0057)**

SC Code: 16-13-0110(A)
CDR Code: 2877

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


Defendant

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


Defendant

Witness: Jonathan W. McBride
C.C.C. PLS. AND G.S. JWB

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jonathan W. McBride
C.C.C. PLS. AND G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on July 20, 2016, the
Grand Jurors of Richland County present upon their oath:

SHOPLIFTING 3RD OFFENSE AND ABOVE

That Gerry Brent James did in Richland County on or about June 22, 2015, take possession of carry away, transfer to another area of the store; alter, transfer, or remove the price label or tag on; transfer to from its container to another container; and/or willfully conceal certain merchandise to wit: LED Tape and Dog Alarm , displayed, held, stored, or offered for sale by HOME DEPOT, with the intention of depriving said merchant of the possession, use, or benefit of such merchandise without paying the full retail value and having two or more prior convictions, an offense for which the term of imprisonment is contingent upon the value of the property involved. All in violation of § 16-13-110, 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.



DAN JOHNSON, SOLICITOR

INDICTMENT/CASE#: 2015GS4003578
A/W#: 2015A4011200100
Date of Offense: 4/13/2015
S.C. Code § : 16-11-520 (A)
CDR Code #: 3600

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

in violation of § 16-11-0510 (A) of the S.C. Code of Laws, bearing CDR Code # 3600 J50
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)

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

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2013-2015
☒ 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. 3570415

☐ 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 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

PTUP

____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ paid to Public Defender Fund

Other:

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation. *22*

parallel

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
 STATE VS.
Gerry Brent James

AKA:

Race: BLACK Sex: M Age: 41DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Columbia, SC 29209DL#: [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: Burglary / Safecracking

INDICTMENT/CASE#: 2015GS4003579A/W#: 2015A4011200101Date of Offense: 4/13/2015S.C. Code § : 16-11-0390CDR Code #: 0141

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADSin violation of § 16-11-0390 of the S.C. Code of Laws, bearing CDR Code # 0141

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(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:

Eaton Vance 101548 [Signature] [Signature] 69673
 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 9 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2015-3578 & 2015-3962
☒ 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. 357 DAYS

☐ 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 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

	\$	\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: ATU

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

Presiding Judge: [Signature]Judge Code: 206Sentence Date: 8-20-16

CLERK OF COURT, RICHLAND COUNTY
 COURT REPORTER
 SOUTH CAROLINA
 SCCA/217 (03/2011)

Jeannette W. McBride
Harris

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
 STATE VS.
Gerry Brent James

AKA:

Race: BLACK Sex: M Age: 41DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Columbia, SCDL#: [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 ☒ PLEADSTO: Shoplifting / Enhancement for 3rd or sub. offense. Value \$2000 or less (see 16-01-0057)in violation of § 16-13-0110(A) of the S.C. Code of Laws, bearing CDR Code # 2877
☒ 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:

[Signature]
Clerk of Court[Signature]
SC Bar#[Signature]
Defendant[Signature]
Attorney for Defendant[Signature]
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 9 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: all other sentences
☒ 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. 3570 HRS
☐ 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 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUPTotal: \$ 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	\$
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Proviso 90.5 (SCCJA Surcharge)	\$5	\$
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

 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 \$ beginning \$ paid to Public Defender FundOther: ATU
☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.
Presiding Judge [Signature]Judge Code: Sentence Date: 6-20-16

Clerk of Court/Deputy Clerk

Court Reporter: [Signature]

SCCA/217 (03/2011)

STATE OF SOUTH CAROLINA

County of RichlandGerry James 302355

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

vs.

Richland County Judicial Ct.

Name of Respondent.

In the Court of Common Pleas

APPLICATION FOR
POST-CONVICTION RELIEF2017 JUN 21 AM 10:36
JENNIFER W. MCGRIDE
C.C.P. & G.S.RICHLAND COUNTY
FILEDINSTRUCTIONS — 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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Kershaw Correctional institution
2. Name and location of Court which imposed sentence Richland County Judicial Center
1701 Main St Columbia, SC
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2015 GS 4003579 Safecracking
 - (b) 2015 GS 4003578 Malicious injury to property
 - (c) 2016 GS 4003962 Shoplifting/Enhancement
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 6/20/16 - 9 yrs concurrent
 - (b) 6/20/16 - 5 yrs concurrent
 - (c) 6/20/16 - 9 yrs concurrent

5. Check whether a finding of guilty was made

- ☒ (a) after a plea of guilty _____
 (b) after a plea of not guilty _____
 (c) after a plea of nolo contendere _____

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

NO

7. If you answered "yes" to (6), list

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

- i. _____
 ii. _____
 iii. _____

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

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

8. If you answered "no" to (6), state your reasons for not so appealing:

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

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

- (a) Ineffective Assistant Counsel
 (b) _____
 (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) Wasnt provided with complete discovery. Told about pictures 4 days before trial
 (b) Signed sentencing sheet for non violent Sentence. Received 9. violent
 (c) _____

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

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

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

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

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

no

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

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

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

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

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

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

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? _____
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Tivis Sutherland Prior address 1916 Barnwell St Cala Se
- ii. _____
- iii. _____

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

- i. Plea
- ii. Sentencing
- iii. _____

18. State clearly the relief you seek in filing this application.

The chance to properly challenge my conviction, & or
a non violent sentence as agreed to.

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

NO

STATE OF SOUTH CAROLINA

County of Richland

VERIFICATION

I, Gerry James, 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.

Gerry James

SWORN to and subscribed before me this 16th

day of June, 16 2017

Catharine A. Oross (L.S.)
Notary Public

My Commission Expires: December 22, 2018

RICHLAND COUNTY
FILED
2017 JUN 21 AM 10:36
JEANETTE W. MCBRIDE
C.C.P. & G.S.

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

I, Gerry James, 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 therefor.

Gerry James
Applicant

SWORN or affirmed to and subscribed before me this

16th day of June, 16 2017

Catharine A. Oross
Notary Public

My Commission Expires December 22, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Gerry Brent James, #302355,	)	Case No.: 2017-CP-40-3819
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The State (Respondent), making its Return to the application for Post-Conviction Relief filed on June 21, 2017, would respectfully show this Court:

I.

Gerry Brent James (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In July 2015, the Richland County Grand Jury indicted Applicant for malicious injury to real property-third offense (2015-GS-40-3578) and burglary/safecracking (2015-GS-40-3579). Applicant was subsequently indicted in July 2016 for shoplifting-third offense (2016-GS-40-3962). Tivis Sutherland, Esquire, represented Applicant. Assistant Solicitor Joseph L. Leventis, Esquire, prosecuted the case. On June 20, 2016, Applicant pleaded guilty as indicted to all charges before the Honorable L. Casey Manning. Judge Manning sentenced Applicant to imprisonment for concurrent terms of nine years each for burglary and shoplifting, five years for malicious injury to property along with credit for time served of 357 days. Applicant did not appeal his conviction or sentence.

Attached to this Return and incorporated by reference are the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's records from the South

Carolina Department of Corrections, the plea transcript, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. “Ineffective Assistance of Counsel”
 - a. “Wasn’t provided with complete discovery. Told about pictures four days before trial. Signed sentencing sheet for nonviolent sentence, received 9 violent”

III.

Respondent submits Applicant’s allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove “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. First, Applicant must prove 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 the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

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

IV.

Applicant 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.

V.

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

VI.

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

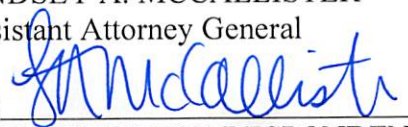
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

6/18, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2017-CP-40-3819
	)	
GERRY BRENT JAMES, #302355	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

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

Jonathan D Waller
Waller Law Group, LLC
1116 Blanding Street
Suite 2B
Columbia, SC 29201

DATED this the 18th day of June, 2018.



Carmen A. Nord, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Gerry Brent James, 302355,

Applicant,

Vs.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT**AMENDMENT TO APPLICATION FOR
POST CONVICTION RELIEF**

Case No. 2017-CP-403819

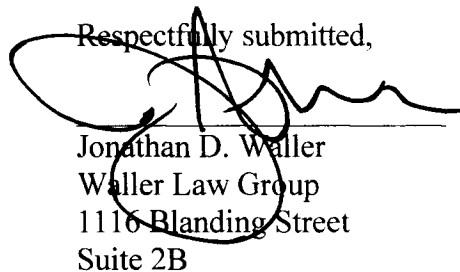
2018 NOV 30 PM 3:29
 DEANETTE W. HERRIDGE
 C.C.P. & G.S.
 RICHLAND COUNTY
 FILED

Applicant, by and through his Attorney, Jonathan D. Waller, Esquire, would amend his Application for Post Conviction Relief filed June 21, 2017, by adding the claims of ineffective assistance of to question 10 and by adding the following specific prayers for relief to his original allegations:

1. As to representation rendered by Tivis Sutherland, Esquire:
 - a. Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant, thus rendering Applicant's plea unknowingly and involuntarily entered into.
 - b. Counsel was ineffective for failing to conduct adequate amount of meeting with Applicant to review discovery so that Applicant would know of the allegations against him, thus rendering Applicant's plea unknowingly and involuntarily entered into.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jonathan D. Waller', is written over a horizontal line.

Jonathan D. Waller
Waller Law Group
1116 Blanding Street
Suite 2B
Columbia, South Carolina 29201
ATTORNEY FOR APPLICANT

November 28, 2018

Columbia, South Carolina

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF RICHLAND) COURT OF COMMON PLEAS NONJURY

3
4 GERRY BRENT JAMES,) TRANSCRIPT
5 APPLICANT,) OF
6 VS.) RECORD
7 STATE OF SOUTH CAROLINA,) 2017-CP-40-3819
8 RESPONDENT.)

9
10 December 5th, 2018
11 Columbia, South Carolina
12

13 B E F O R E:

14 THE HONORABLE JOCELYN NEWMAN, Judge.

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

16 JONATHAN D. WALLER
17 ESQ.
18 Attorney for the Applicant

19 LINDSEY A. MCCALLISTER
20 ASSISTANT ATTORNEY GENERAL
21 Attorney for the Respondent
22

23 Transcribed by Pamela E. Green, from,
24 DCRP, Digital Courtroom Recorder Project
25

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

GERRY JAMES

Direct examination by Mr. Waller 5

Cross-examination by Ms. McCallister 19

TIVIS SUTHERLAND

Direct examination by Mr. Waller 22

Cross-examination by Ms. McCallister 32

Redirect examination by Mr. Waller 38

Closing by Mr. Waller 42

Closing by Ms. McCallister 43

Ruling by the Court 44

Certificate 45

P R O C E E D I N G S

THE COURT: All right. Yes, ma'am.

MS. MCCALLISTER: May it please the Court.

Gerry Brent James versus the State of South Carolina.
2017-CP-40-3819.

Your Honor, Mr. James was indicted in July, 2015 by the Richland County Grand Jury for malicious injury to real property third offense, and burglary, and safe cracking. He was subsequently indicted in July of 2016 for shoplifting third offense. He was represented on both sets of charges by Tivis Sutherland, and the cases were prosecuted by Joseph Leventis.

On June 20th, 2016, he pleaded guilty as indicted to all charges before Judge Casey Manning. Judge Manning sentenced him to imprisonment for concurrent terms of nine years for the burglary and shoplifting, and five years for malicious injury to property. He did not appeal his conviction or sentence.

He filed this application on June 21st, 2017. Mr. Jonathan waller has been appointed to represent him in this action. Both Mr. waller and Mr. James are present in the courtroom today.

Your Honor, the State did file a motion for a more definite statement with -- in response to the original

1 application. Mr. Waller filed an amendment to the
2 application for Post-Conviction Relief on November 28th,
3 2018, alleging kind of, I guess, giving more detail to that
4 allegation of ineffective assistance alleging that counsel
5 was ineffective for failing to properly investigate the
6 facts and the circumstances surrounding the allegations
7 against Applicant thus rendering his plea unknowing and
8 involuntarily entered into, and that counsel was ineffective
9 for failing to conduct an adequate amount of meetings with
10 the Applicant to review discovery so he would know the
11 allegations against. And, to the State's understanding,
12 those are the, the two allegations that are going forward at
13 this time, Your Honor.

14 THE COURT: Is that correct---

15 MR. WALLER: That's---

16 THE COURT: ---Mr. Waller?

17 MR. WALLER: That's correct, Your Honor.

18 THE COURT: Okay. Just the two that are in the
19 amendment?

20 MR. WALLER: Yes, ma'am.

21 THE COURT: Okay. You ready to proceed?

22 MR. WALLER: Yes, ma'am.

23 THE COURT: All right.

24 MR. WALLER: I would call---

25 THE COURT: Call your first witness.

Gerry James - Direct examination
by Mr. Waller

1 MR. WALLER: I would call Gerry James. Gerry James. I
2 apologize.

3 MS. MCCALLISTER: well, I said it wrong. I'm sorry.

4 GERRY JAMES, being first duly
5 sworn, testified as follows:

6 THE CLERK: Thank you. Have a seat in the witness
7 stand please.

8 (Witness complies.)

9 THE CLERK: State your name for the record.

10 THE WITNESS: Gerry James.

11 DIRECT EXAMINATION

12 BY MR. WALLER:

13 Q Good afternoon, Mr. James.

14 A How you doing, sir?

15 Q How are you today?

16 A I'm fine.

17 Q All right. Mr. James, you, you were arrested and
18 ultimately pled guilty to a couple different charges.

19 Is that right?

20 A Correct.

21 Q What charges were you facing?

22 A Safe cracking, malicious injury to property, and a
23 shoplifting.

24 Q Okay. And, if you could, what are those charges --
25 where did they come from?

1 what were the allegations against you?

2 A It was a, a breaking into a, a -- ATMs. It's out
3 stretchy -- outhouses. ATM.

4 Q Okay. So, an, an ATM.

5 was it in a -- was it up against a building?

6 was it like a drive through---

7 A It---

8 Q ---or was it by itself?

9 A It was like out -- stand out. By itself.

10 Q Okay.

11 A It was just---

12 Q Okay. So---

13 A ---stand out.

14 Q ---one, out there by itself?

15 A Yes, sir.

16 Q Was it in, in, in any sort of enclosure or anything?

17 A It was a -- I guess around the safe you would call it
18 whatever.

19 Q Okay.

20 A Yes. Basically the size of a shed. Just a --.

21 Q Okay. So the person using the ATM would, would walk in
22 through a door of some kind, and then use the ATM.

23 Is that right?

24 A I -- I'm not, I'm not --.

25 Q Okay. Did the person use the ATM, were they outside?

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by Mr. Waller

1 A Yes.

2 Q Okay. It was just the ATM box itself?

3 A Yes.

4 Q Okay. So, you were arrested on those charges?

5 A Yes, sir.

6 Q All right. And who was your attorney on those charges?

7 A Mr. Tivis Sutherland.

8 Q Okay. And did you hire Mr. Sutherland or was he
9 appointed to represent you?

10 A He was retained. He was a hire.

11 Q Okay. Had you known him before?

12 A Yes, I had.

13 Q Okay. How did you know him before?

14 A I had assisted in a prior case with him. An associate
15 of mine was being represented by him, and I -- ultimately I
16 was -- ended up with the charges. It was, it was my crime
17 that was committed, and I just, you know, came forward
18 and---

19 Q Okay. And, and I apologize. I'm not trying to, to get
20 into your business. I was just making sure---

21 A No problem.

22 Q ---he hadn't represented you before.

23 A No, sir.

24 Q Okay.

25 A No, sir.

1 Q So, you hired Mr. Sutherland to represent you.

2 How many times you think you met with him?

3 A Including the Court date, maybe three.

4 Q Okay. So, three including the Court date?

5 So, maybe two times---

6 A Yeah.

7 Q ---outside of Court?

8 A Yes, sir.

9 Q Okay. When you met with him, what did y'all talk
10 about?

11 A That he was gonna get with the solicitor. At the time
12 we was trying to figure out who my solicitor was. It was a,
13 it was a, a tall sub (phonetic). I guess it kept being
14 passed around. It was, it was a Vance guy. A Vance -- I
15 can't remember his --.

16 Q Okay.

17 A -- his name or whatever.

18 Q That's okay.

19 Did y'all discuss the, the evidence the State had
20 against you?

21 A Partially. When he, when he first obtained my motion,
22 he met me with pictures and, you know, a couple statements.
23 But it wasn't really too much to think -- nothing in detail.

24 Q Okay. When you said pictures and a couple statements,
25 who were the statements from?

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1 A Law enforcement.

2 Q Okay. And what were the pictures of?

3 A Just the out structure of the, of the -- just tin.

4 Basically tin peel back.

5 Q Okay.

6 A Just out of structure.

7 Q The out---

8 A It wasn't---

9 Q Outer structure of the ATM?

10 A Yes, sir.

11 Q Okay. Was there a, a picture or any, any tools that
12 were used that they -- recovering that stuff?

13 A I, I -- yes, it was. Yes, sir.

14 Q Was it a saw?

15 A It was a saw.

16 Q Okay.

17 A Yes, sir.

18 Q Were there some pictures that y'all got later on?

19 A We was scheduled for trial I believe on the Wednesday
20 or Thursday, and the day before we was -- I was to pick my
21 jury, a picture came in.

22 Q Okay. And we're gonna come back to that in just a
23 second.

24 A Yes, sir.

25 Q All right. You testified you met with him, you think,

1 three times.

2 okay.

3 A That's right.

4 Q When y'all were outside just meeting with him, were
5 y'all able to communicate at all?

6 A Excuse me?

7 Q Were y'all able to communicate other than the meetings?

8 A We, we had. It was -- but it was just requested, can,
9 can I see him, you know. It wasn't constant communication.
10 It wasn't back and forth. It was just like a, a request
11 that I would like to speak with my attorney, whatever have
12 you. But it was no back and forth communication.

13 Q Okay. Do you remember which of the meetings when he
14 would of had a copy of your discovery motion?

15 A It would had of been the second meeting. The second
16 and -- prior to us meeting up here at the courthouse.

17 Q Okay. So the time right before you went to Court?

18 A Correct.

19 Q Okay. Y'all's first meeting, do you remember what you
20 talked about?

21 A Finding out about my discovery, and my -- who my
22 solicitor was, and it was just like an initial.

23 Q Okay. Did y'all talk about the penalties each charge
24 carried?

25 A That was here at the courthouse.

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1 Q Okay. That's when y'all talked about---

2 A The third---

3 Q ---that?

4 A This is---

5 Q On the third meeting?

6 A Yes, sir.

7 Q Okay. Did y'all talk about your constitutional rights?

8 A Yes, sir.

9 Q Okay. Did you give a statement to law enforcement or
10 anything like that?

11 A No, I didn't.

12 Q Okay. So y'all didn't need to talk about that.
13 Did y'all talk about your right to a jury trial?

14 A Yes.

15 Q Okay. Did you -- did you want to go to trial?

16 A Yes, was actually here to pick my jury the day that we
17 found out about this alleged picture that I still have yet
18 to been have presented to me.

19 Q Okay. So you still haven't seen the picture?

20 A No, sir.

21 Q But you've heard of, of the new picture?

22 A Yes.

23 Q Okay. So, when you say were here to pick your jury,
24 what had y'all done to get ready for your trial at that
25 point?

1 A Not much of anything. I mean I, I, I felt it was
2 rushed. I felt that it was -- I had no knowledge of what
3 really I was going up against. I knew what the charge was
4 and, and -- but I didn't know the stipulations. I didn't
5 know how in-depth -- I didn't know really much of anything
6 pertaining to the charges.

7 Q Okay. The charges -- the three charges you had, was
8 there one that y'all were more concerned about than the
9 others?

10 A Yes, it was a safe cracking---

11 Q Okay.

12 A ---that was -- oh, yes, sir.

13 Q Did y'all talk about any potential defenses you might
14 have to all the charges or, or that safe cracking charge
15 in -- by itself?

16 A It was basically that -- in my mind, I thought that the
17 shoplifting was a, was a misdemeanor. I also was under the
18 impression that the malicious injury was a misdemeanor.
19 Like I said, it was out of the blue. My third meeting with
20 him, when I came here, that's when they was -- it was
21 dropped in my lap.

22 Q Okay. Let me ask you this.

23 was the shoplifting -- was the shoplifting related to
24 the ATM incident?

25 A No, it wasn't.

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1 Q Okay. What, what was the shoplifting related to?

2 A It was a charge on its, on its own. It was about a
3 bicycle --

4 Q Okay.

5 A -- and which, ultimately, that -- my, my codefendant,
6 allegedly, which was my codefendant, the charges was
7 dismissed. I, I really actually just jumped the gun and
8 pled to all that altogether because it was -- really was a
9 clear misunderstanding.

10 Q Okay. The -- your indictment on the shoplifting was
11 talking about some items from a Home Depot.

12 Does that sound right?

13 A Yes, sir.

14 Q Okay. And that's what we were just talking about?

15 A Yes, sir.

16 Q Okay. So, when you and Mr. Sutherland were getting
17 ready for trial, what, what did y'all discuss as any
18 potential defenses that you might have?

19 A Really, at the time, it was really lack of evidence or,
20 or discovery evidence, evidence, you know. We -- it was
21 just basically seeing that I was there. It was no DNA, no
22 fingerprints, no -- I don't know.

23 Q Okay. Okay. When you're talking about lack of
24 evidence, what, what did you and Mr. Sutherland talk about,
25 I, I guess, the lack of evidence?

1 what did y'all discuss in -- individual pieces of
2 evidence that they were missing?

3 A To be honest with you, it's really just like rush
4 because we -- I didn't have any discovery. I didn't have
5 any discovery, and the little that he had, it just -- it, it
6 really was just lacking. It --.

7 Q Okay. Did you give Mr. Sutherland any information or
8 any people you wanted him to talk to or investigate that
9 might help in your defense?

10 A No, sir.

11 Q Okay. You maintain that it wasn't you. So you didn't
12 have any information about the incident.

13 Is that right?

14 A Correct.

15 Q Okay. Was there any witnesses or anything like that
16 you asked Mr. Sutherland to talk to?

17 A No, sir.

18 Q Okay. Ultimately you ended up pleading guilty?

19 A Correct.

20 Q What changed from being there to pick a jury to you
21 deciding to plead guilty?

22 What, what changed?

23 A I was told that if I take, if I take it to trial, I was
24 ultimately gonna end up with 30 years due to this new
25 discovery, something though -- the, the wall cut or

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1 something, something to that effect or the safe. Some cut
2 marks that was supposedly found in, in the safe the day
3 before.

4 Q Okay. Did you -- this new discovery that was produced,
5 you know, the day before, did you, did you understand what
6 it was or what they were saying it was?

7 A I understood to an extent. It just -- it really just
8 was something frightening. It just -- it threw me for a
9 loop. I was looking at 30 years, and it was now or never.
10 You know, my solicitor had already took me in front of Ms.,
11 Ms. Benjamin and was saying that he would like to take all
12 pleas off the table if there ever was any, and that he
13 was -- wanted to prosecute to the fullest extent of the law,
14 and he just -- it threw me. I'm, I'm in my 40s and I know,
15 30 years from now, I wouldn't be --.

16 Q Okay. You talked earlier about wanting to go to trial,
17 and, and preparing for trial.

18 Did you think Mr. Sutherland was ready to start the
19 trial?

20 A I -- now, I mean, from looking at it from hindsight, I
21 don't think so.

22 Q Okay. How about with this new evidence being given to
23 you the day before?

24 A He was---

25 Q Do you think he was ready for that new evidence?

1 A No. Not at all.

2 Q Okay. You think he could of been ready---

3 A It took---

4 Q ---for the new evidence?

5 A No, no way possible.

6 Q Okay. Did y'all ever discuss trying to get a
7 continuance for the trial?

8 A Not that I can recall.

9 Q Okay. You were -- okay. Let me ask you this.

10 If Mr. Sutherland had been ready or, or you thought he
11 had been ready, would you have still pled guilty or were you
12 going to trial?

13 A I would of went to trial because I had, I had all
14 confidence in him. But, like I said, our, our meetings were
15 so rushed. You know, he was giving me good hope until the
16 last minute when this new packet or whatever had arrived.

17 Q Okay. When y'all were dis -- did, did y'all discuss
18 you pleading guilty before you actually did so?

19 A No, we discussed fighting the case.

20 Q Okay. Did y'all discuss maybe the potential sentence
21 you might get on a plea?

22 A Like I said, when I was here the third meeting, and I
23 was actually downstairs, that's when I would -- that's when
24 it all really came down on me to what the full extent of
25 what, what was going on. I had no idea about 85, your

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1 charge carries -- X amount of time is 85. I was, I was not
2 eager to that.

3 Q Okay. One of the sentences you're serving carries a
4 higher percentage, I guess the best term, then, then the
5 others.

6 Is that right?

7 A Correct.

8 Q Did you understand that when you pled guilty?

9 A No, sir.

10 Q Okay. And what did you think -- what did you think
11 each of the charges carried?

12 A I thought -- really I didn't even know any -- what the
13 charge carried. I know that I offered -- what I was
14 offered. So, I didn't know the, the max on what the heavier
15 charge would carry.

16 Q Okay.

17 A I was offered 12 years, six to 12, or something to that
18 effect and I declined it. And, at that time, that's what
19 I -- you know, I had no idea what the max of the sentence
20 was.

21 Q Okay. How about whether the charges were violent or
22 nonviolent?

23 Did you know that at the time?

24 A No.

25 Q Okay. Did you---

1 A I thought---

2 Q Did you and Mr. Sutherland ever talk about that?

3 A Not about violent and nonviolent.

4 Q Okay. Has, has that affected where you're housed and
5 how much time you're gonna have to do?

6 A Yes.

7 Q Okay.

8 A It does.

9 Q What's your understanding of the, the new discovery
10 that was produced?

11 What was it?

12 A To my knowledge -- and, like I said, I've only heard
13 about it. I have yet to see. It was scratches on the front
14 surface of a -- of the, of the actual safe I would guess you
15 would call it.

16 Q So was it inside the ATM itself or was it the -- out --
17 the front of the, the ATM?

18 A It was inside of a -- inside of the box that you was
19 housing it in I would guess.

20 Q Okay. So the ATM is in a, in a box.

21 Is that right?

22 A (No audible response.)

23 Q And then inside that there's another box?

24 A Correct.

25 Q Okay. So what you understand is there was a picture of

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1 the inside box?

2 A Correct.

3 Q But you've never seen it?

4 A No, sir.

5 Q Okay. You testified your trial was the, the day after
6 you got the new discovery?

7 A Yes, sir.

8 Q Okay. Mr. James, I've asked you all the questions that
9 I have for you.

10 Is there anything you think I've left out or neglected
11 to ask that the Judge needs to be aware of Mr. Sutherland's
12 representation of you?

13 A No, sir.

14 Q Okay. Please answer any questions Ms. McCallister has.

15 A Yes, sir.

16 THE COURT: Ms. McCallister.

17 MS. MCCALLISTER: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MS. MCCALLISTER:

20 Q Mr. James, do you recall going into the courtroom on
21 the day of the plea and speaking with the Judge and
22 answering some of the Judge's questions?

23 A Yes, ma'am.

24 Q Okay. And the Judge was talking to you and explaining
25 some things to you about this plea and the -- and what was

1 gonna happen.

2 Is that right?

3 A Yes, ma'am.

4 Q Okay. Do you remember the Judge explaining to you the,
5 the potential sentences that each of the -- each of these
6 charges carry?

7 A Yes.

8 Q Okay. You remember him telling you the maximum
9 sentence for the safe cracking was 30 years?

10 A Yes, ma'am.

11 Q Okay. Do you remember telling him that you understood
12 all that, and you had talked about all of those things with
13 your attorney?

14 A I understood it and I had spoken to my attorney.
15 That's correct.

16 Q Okay. And you told the Judge that you were entering
17 into this plea freely and voluntarily cause that's what you
18 had decided you wanted to do?

19 A Versus go to trial and catch 30 years with this new
20 discovery that I -- like I said, I'm still in the blind to.
21 I've, I've, I've yet to see it.

22 Q Okay. I understand, I understand that.

23 You're saying you haven't seen it, but you knew about
24 it?

25 You were told about it?

1 A I was told, yes, ma'am.

2 Q Okay.

3 A I was, I was told about it.

4 Q So you -- at the time that you went in to enter this
5 plea, and you decided to plead guilty, you knew that there
6 was some discovery out there that you hadn't seen?

7 A Yes, ma'am.

8 Q But you decided to plead guilty anyways?

9 A I was on the verge of picking a jury out. It was now
10 or never, ma'am. I just was trying to preserve myself, my
11 life.

12 Q Okay. And you didn't say that to the Judge though?
13 You didn't say I feel coerced into this because I've
14 just found out about this discovery?

15 A I don't think it was -- my arm wasn't twisted. I
16 wasn't pushed in here and made to, you know, from someone
17 else. But I just like felt like, at the time, that that --
18 that's all I had as far as preserving me.

19 Q Okay. And you remember talking to the Judge and him
20 asking you if you were satisfied with Mr. Sutherland and his
21 services and the job that he had done for you and you said
22 that you were?

23 A Yes, ma'am.

24 Q Okay.

25 A And --.

1 MS. MCCALLISTER: I think that's all the questions I
2 have, Your Honor.

3 THE COURT: Anything further, Mr. Waller?

4 MR. WALLER: Nothing further, Your Honor.

5 THE COURT: Okay. You can go back and sit next to your
6 lawyer.

7 (Witness complies.)

8 THE COURT: Any additional witnesses, Mr. Waller?

9 MR. WALLER: Your Honor, the Applicant will call Tivis
10 Sutherland.

11 TIVIS SUTHERLAND, being first duly
12 sworn, testified as follows:

13 THE CLERK: Thank you. Have a seat in the witness
14 stand please.

15 (Witness complies.)

16 THE CLERK: State your name for the record.

17 THE WITNESS: My name is Tivis Sutherland. That's
18 Tango, India, Victor, India, Sierra, and then my last name's
19 like the guy from 24.

20 DIRECT EXAMINATION

21 BY MR. WALLER:

22 Q Good afternoon, Mr. Sutherland.

23 How are you today?

24 A I'm pretty well. Pretty well.

25 Q All right. Mr. Sutherland, do you recall your

1 representation of Mr. James?

2 A I do.

3 Q Okay. How did you come to represent him?

4 A I had known him for a while. I think the first time we
5 met he was a codefendant of a client of mine, and we had
6 talked in-between. I think we had talked in-between about
7 another relative case, a case that they had. But I also
8 think we might of had beers or something in-between,
9 in-between there too. I mean I knew, I knew him for a good
10 while. So --.

11 Q And I think you -- I think you told me -- the Court
12 that in the plea.

13 A Yeah.

14 Q Do you recall the allegations against Mr. James in this
15 case?

16 A I do and I, I just -- I do. I do. Yeah.

17 Q Okay. If, if you could, so the Court understands,
18 what, what were the general allegations against Mr. James?

19 A Well, they show up at this ATM, and it's kind of a
20 weird one. Well, it ended up leaving me a little bit of
21 wiggle room to try and finagle a defense on this thing.

22 It's not one of those, you know, like you see a machine
23 just standing there. But it's also not like one of those
24 like you were asking about that you walk in.

25 It's -- there's like a little bit of a building around

1 it with a service door where they can go in and service the
2 thing. But then, ultimately -- well, we get down the road,
3 that was how I was gonna argue it was a burg third.

4 So they show up there. Door's kicked up, and
5 there's -- the service door was kicked up, like folded up in
6 half, and there's a saw over here. Power saw. So, they --
7 and I think there was a hat. I think.

8 They get the saw and they go to the rental place, and
9 it's got my guy's name on it. They go and they find out
10 that he was on a monitor. And so then the monitoring puts
11 him there, and it was off to the races from, from that
12 point. So --.

13 Q Okay. So talk about this ATM again.

14 So it was -- when you say a service door, was it like
15 an access panel or could a person physically go through the
16 door and inside the machine?

17 A I think the service person -- now there's not a lot of
18 room in there.

19 Q Right.

20 A But really it was about like the -- maybe a little bit
21 broader than the witness stand. Had the ATM up here. But
22 it had a door door with a handle on the side.

23 Q Okay. So a customer would be not there?

24 A You step -- yeah, like right there just like in front
25 of one of those little bubble things.

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by Mr. Waller

1 Q But---

2 A I mean just -- but that little service door was what
3 opened the door---

4 Q Okay.

5 A ---to me coming to that.

6 Q So a technician would of gone in the back-door or, or
7 how -- a side door or however they need---

8 A Yeah, they just open it up on the side, and do whatever
9 they do. Take the money, change it around, or something.
10 If, if memory serves, I think there's about that much space
11 between the door, and the actual -- about a foot and a half
12 of -- I saw she was typing. About a foot and a half or so
13 of space between that door and the actual vault --

14 Q Okay.

15 A -- which was the object of the, the statute and
16 everything.

17 Q When, when you and Mr. James met to discuss this case,
18 what discovery did you have initially?

19 A Initially they had turned over a bunch of stuff. It
20 showed a bent up door. It didn't really show any action in
21 there, and, you know, I was sure they weren't gonna argue
22 that the store was part of the thing and everything -- was
23 part of the actual ATM to, to make it the safe cracking. I
24 had a picture of the saw.

25 There's a picture of the hat, and actually I know that

1 hat, but, but there's, there's a picture of the hat and saw
2 over here in the grass. Now the doors just flum (phonetic)
3 sort of up like that.

4 And then there, there were some more pictures of like
5 an alarm having been ripped off or like an alarm panel or
6 something or maybe been cut or something. But that was
7 missing on there.

8 Q Okay. And so what, what, if anything, did you and
9 Mr. James discuss about any possible defenses you might have
10 based on that discovery?

11 A Well, ultimately, I think I had got him out of jail or
12 something, and he was out for a while, and, you know,
13 just -- I don't know if it's in there. But, you know, he
14 had a little bit of a record, and Vance was prosecuting him
15 at, at the time, which I get along with Vance, but he can be
16 kind of a square when it comes to sentencing people and, and
17 making deals.

18 So I think it was just sort of terminal and floating
19 along, and I think I met him at Casalino (phonetic) a couple
20 times while this thing was out there pending, and then he
21 got picked up on the shoplifting. And I think, at that
22 point, they, they started to turn up the heat a little bit
23 on him.

24 And, you know, I was talking to him. This other stuff
25 is not -- well, my, my memory is. Now, he may be

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1 remembering it right. I've known him a while. I don't
2 think he'd just sit up here and make stuff up. But my
3 memory is well, you know, this other stuff is nonviolent.
4 It's not a big deal. The safe cracking, ouch.

5 So I went through and I looked at the statutes that
6 were around the safe cracking statute, and I figured out
7 that all of this stuff -- they had to pass all these laws
8 like in the 1890s or maybe around the turn of the century
9 when cats were robbing like stagecoaches, and doing train
10 robberies, and stuff like that because that was the order
11 of, of the statute was that -- I mean I, I think they
12 changed it to a motor coach instead of a stagecoach, but I
13 mean I could recognize it out of that.

14 And so I was thinking all right. You know, well, just
15 do like a cowboy defense, and, and argue it from that
16 prospective, and that he had never, you know, that he had
17 never gotten to the vault, that this building -- this should
18 of been a burg third, which would of been nonviolent.

19 You know, when they pushed us in the corner, I, I
20 thought -- actually told him I thought it might work, and I
21 remember I was in Pet Smart, dog food, and my one son's
22 little Pug had broke his chain or something. I had to
23 get -- you know them ones that -- like real long that are --
24 not like a chain, but like a wire. Had to get one of those.
25 And Leventis called me when I was in there, and I answered

1 the phone.

2 And he said guess what?

3 Because I'd been talking to them, but not like zeroing
4 in. You know, you got to leave stuff out kind of when
5 you're defending. But he just like oh, yeah. We went back
6 and we talked to the, the crime scene people, and we
7 actually got some more, got some more photographs. And I
8 was just like of what, and he said of the vault. And I said
9 what's it look like. And he's like oh, it's got some little
10 zigzag cuts on it from the saw.

11 And I thought -- well, I was thinking well, you just
12 destroyed my defense. I, I can't remember. It might of
13 been on the phone call or something when I let Gerry know.
14 But they, they showed me the pictures, and, sure enough,
15 there was the little squiggly cut on there. And so then,
16 you know, we're backed into the corner. I think, at that
17 point, I was like man, I don't think we can pull this thing
18 out here, and, with your record, huh, you know, going, going
19 up there, and we ended up entering a plea.

20 Now, the timeline could be just what he said. I
21 remember -- like I say, I remember like not being in Court.
22 I remember getting the call in that pet store. But I also
23 remember, you know, I was right in the middle of my not
24 eating like ribs and stuff, of taking weight off. I was in
25 that zone of getting to a trial. I do remember that.

1 But, shortly thereafter, it wasn't long after that that
2 we ended up disposing of the case by plea.

3 Q Okay.

4 A And---

5 Q So you were provided with that -- the new picture or
6 new pictures right before the trial?

7 A It -- my memory in -- you know, I remember things in
8 pictures, and I remember in a black and white or something
9 where -- again, I would have to rely on him cause I keep
10 seeing like a black and white printout of the color photo
11 where you can't really see the zigzag too good.

12 So, is that just me printing it out for my trial
13 notebook or is that me taking it and showing it to him?

14 If he says he didn't see it, then I take his word for
15 it that he didn't see it. I, I mean -- but I know that I
16 printed it out as an addition to all the other stuff, the,
17 the -- it's disappointing.

18 Q Okay. And that was the actual safe you said or the
19 actual---

20 A It was---

21 Q ---box inside?

22 A It was the vault. So they had just gone up in there
23 whereas they were showing the alarm thing on the back with
24 their pictures, and the door bent up, and all of this stuff.
25 I'm -- you know, I was thinking man, I guess he never got to

1 the vault, and I'd found some cases and was gonna do the
2 cowboy thing where, you know, cause I found some explosive
3 cases.

4 I, I had a plan, and I convince myself that my plans
5 are good however it may sound. But those are of that little
6 vault thing, that little thing that has the money in it, and
7 it's just like zig like somebody had just cut a Rune S into
8 it or something.

9 Q Okay. Is there any -- were you given an explanation as
10 to why you were just receiving it, and why it wasn't with
11 the first group?

12 A I got, I got to be honest with you. I have
13 historically received, on day four of murder trial, a big
14 thing of ballistics, and it's -- it -- it is not unusual and
15 cause, you know, what -- I mean what I do in those
16 circumstances is well, you know, I think I may need to
17 object to this and let me take it home, you know, with all
18 the time that I have. We're here in the middle of trial.
19 Let me go set aside another couple of hours that I don't
20 have to go through this ballistics stuff, but, you know, to
21 see if I want to object to it or not.

22 It's just, at that point, was something dribbling in at
23 the end. It wasn't a great shock -- the only reason it was
24 shocking to me was because it was like a cruise missile
25 right at the defense. Just poof, blew it up.

1 Q Okay. Did you and Mr. James ever have any discussions
2 about, not number of years, but, but the conditions that
3 each of the charges -- the conditions of the sentence that
4 each of the charges carry?

5 A Well, I had -- I can't specifically say that, but the
6 only thing -- I mean everybody knows -- you know, as far --
7 when I say nonviolent charges in a situation where you
8 got -- looking at a 30, 85 percent, I mean I tend to like
9 not even really care about those because, you know, it's a
10 difference between Wateree and Lee County where, you know,
11 you go over there, and it's a farm, and you could almost
12 walk off the place.

13 They've, they've actually improved the security there.
14 One time I went through the front door. It's a swinging
15 door. No COs and my guy's standing right there. This was
16 probably eight or nine years ago. They have like a side
17 through a gate thing now.

18 But still I mean it's a, it's a farm. You know, guys
19 are just sort of hanging out. It's like a dorm in there.
20 It's not chicken wire. But, anyway, then you go over to Lee
21 County where they're dragging everybody around, and just
22 everybody's always hooked up all the time, and the stuff
23 like April that happened in April over there, the riots and
24 all that.

25 So, that's the sort of -- those are the -- that's the

1 big deal in these cases where I get someone with an 85
2 percent with a, with a violent thing just try to get him off
3 of it, and then we were just cornered in this thing, and
4 nowhere, you know, nowhere to go. And Vance was putting the
5 heat on. Leventis did the plea, but he was gonna do the
6 trial with Vance. He's the one that called me in the thing
7 there.

8 MR. WALLER: Okay. Beg the Court's indulgence please.

9 THE COURT: Sure.

10 All right. Let me --.

11 (Pause.)

12 MR. WALLER: I have nothing further of Mr. Sutherland.
13 Thank you.

14 THE WITNESS: All right.

15 THE COURT: Yeah.

16 Okay. So let's pause real quick before your
17 cross-examination.

18 (Pause.)

19 THE COURT: Okay. Now cross-examination.

20 MS. MCCALLISTER: Thank you.

21 CROSS-EXAMINATION

22 BY MS. MCCALLISTER:

23 Q Okay. Mr. Sutherland, so you've explained in detail.

24 You got a first round of pictures, second round of
25 pictures pretty close to trial?

Tivis Sutherland - Cross-examination
by Ms. McCallister

1 A Yeah, it---

2 Q A couple days before?

3 A I mean it was, it was very close.

4 Q Okay.

5 A Because they were to the point where they're sitting
6 around in the same room, and I bet they were chuckling as
7 they were calling me at the pet store.

8 Q Okay.

9 A But they're -- I bet they were like this is it. This
10 is what he's gonna do. So --.

11 Q Okay. So, you, you -- you, at least, saw the pictures?

12 A Oh yeah.

13 Q And you told Mr. James about the existence of the
14 pictures?

15 A Yeah, I mean I'll rely on his memory at the --

16 Q Sure.

17 A -- because mine is just that picture of the black and
18 white stuff.

19 Q Okay.

20 A But it -- I mean it was a, it was a very depressing
21 moment I'm sure immediately to his wife, and then to him
22 with oh, no. So --.

23 Q Okay. So when you told him about the existence of the
24 pictures, would you also have explained why that was so
25 problematic for the defense that you had prepared?

1 A Oh, yeah, because I mean---

2 Q Okay.

3 A ---that, that -- I'm pretty sure I told him --

4 Q Okay.

5 A -- you know because I, I think he might even know the
6 nickname, the cowboy defense.

7 Q Okay. And so that picture then is kind of what
8 precipitated the plea?

9 A Yeah, that's when it's just -- it's like oh, no, you
10 know, you're gonna get jammed up in here.

11 Q Okay.

12 A There's, there's no way out of this, this thing.

13 Q Okay. And on, on the day of the plea, you guys, you
14 fill out a sentencing sheet together.

15 Is that right?

16 A Yeah, we always do the paperwork and --.

17 Q So you would of -- you would of ex -- you would of
18 shown him the sentencing sheet, and you would of witnessed
19 it, and he would of signed in -- signed it as well?

20 A Yeah, I mean but it's really a proforma thing.

21 Q Okay.

22 A It's like ah, the judge is gonna write sentence on
23 here, and I'll put my bar number sign, and here, there, and
24 this is the fee sheet. They're not gonna hold you if you
25 don't pay it. But they may come after you and hold you in

Tivis Sutherland - Cross-examination
by Ms. McCallister

1 contempt if you don't pay the two hundred bucks or, or
2 whatever it is.

3 Q Okay.

4 A Yeah.

5 Q So, it's kind of the same thing.

6 You go over the same kind of spiel with every client?

7 A Yeah, the---

8 Q Yeah.

9 A Yeah, the --.

10 Q Okay. But that, that sentencing sheet does have marked
11 on it whether a particular sentence is violent or
12 nonviolent?

13 A Oh, it, it does.

14 Q Yeah.

15 A It does.

16 Q Okay.

17 A It's like with an X up there.

18 Q Okay. And whose decision was it to enter into this
19 plea?

20 A Well, you know, I mean my guys, they decide what to do.
21 So that's -- I don't, I don't ever make that decision for my
22 fellows. So --.

23 Q Okay. Did you agree with his decision at that point?

24 A Oh, I did.

25 Q Yeah.

1 A I did.

2 Q Okay. And, at the plea, you've, you're mentioned it a
3 little bit, but Mr. James has an extensive criminal history
4 which was read into the record, correct?

5 A Yeah, and that, and that was the big worry. I mean
6 safe -- you know, you go zero to 30. You're not, you're not
7 always gonna end up around 30. I mean if you've never been
8 in trouble before, and you lose a trial, you -- just about
9 anything could happen. Since you lose a trial, you probably
10 catch a little time in the can.

11 You know, but, at that time -- with the, with the prior
12 record, it's the type of thing -- because I remember
13 Leventis, during the plea, said to Judge Manning, he said
14 well, Judge, if you're inclined to give him probation, and I
15 was sitting over there like, dude, come on, you know.
16 This -- but I remember -- and Judge Manning, I think, said
17 the same thing.

18 Q Right.

19 And Judge Manning kind of cut him off and said don't
20 worry about that?

21 A Yeah, I mean that would of been stellar, but I just
22 didn't think it a possibility.

23 Q Okay.

24 A I've represented a couple thousand people, different
25 situations. I was like no, no, no, there's gonna be some

Tivis Sutherland - Cross-examination
by Ms. McCallister

1 time in the can here. So --.

2 Q And, in fact, when Judge Manning issued the sentence,
3 he, he actually said the issue wasn't necessarily this case
4 so much as it was the fact of Mr. James' extensive criminal
5 history?

6 A It, it -- it's -- it could be. It could -- I mean
7 that's -- you know, everybody knows. I mean we all do this
8 stuff. So --.

9 MS. MCCALLISTER: Your Honor, that's on Page 33 of the
10 transcript. I would just---

11 THE COURT: Thank you.

12 MS. MCCALLISTER: ---direct Your Honor to the record.

13 Okay. Beg the Court's indulgence, Your Honor.

14 (Pause.)

15 Q Okay. Mr. James has alleged that you did not conduct
16 an adequate amount of meetings to review the discovery with
17 him. Mr. James has alleged you didn't conduct an adequate
18 amount of meetings to review discovery with him.

19 It -- is there any discovery -- I understand he says he
20 hasn't seen the picture. You say he at least knew about the
21 picture.

22 Is there anything else out there -- you went over the
23 first batch of pictures with him, correct?

24 A We, we went through the -- we went through the case.

25 Q Okay.

1 A And I mean I, I felt -- now, again, you know, it's what
2 he's thinking, but I was feeling comfortable that he knew,
3 you know, what I was dealing---

4 Q Okay.

5 A ---over here.

6 Q So, you felt you had met a sufficient amount of times,
7 and you had all of the discovery to go over the important
8 issues in the case with him?

9 A Yeah, I mean I thought I -- I thought we were, we were
10 ready to go. I mean we got pushed in a corner, and then we
11 ended up with what I thought was a pretty good defense until
12 the, the end there. So---

13 Q Okay.

14 A ---it could of really been good, you know, to win. So
15 --.

16 MS. MCCALLISTER: Okay. I think that's all the
17 questions I have, Your Honor.

18 THE COURT: Anything further, Mr. Waller?

19 MR. WALLER: Just briefly, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. WALLER:

22 Q Mr. Sutherland, did -- was Mr. James able to review the
23 sentencing sheets himself or, or was it -- I think you can
24 kind of go over, over it with reading it to him?

25 A Oh, it's, it's -- again, when I describe it as

Tivis Sutherland - Recross examination
by Mr. Waller

1 proforma, it is proforma. I mean it's -- you know, we're
2 all signing in the straight-line. The Judge is gonna write
3 the sentence in here. Intermittently I'll explain the
4 little three digit codes, but not always, you know where --
5 but those do need to be correct because that's what the
6 computers at SCDC are going to -- that's how they classify
7 somebody. It's not what they write in the thing. It's the
8 little code that they put on there.

9 Q Okay.

10 A But just as a general matter, you know, Judge is gonna
11 write the sentence here. I got to sign here. That's the
12 solicitor. You sign here. And I always tell them like
13 cause you're never saying anything until you speak into the
14 microphone. Just, just sort of prepping, getting ready for
15 the plea. The plea is to the Court. Not to a piece of
16 paper.

17 Q Okay. So you're just kind of going over what you --
18 and explain things to him, things like that.

19 Is that right?

20 A Sure. And I mean that, that is a short -- that's the
21 shortest -- one of the shortest things. We finally got the
22 paperwork. We know what we're doing here. You know, here's
23 what this is, here's what that is. Sometimes -- and I don't
24 know if Gerry had of been like true billed, no billed. You
25 know, he knows some stuff, you know. But, yeah, it's all --

1 I think, I think my six year old could do a plea.

2 Q Okay.

3 A It's not -- yeah.

4 Q All right. After you, after you were -- the defense
5 you had come up with was kind of shot down, so to speak, did
6 you have, given the late time, did you have adequate time to
7 prepare additional defenses?

8 A Well, I, I don't -- I did not -- I couldn't conceive of
9 where to go from there honestly because that was it, and I
10 mean, you, you know, you have to come up with something, and
11 you always do come up with something. I mean it's a trial.
12 You do everything you can for your people, but that was
13 something that might work. Right.

14 As far as something that might work, I don't know
15 what's gonna work after that, you know.

16 Q Okay.

17 A So --

18 Q Did you have time to research and do any investigation
19 into what else may have worked?

20 A I had done -- I'd researched -- that's how I came up
21 with the thing looking at -- with the cowboy thing. I'd
22 already done, you know, my research on the case, and I was
23 like ah ha, there, you know, there it is. So --.

24 Q If you had to switch gears and go to trial, did you
25 have time to come up with a new defense?

Tivis Sutherland - Recross examination
by Mr. Waller

1 A Oh. well, it's something I, I, I come -- I mean, you
2 know, I do stuff with my guys on video pulling the trigger.
3 I mean I'd come up with something. But it's, it's, it's --
4 for -- I mean I, I know him and you only go -- get thrown in
5 the can for 25 years or something, and it's, and it's never
6 like an experimental thing.

7 It's just if you've got somebody's been served life
8 papers, you know, you're trying the case period. There's no
9 pleading to LWOP. And so you go in there and you do your
10 best to come up with what you, you come up with. But, you
11 know, here there was an alternative, and I -- I'm kind of
12 glad we went that way, you know, honestly. It's not
13 forever, you know. I don't like the sentence, but it could
14 of, it could of, it could of gone south. Way south. So --.

15 MR. WALLER: Beg the Court's indulgence please.

16 THE COURT: Yes, sir.

17 (Pause.)

18 Q Thank you, Mr. Sutherland.

19 A You're welcome.

20 THE COURT: Anything further?

21 MS. MCCALLISTER: Nothing further, Your Honor.

22 THE COURT: Okay. Thank you. You may step down.

23 THE WITNESS: All right. Thank you, Judge.

24 THE COURT: Any additional witnesses, Mr. Waller?

25 MR. WALLER: No additional witnesses, Your Honor.

1 THE COURT: Does the State have any witnesses?

2 MS. MCCALLISTER: No, Your Honor.

3 THE COURT: All right. Let me hear from you,
4 Mr. Waller.

5 MR. WALLER: Thank you, Your Honor.

6 May it please the Court.

7 Judge, Mr. James testified that, that the late
8 discovery was on the eve of trial. He testified that it
9 completely destroyed the defense that they had previously
10 discussed. He testified he was ready to go to trial, and,
11 and that they were prepared to go trial, and not for that
12 new discovery being provided to them, which he felt Mr.
13 Sutherland just didn't have time to prepare for, I, I don't,
14 I don't think he's blaming Mr. Sutherland. I think he's,
15 he's blaming the, the lack of time that Mr. Sutherland had,
16 and he testified that he would of gone to trial if Mr.
17 Sutherland had had time to prepare based on that new
18 discovery.

19 And, Judge, unfortunately, this is something that, that
20 it does happen very often, and I don't know what the fix for
21 it is. But the discovery is provided on the eve of trial in
22 cases all the time. I don't know why this picture would of
23 been not turned over with the original pictures, but, for
24 whatever reason, it was.

25 I believe that Mr. James was put in the impossible

1 decision of having to go to trial unprepared, and his
2 criminal record is his criminal record, and, and it's --
3 there's nothing he can do about it in the moment. But it
4 certainly factors in on his decision making when put in a
5 difficult situation of having to face going to trial
6 unprepared versus taking a plea that will most likely reduce
7 or, or produce a lesser sentence than be convicted at trial
8 especially if that conviction is, is due to his counsel
9 being unprepared.

10 So, Your Honor, I think, for those reasons, that the,
11 the plea was not entered into voluntarily, and I would ask
12 that you grant this application for Post-Conviction Relief.

13 THE COURT: Ms. McCallister.

14 MS. MCCALLISTER: Thank you, Your Honor.

15 I think Mr. Sutherland testified that he was prepared,
16 that he had done his research on this case. He had done his
17 investigation, and he came up with something, and, even
18 though that was kind of out based on this picture, that he
19 would of, he would of come up with something because he knew
20 the case, and he was ready to go.

21 Your Honor, Mr. James sat up there himself and said no
22 one twisted his arm. He -- you know, he knew what his
23 choices were. He knew what kind of -- the precipitating
24 factor was. He knew about this discovery, and he had talked
25 about how that would affect his defense with Mr. Sutherland,

1 and he made a choice.

2 It may not be a choice that he likes. He doesn't like
3 either alternative, but it was his choice, and he did it
4 voluntarily. And I think the transcript and everybody's
5 testimony here reflects that.

6 THE COURT: All right. I agree.

7 The Application for Post-Conviction Relief is denied.

8 MR. WALLER: Thank you, Your Honor.

9 THE COURT: Thank you.

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13 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, 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 proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Richland County, South Carolina, on the 5th day of December, 2018.

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

December 18th, 2019



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 Gerry Brent James (SCDC #302355),
 Applicant,
 v.
 State of South Carolina,
 Respondent.

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-40-0381

ORDER OF DISMISSAL

2019 SEP -5 AM 8:52
 FILED
 RICHLAND COUNTY
 CLERK OF COURT
 C.C.P., G.S., & F.C.

This matter came before the Court upon Application for Post-Conviction Relief ("PCR Application") filed by Applicant Gerry Brent James ("Applicant") on June 21, 2017. Respondent, the State of South Carolina, filed its Return on June 18, 2018; and Applicant filed an amended PCR Application on November 30, 2018. An evidentiary hearing was conducted at the Richland County Judicial Center on December 6, 2018. Applicant was present along with his counsel, Jonathan D. Waller, Esquire; and Respondent was represented by Assistant Attorney General Lindsey A. McCallister, Esquire.

For the reasons set forth below, the PCR Application is DENIED; and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During the July 2015 term, the Richland County Grand Jury indicted Applicant for Malicious Injury to Real Property – Third Offense (Indictment 2015-GS-40-3578) and Safecracking (Indictment 2015-GS-40-3579). Subsequently, during the July 2016 term, Applicant was indicted for Shoplifting – Third Offense



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(Indictment 2016-GS-40-3962). Tivis Sutherland, Esquire ("Plea Counsel") was retained to represent Applicant on all charges.

On June 20, 2016, before the Honorable L. Casey Manning, Applicant pled guilty as indicted to all charges and was sentenced to imprisonment for concurrent terms of nine years each for Safecracking and Shoplifting, and five years for Malicious Injury to Real Property. Applicant did not appeal his conviction or sentence.

On June 21, 2017, Applicant filed the instant PCR Application in which he alleges "ineffective assistance of counsel." Specifically, he contends that "Counsel was ineffective, failed to provide complete discovery and told about pictures four (4) days before trial. Additionally, signed sentencing sheet for nonviolent sentence, received nine (9) violent." However, during the evidentiary hearing, Applicant abandoned this allegation and opted for the Court to hear only those two allegations contained in his Amended PCR Application. In the amendment, Applicant alleged:

- (a) Counsel was ineffective, failed to properly investigate the facts and circumstances surrounding the allegations against Applicant, thus rendering Applicant's plea unknowingly and involuntarily entered into
- (b) Counsel was ineffective, failed to conduct adequate amount of meetings with Applicant to review discovery so that Applicant would know of the allegations against him and the potential sentences regarding those allegations thus rendering Applicant's plea unknowingly and involuntarily entered into

Therefore, the allegation contained in the initial PCR Application is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As to the remaining allegations, the Court has reviewed the record in its entirety and has considered the testimony and arguments presented at the evidentiary hearing. Specifically, the Court has had the opportunity to observe each witness who testified at the evidentiary hearing and



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to closely pass upon their credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. §17-27-80 (2003).

I. Evidentiary Hearing

A. Applicant's Testimony

During the evidentiary hearing, Applicant testified that he retained Plea Counsel to represent him on all charges. He stated that he met with Plea Counsel three times prior to entering his guilty plea, including the morning of the plea at the courthouse. According to Applicant, he and Plea Counsel discussed some of the evidence the State had against him, including the pictures and statements, but they did not go into detail. Specifically, Applicant testified that he saw pictures of the outer structure of the ATM, some tools and a saw, and reviewed several statements or reports from law enforcement.¹ Applicant stated Plea Counsel had discovery with him for their second meeting and at the courthouse on the day of the plea, but they only discussed penalties and Applicant's constitutional rights on the morning of the guilty plea.

Applicant testified that he wanted to have a jury trial. On the day before trial was to begin, Applicant was informed that there was another photograph showing cut marks on the ATM, which the State planned to introduce into evidence. He also learned that the State had taken extractions from the front surface of the safe. According to Applicant, the guilty plea was only discussed on the morning of trial, and "Everything was so rushed." He testified that he barely discussed the guilty plea with Plea Counsel, but he believed that Plea Counsel was no longer prepared for trial due to the new evidence. Prior to learning of the new evidence, Applicant believed that he had

¹ Applicant was charged with breaking into an ATM which was situated in an enclosed space, accessed by a service door. He was alleged to have used an electric saw in the commission of the crime.



several potential defenses to the charges, including the lack of evidence such as DNA and fingerprints. However, because the trial was scheduled to begin the day after Plea Counsel received the new evidence, Applicant didn't believe that Plea Counsel was ready for trial.

According to Applicant, he was told that if convicted at trial he would get a thirty-year sentence because of the newly-discovered evidence. In addition, the State had previously offered a plea bargain resulting in a sentence of six to twelve years; however, that offer was revoked, scaring him. Applicant and Plea Counsel did not discuss requesting a continuance. He also admitted that he never provided Plea Counsel with the names of potential witnesses or any leads to investigate in his defense.

Applicant initially testified that he didn't know the maximum possible sentence, that Plea Counsel didn't discuss the difference between violent and non-violent crimes, and that he didn't know anything about eighty-five percent sentences; however, he later admitted that the Court informed him of the maximum possible punishment and that he told the Court that he understood. Applicant also testified that he was most concerned about the safecracking charge because its sentence would require a longer period of incarceration before parole eligibility.

Finally, Applicant conceded that he told the Court that Plea Counsel had, in fact, explained the charges, their possible penalties and his constitutional rights. He also admitted having told the Court that he was satisfied with Plea Counsel and that he understood all of their conversations. Applicant testified that he "wasn't pushed or made by someone else" and no one "twisted [his] arm" to plead guilty. Rather, he pled because if he didn't, the attorneys were going to select a jury; so he felt it was the only choice.



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B. Testimony of Plea Counsel

Plea Counsel testified that he knew Applicant prior to this case because Applicant had previously been a co-defendant of another client, and he and Applicant had a personal relationship. Plea Counsel explained the allegations leading to Applicant being charge with safecracking, including the use of the electric saw, which was found near the scene of the incident and turned out to have been rented in Applicant's name. The State also had video of Applicant having rented the saw in question; and Applicant's GPS monitor placed him at the scene of the crime. Plea Counsel explained that Applicant was arrested and charged in an unrelated shoplifting incident while he was out on bond for the safecracking and destruction of property charges, which caused the State to press the case for a resolution.

According to Plea Counsel, he focused on the safecracking charge because it is classified as a violent offense. He stated that the initial discovery received from the State contained pictures of damage to the building's door, an alarm panel that had been cut, and a hat and a saw nearby in the grass. However, the evidence did not indicate any action had taken place inside the building. He believed this to be important because while researching the applicable statute, Plea Counsel read its legislative history. He believed that he could make a compelling argument for dismissal of the charge against Applicant because the allegations didn't comport with the statute's legislative intent – to punish “cowboys and Indians” in the time of stagecoach robberies. Plea Counsel intended to argue that third-degree burglary, a non-violent offense, was the more appropriate charge because Applicant hadn't actually reached the vault/ATM in question. While Plea Counsel had to finagle a defense, he testified that he was confident in his plan.

Unfortunately, on the day before trial Plea Counsel received a phone call from the State, advising him that they had additional, more incriminating pictures which showed saw cuts on the


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vault itself. Plea Counsel testified that he told Applicant about the new pictures and that he went to see the pictures in order to confirm the State's description of them. The new pictures decimated their defense (that Applicant hadn't attempted to enter the vault), and Plea Counsel felt like they were up against the wall. Plea Counsel testified that while it was not unusual to receive additional discovery items so close to trial, it was surprising in this case because it destroyed his defense strategy, leaving him no way to prepare any other defense. Although Plea Counsel believed that he had sufficient time to prepare for trial and was "ready to go," the new pictures precipitated Applicant's guilty plea.

Plea Counsel further testified, although he could not recall whether he and Applicant specifically discussed the conditions of Applicant's sentence, they both signed the sentencing sheets, each of which was marked as either violent or nonviolent. While the ultimate decision was Applicant's, Plea Counsel agreed with Applicant's choice to plead guilty. He testified that he adequately discussed the plea agreement with Applicant. Finally, Plea Counsel explained that the reason given by the Court for the lengthy sentence imposed on Applicant was not the facts of this case but was because of Applicant's lengthy criminal record.

II. Involuntary Guilty Plea

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for PCR alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; see *Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence

required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCF.

The court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (*rev'd on other grounds by Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).



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In addition, where a PCR applicant alleges ineffective assistance due to counsel's failure to call witnesses or present evidence, the South Carolina Supreme Court has repeatedly held that an applicant must produce the testimony of a favorable witness or otherwise offer testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *See, e.g., Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). To establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. *See Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); *Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct independent investigation does not constitute ineffective assistance when the allegation is supported only by mere speculation as to the result); *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing that he would have had a defense with additional time to prepare for trial); *Skeen v. State*, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant not entitled to relief where no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on trial outcome).

In order to find that a guilty plea is knowing and voluntary, the record must establish that the applicant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the evidentiary hearing. *Harris v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an


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individual, an applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. U.S.*, 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by U.S. v. Whitley*, 759 F.2d 327 (4th Cir. 1985).

In this case, the Court finds Plea Counsel's testimony to be credible – specifically his statements that he reviewed the State's evidence, potential defenses, and the plea agreement with Applicant prior to the plea. The Court also finds credibility in Plea Counsel's assertion that he had researched and prepared a defense, but the defense was essentially neutralized once the State produced the pictures showing Applicant had attempted to open the vault. Further, this Court finds the plea colloquy dispositive as to these issues, as the record clearly establishes that Applicant pled guilty freely and voluntarily.

In addition, the Court finds that Applicant's testimony is strictly contradicted by the record and is, therefore, not credible. The record reflects that Applicant informed the plea court that he had discussed the charges with Plea Counsel and had understood those discussions, that he did not need any more time to speak to Plea Counsel, and that he was satisfied with Plea Counsel's advice. Most tellingly, the plea court asked Applicant directly whether Plea Counsel had done everything Applicant asked him to do, and Applicant stated that Plea Counsel had. Additionally, Plea Counsel explained to the plea court the potential defense and the late discovery of the new pictures, confirming that, at the time of the guilty plea, Applicant at least knew of the existence of the pictures and was aware of Plea Counsel's analysis of how the pictures impacted their defense.

Based on the foregoing, the Court finds that Plea Counsel was not deficient in his representation of Applicant, his investigation of the case, or his preparation for trial. Applicant

has also failed to prove any resulting prejudice. Plea Counsel met with Applicant on multiple occasions to review discovery, discuss the facts of the case, and explain Applicant's constitutional rights and options for resolving the case. He prepared a creative defense based on the discovery he had received and was prepared to try the case. Plea Counsel properly informed Applicant that he was unlikely to succeed at trial, and Applicant knowingly and voluntarily agreed to enter a guilty plea to avoid receiving a possible maximum sentence of forty-five years.

The plea court clearly explained the terms of the plea agreement to Applicant, including the possible sentences, and Applicant indicated his understanding of the agreement. The plea court also explained to Applicant his rights to a jury trial, to call witnesses, and to put on a defense – all of which were waived by Applicant. Finally, the plea court clearly explained its sentencing decision had less to do with the circumstances of this case than Applicant's extensive criminal record. Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Therefore, this PCR Application must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.


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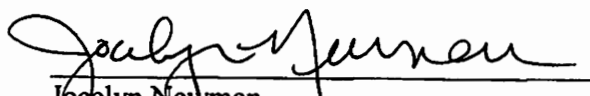
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IT IS THEREFORE ORDERED that the Application for Post-Conviction relief is DENIED, and this action is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant Gerry Brent James be REMANDED to the custody of the State of South Carolina.

AND IT IS SO ORDERED.


Jocelyn Newman
Presiding Judge

September 4, 2019
Columbia, South Carolina.