

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————
Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

—————
GARY WAYNE THOMAS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000440

—————
APPENDIX
—————

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S.C. SUPREME COURT

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1 STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
 2 COUNTY OF RICHLAND) 2015 GS 40 00183; 00196

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4 STATE OF SOUTH CAROLINA)
)
 5)
 6 versus) TRANSCRIPT OF RECORD
 7)
 8 GARY WAYNE THOMAS)
 9 Defendant)

10 Columbia, South Carolina
 11 November 9, 2015

12

13 B E F O R E :
 14 HONORABLE TANYA GEE, Judge Presiding

15

16 A P P E A R A N C E S :
 17 For the State: M. WALKER, Esq.
 Assistant Solicitor
 18 For the Defendant: T. PINNOCK, Esq.
 19
 20 Reporter Present: CRYSTAL HOLMES

21

22 HARRIET P. BENNETT
 Reporter, S. C. Court Administration
 23 46 Regency Oaks Drive
 24 Summerville, S. C. 29485

25

1 (The within matter came before the Court for hearing on
2 November 19, 2015)

3 THE COURT: All right, I'm happy to hear from you.

4 SOLICITOR: Yes, maam. Before you is Gary Wayne Thomas :
5 to plead guilty in this case.

6 THE COURT: All right, you are Gary Thomas?

7 DEFENDANT: Yes, maam, I am.

8 THE COURT: All right, and you are here to plead guilty
9 today to armed robbery and attempted murder. Is that correct?

10 DEFENDANT: Yes.

11 THE COURT: All right, and your attorney is Ms. Pinnock,
12 is that correct?

13 DEFENDANT: That's correct.

14 THE COURT: How long has she been representing you?

15 DEFENDANT: For over a year.

16 THE COURT: For over a year, and during that time have
17 you been satisfied with her services?

18 DEFENDANT: Yes, I have.

19 THE COURT: Do you need any more time to speak with her
20 today?

21 DEFENDANT: No, maam, I don't.

22 THE COURT: All right. Has she advised you that if you
23 plead guilty you give up some important constitutional rights?

24 DEFENDANT: Yes, maam, she has.

25 THE COURT: Do you understand that by pleading guilty

1 today you are giving up your right to a jury trial?

2 DEFENDANT: Yes, I do.

3 THE COURT: Do you wish to waive that right?

4 DEFENDANT: Yes, maam.

5 THE COURT: You are also giving up your right to confront
6 witnesses against you and your right to remain silent. Do you
7 understand those rights?

8 DEFENDANT: Yes, maam, I do.

9 THE COURT: Do you want to do that? Give up those rights?

10 DEFENDANT: Yes, maam.

11 THE COURT: Do you understand your rights?

12 DEFENDANT: Yes, maam.

13 THE COURT: All right. You are pleading guilty to what
14 are considered violent and most serious offenses in South
15 Carolina. Did she explain to you what that means?

16 DEENDANT: Yes, she did.

17 THE COURT: Do you understand that that will affect the
18 amount of time that you actually spend incarcerated?

19 DEFENDANT: Yes, I do.

20 THE COURT: And it also affects you in that if you were
21 to commit another most serious and violent offense you would
22 receive a life without parole sentence. Do you understand
23 that?

24 DEFENDANT: Yes.

25 THE COURT: Understanding those things do you still wish

1 to plead guilty?

2 DEFENDANT: Yes, maam.

3 THE COURT: Do you understand that the sentence for armed
4 robbery is ten years incarceration and up to thirty years in-
5 carceration?

6 DEFENDANT: Yes, maam.

7 THE COURT: And for an attempted murder charge, you could
8 receive up to thirty years incarceration?

9 DEFENDANT: Yes, maam.

10 THE COURT: Understanding that do you still wish to plead
11 guilty?

12 DEFENDANT: Yes, maam.

13 THE COURT: Are you pleading guilty because you are
14 guilty?

15 DEFENDANT: Yes, maam.

16 THE COURT: Are you pleading guilty freely and voluntar-
17 ily?

18 DEFENDANT: Yes, maam.

19 THE COURT: Has anyone promised you anything to get you
20 to plead guilty?

21 DEFENDANT: No, maam.

22 THE COURT: Has anyone threatened you or coerced you to
23 get you to plead guilty?

24 DEFENDANT: No, maam.

25 THE COURT: Are you currently under the influence of any

1 drugs or alcohol?

2 DEFENDANT: No, maam.

3 THE COURT: And do you suffer or have you suffered from a
4 mental condition that would prevent you from understanding what
5 you are doing?

6 DEFENDANT: No, maam.

7 THE COURT: All right, I'm going to ask the Solicitor to
8 tell me about the facts and I ask that you listen to what she
9 tells me.

10 DEFENDANT: Yes, maam.

11 SOLICITOR: Thank you, Your Honor.

12 Before I go into the facts, I do want to make the Court
13 aware that the victim and several members of her family are
14 here and present for this guilty plea. At the appropriate time
15 one of them might like to speak, and one of them would like
16 to read a statement of the victim.

17 THE COURT: All right.

18 SOLICITOR: I believe this is her sister and brother in
19 law, her brother, father and mother, as well as a friend of
20 theirs.

21 Your Honor, the victim in this case and the Defendant
22 were married up until this incident. The State, Your Honor,
23 is not asking for consecutive time but I am asking for the max-
24 imum sentence on the attempted murder charge.

25 We are asking for thirty years in this case, and here is

1 why, Your Honor.

2 On the day in question in August, on August 23rd of 2014,
3 Your Honor, the victim in this case returned home from being
4 out with a family friend. She and the Defendant were estranged
5 at this point in time.

6 He had a CDV, a prior criminal domestic violence, convic-
7 tion against him. They tried to begin a separation and try to
8 dissolve their marriage, at which point the Defendant began a
9 pattern of harrassing behavior.

10 He was showing up at her place of employment and confront-
11 ing her in front of co-workers at work. He was sending text
12 messages to her and calling her family, trying to find out from
13 them where she was going and who she was going with, when she
14 was going places.

15 He sent her text messages, Your Honor, and I would just
16 read one that he sent her.

17 I know you want it to be over but (inaudible) has to
18 stop. It's not over until God says it's over. So
19 don't you and I or anyone else try to stand in the
20 will of God.

21 There are a lot of text messages, Your Honor, where he is
22 using religion to try to force her to re-engage in this rela-
23 tionship.

24 On the night in question, Your Honor, and the days lead-
25 ing up to it, his daughter who was living with the victim at

1 the time -- she was receiving phone calls from her father say-
2 ing where is your stepmother, where is she at, and, Your Honor,
3 saying you know I'm her husband so where is she.

4 He was walking around the residence and trying to control
5 her behavior at the time.

6 Your Honor, on the night in question the victim returned
7 home to her residence and she saw him coming up behind her,
8 with his fist drawn, swinging it over and over and over and
9 over again to her face and head, breaking virtually every bone
10 in her face.

11 Multiple calls were made from that residence to nine one
12 one, saying he's hitting her and hitting her, he's picked up
13 her purse and ran away. That's where the attempted murder
14 charge comes in.

15 Your Honor, her blood was splattered on the door. I'm go-
16 ing to hand up some pictures so you can see what he did to her.

17 He then ran away, Your Honor. She was transported to the
18 hospital where she had bilateral multiple fractures from a blow
19 directly to her face.

20 There was a fracture involving the sinus walls, a left
21 calvarior fracture, a non-displaced right calvarior fracture.
22 There was a brain shift injury that was going on that the doc-
23 tors saw.

24 She was in ICU for the majority of her three month stay
25 in the hospital.

1 Her mother became her primary care-giver, and, Your Honor,
2 what makes this so troubling was that this victim was in this
3 abusive situation and she tried to get out of it. She went to
4 the Family Court for events that had happened and sought a pro-
5 tective Order but that Order was denied by a Family Court
6 Judge. This was before this incident happened.

7 There are times when a victim cannot leave the home be-
8 cause of the children, and I believe that was part of this
9 case as well. They are afraid to leave.

10 Your Honor, he has a pointing and presenting conviction
11 from his first wife.

12 Your Honor, this victim needs to be protected from this
13 man and that is what we are asking here today, thirty years.

14 I think at this time the victim has a statement that she
15 wishes to be read to the Court.

16 THE COURT: Yes, maam.

17 SOLICITOR: If I could have it done at this time?

18 THE COURT: Yes, maam.

19 SISTER OF VICTIM: My sister is the victim in this case.
20 My name is Loretta Moore. I am her sister.

21 I would like to say this on the events that occurred on
22 August 23rd of 2014. (Reading statement of victim) My life
23 has changed because of the events that occurred on August the
24 23rd of 2014. The way I feel is I have (portion inaudible on
25 the record).

1 He hit me over and over and shoved me back and forth,
2 from side to side. He did wrong.

3 I spent months in ICU at the hospital fighting for my
4 life, enduring surgeries and therapy, as well as other treat-
5 ment for problems that I had. (Portion inaudible)

6 I am thankful that I was able to return to work after I
7 struggled to improve. My supervisor and co-workers have been
8 absolutely wonderful as well as my parents for the care of my
9 child. Also members of my church.

10 If not for them I would not have been able to get to the
11 point that I could go back to my job.

12 (Transcription Note: The statement being read on the
13 audio is difficult to hear and transcribe, some of it inaudible)

14 My family has been hurt also. They have been there for
15 me the entire time I have been fighting for my life as well
16 as for my child. He not only hurt me but he hurt his daughter
17 and my family and church family.

18 It has truly been a terrible time in our lives but he
19 walked away unhurt and left me in the care of my family. I
20 am still in fear for my life. I still suffer from depression.

21 I feel like he should be punished and that he should get
22 thirty years.

23 Respectfully.

24 THE COURT: Yes, maam.

25 SOLICITOR: Thank you.

1 THE COURT: Thank you.

2 SOLICITOR: Your Honor, that night she was dropped off at
3 her front door. That's what the testimony would have been at
4 a trial from her and witnesses.

5 After he hit her a final time he said to her, you will
6 never do this again. This is speculative but she thinks he
7 thought she was doing something that she never did. So for
8 something she never did he attempted to make sure she never
9 did it again.

10 He did this by beating her almost to death with his hands.
11 We first had it on video and I couldn't put everything on the
12 record because it wasn't known if she would live or die. We
13 didn't know whether to put it all on the record or not.

14 Your Honor, because of his history of violence in his re-
15 lationship with her as well as with his ex-wife that has been
16 mentioned, she went to Family Court in an effort to protect
17 herself but that was denied her.

18 The injuries that she suffered were vicious. It was in
19 front of her children which is difficult to believe. I will
20 hand up the pictures that show the extent of what he did.

21 (Brief pause)

22 THE COURT: Thank you. There is a pillow in these pic-
23 tures. Can you tell me about that?

24 SOLICITOR: Your Honor, it is my understanding that her
25 family put it there to place it under her head. To hold her

1 head.

2 THE COURT: Okay.

3 Mr. Thomas, have you had an opportunity to look at these
4 pictures?

5 DEFENDANT: Yes, maam.

6 (Brief pause)

7 THE COURT: All right. Mr. Thomas, you have heard the
8 version of what happened in these events from the State. Do
9 you agree that that is what happened that night?

10 DEFENDANT: Yes, maam.

11 THE COURT: And do you still wish to plead guilty?

12 DEFENDANT: Yes, maam.

13 THE COURT: All right, I find there is a substantial fac-
14 tual basis for this plea, and I will accept the plea.

15 I find that it was freely, voluntarily and intelligently
16 made and that you've had the advice of counsel with whom you
17 say you are satisfied.

18 I will be glad to hear from Ms. Pinnock.

19 MS. PINNOCK: Thank you, Your Honor. May it please the
20 Court.

21 I can't stand up here and try to say that what happened
22 is not serious. On that night we don't know exactly what hap-
23 pened because we were not there.

24 We cannot say it did not happen. We cannot say that she
25 did not suffer serious injuries.

1 That is true also, but, Judge, there are a couple of
2 things without going into a long recitation.

3 I would tell you that the prior conviction referenced
4 here by the Solicitor was a 1991 CDV first conviction, and
5 we have not discussed that with the Solicitor whatsoever. All
6 we have is that the first conviction was in 1991 and the sec-
7 ond one in 1995.

8 Since that time, Your Honor, he hasn't been to Court for
9 anything serious. So I don't believe that it's fair to con-
10 sider the State's recommended sentence based on his prior re-
11 cord, something that happened over twenty years ago.

12 So I'd just like to start with that. There is no way we
13 can know what happened that night. Again, we've talked about
14 that night and how he got there that night and the things that
15 were going on in his mind.

16 What was between him and his wife and in their marriage,
17 you know, it doesn't matter. It happened and he has entered
18 a plea as to that.

19 I think he is a reasonable human being. He is a very in-
20 telligent man, but I think on that night he lost control but
21 there is no justifying that or his actions.

22 You know, what happened that night happened, but I don't
23 think he was thinking clearly. He clearly was going up to
24 his ex-wife's job and he clearly was at the house when she
25 came home that night.

1 He had been walking around the house, but what happened
2 that night are not the actions of a reasonable and a right-
3 thinking man. That does not excuse what happened that night.

4 You asked him if he had any physical or mental impairment
5 that would interfere with or prevent him from understanding
6 what he is doing here today. I had him examined and the rea-
7 son I did that, Your Honor, was to be clear in my own mind as
8 to that.

9 I was not present when he was placed under arrest. It
10 was sometime after that when I became his attorney, and even
11 after three months into it we could not get past in our con-
12 versations his belief that his wife was being unfaithful to
13 him. It was almost an obsession with him.

14 You know, that this was happening, this was happening.
15 It was all he was able to talk about. Nothing about the alle-
16 gations or what happened, you know, up to the time of his ar-
17 rest. Just the fact that all of those three months that was
18 in his mind and were his thoughts.

19 Whether it happened or not, that is what was in his mind
20 all of that time. I don't believe those actions define who he
21 was. On that night, yes, but one night does not define a per-
22 son.

23 Your Honor, one thing that is very important. I don't
24 think it is fair for the State to present to Your Honor any
25 idea that he might have been carrying or had some sort of weapon

1 with him to use so as to make it appear that he came prepared
2 to use it to injure his wife. He did not have a weapon with
3 him at the time this occurred

4 Gary was in school studying for his degree. He went to
5 Allen University and he was an Associate Pastor at the First
6 Baptist Church at the time, so religion was a part of their
7 lives, a part of the lives of the family.

8 Since his incarceration, Judge, he has been enrolled in a
9 program to continue to pursue his degree. He has begun some
10 work involving enrolling himself in a correspondence program,
11 so he is at work doing that and in his ministry.

12 That is while he is in jail, and that is where he is at
13 this time. Since he has been incarcerated he also has had a
14 perfect record. He is enrolled in the church that comes to
15 the jail on every Sunday. He leads in prayer and assists with
16 the service. The people who participate in the program are
17 very complimentary about him.

18 I don't believe that what he has done defines him at this
19 time. He has accumulated credits in the pursuit of his min-
20 istry degree. That does not, as I said, excuse what happened
21 that night and he has accepted responsibility for that. We
22 ask the Court to consider all of these things.

23 Your Honor, he has family members here. His mother, his
24 father and sister and other family members, as well as a fam-
25 ily friend, may wish to address the Court if Your Honor will

1 permit that. I'm not sure who wishes to speak.

2 THE COURT: All right. Anyone who wishes to speak will
3 please come up to the front here and state your name for the
4 record.

5 MS. THOMAS: My name is Erica Thomas and I am his sister.
6 Not just because he is my brother but he is a good person and
7 a good brother.

8 I have seen many changes throughout his life. My brother
9 did not complete high school. However, he did go back and get
10 his GED. After he got his GED he decided to go back to col-
11 lege, and he was working toward his degree at the time this
12 incident happened.

13 My brother throughout our lives has been my protector, my
14 friend, and he has always been there for me. I love my bro-
15 ther and I know that he is a good person. My brother is a
16 good person.

17 He has always been there for my family, my father and my
18 mother, my sisters.

19 Your Honor, all I can say is that up until the time this
20 happened and up to this time my brother was a good person. I
21 know that something happened to cause my brother to act the
22 way he acted that night because it was totally out of char-
23 acter for him.

24 I love you.

25 Thank you.

1 (Brief pause)

2 (Other family members speaking to the Court in behalf of
3 the Defendant, not audible on the record)

4 THE COURT: Thank you.

5 MS. PINNOCK: I believe my client would like to speak to
6 you.

7 THE COURT: All right.. Mr. Thomas.

8 DEFENDANT: Yes, maam. (Short portion inaudible)

9 THE COURT: I need to hear you.

10 DEFENDANT: I was happy with my marriage and my family.
11 I thought our life was outstanding. At the time I trusted my
12 wife with all my heart. I know we shared some good times; we
13 shared some bad times. I loved my wife and my family very
14 much. I never thought something like this would ever occur.
15 I know that at the time I took my eyes off God. That's
16 all I can say. Not a day went by that I didn't feel like I
17 was out there by myself.

18 I ask for forgiveness. I never stopped loving my family
19 and my God. I tell him the first thing every day. I love
20 him now.

21 There was a change in me. I just pray to God for for-
22 giveness. Forgive me, God. (Short portion inaudible) I
23 know he is with me and that he forgives.

24 Ms. Walker said that what I did defines me but it does
25 not define me. I'm a God-fearing man and he is my reason for

1 being. I made sure my girls attended church and Sunday
2 school. I made sure they were at the church often, and be-
3 cause of that I was controlling to my family but I was trying
4 to lead my family in the path of righteousness.

5 I never intended to harm anyone in my life. I never did.

6 THE COURT: When you were hitting her over and over again
7 you weren't intending to harm her?

8 DEFENDANT: Maam, I was -- I took my eyes off God. I was
9 out of character and I took my eyes off God. I didn't do what
10 God wanted me to do.

11 I was responsible for what I did, and I've had a long
12 time to think about it while I was in the detention center,
13 you know, and it's been really rough. It's been really rough.

14 I knew I was wrong. I was wrong, and, you know, that was
15 not part of who I am, the way I was right then.

16 I've tried to apologize to my wife but I was unable to.
17 Like I said, I have asked God to forgive me. I was not myself
18 at the time, you know. I believed certain things were going
19 on at the time and I was not myself and not thinking reason-
20 ably.

21 I'm sorry. It's hard to say all this. (Portion not
22 audible) I know I've got to pay for what happened.

23 THE COURT: All right. What you did was awful but I have
24 listened to what you've said, what your attorney and your fam-
25 ily have said about that. I will consider that.

1 MS. PINNOCK: He made mistakes when he was a young per-
2 son but he has not been back before the Court again as an
3 adult. He is not a career criminal. I think that his having
4 gone this long a period of time without any problem speaks in
5 his favor, Your Honor.

6 He is going to be punished severely but thirty years is
7 a long time. As far as rehabilitation, Your Honor, we would
8 ask that he be sentenced in such a way that he would be able to
9 come back out in society. He will be punished.

10 What he has done since he has been incarcerated shows
11 what he can do to better himself. I understand, Your Honor,
12 again the severity of the charges and the seriousness of it
13 all. We are not forgetting that whatsoever. I am asking that
14 you consider a sentence of ten to fifteen years. He will be
15 punished and I believe he will come out and never be back be-
16 fore the Court again.

17 Since he's been incarcerated he has kept his eyes on what
18 he can do for himself and to be of help to society.

19 A reason for incarceration is punishment certainly but it
20 is also for rehabilitation. If he is sentenced to ten or fif-
21 teen years he will be well prepared to come back out into so-
22 ciety. He has shown what he can do and I believe he will not
23 stray from that path. He is not the person that he was in
24 1991 or 1995.

25 THE COURT: I think you've made your point, but after

1 listening to all of this what occurs to me is that he said he
2 had wanted to apologize but I don't believe he did. Maybe he
3 did but I was hearing absolutely no remorse in what he has
4 said.

5 The sentence of the Court is that the Defendant be commit-
6 ted to the Department of Corrections for a term of thirty
7 years. He will be given credit for time served.

8 -----END OF REQUESTED TRANSCRIPT OF RECORD-----

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CERTIFICATE

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I, HARRIET P. BENNETT, Court Reporter for South Carolina Court Administration, hereby certify that the foregoing Transcript was prepared from the records of Crystal Holmes to the best of my ability, having been heard in the Court of General Sessions for Richland County on November 9, 2015.

FURTHER, I certify that I am neither of kin nor counsel to any party to this matter, nor do I have any interest in the same.

February 8, 2018



State of South Carolina)	In the Court of Common Pleas
County of Richland)	Fifth Judicial Circuit
	2015-GS-40-00183 and -00196

The State of South Carolina,)	
)	
Plaintiff,)	
)	
Vs.)	Transcript of Record
)	
)	
Gary Wayne Thomas,)	
)	
Defendant.)	
)	
)	

May 19, 2016
Columbia, South Carolina

B e f o r e:

The Honorable Judge Tanya Gee

A p p e a r a n c e s:

Meghan Walker, Esq.
Attorney for the Plaintiff

Tracy Pinnock, Esq.
Attorney for the Defendant

Bonnie H. Kelly, CVR
Circuit Court Reporter

I N D E X

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1 THE COURT: All right. We are here on Mr. Gary Wayne
2 Thomas's motion to reconsider the sentence that I gave back
3 in November of 2015.

4 He had pled guilty to armed robbery, as well as to --
5 I believe it was attempted murder; and he received 30 years
6 on the attempted murder and 10 years on the armed robbery.
7 And those were to be -- the 10 years was consecutive to the
8 30.

9 Ms. Pinnock, I'll hear from you on your motion.

10 MS. PINNOCK: Thank you, Your Honor. May it please
11 the Court. Your Honor, as you -- you just said, Gary
12 appeared in court November of last year, and he did enter a
13 guilty plea on two charges. Your Honor sentenced him to 40
14 years.

15 You know, I filed this motion, not because Gary asked
16 me to, but I told him I would file it after we got back down
17 to the holding cell because, to be honest with the Court, the
18 40 years struck me -- I was -- I was shocked.

19 You know, it's rare -- in my opinion, it's rare to
20 have, you know, somebody who stands up in court and does the
21 only thing that they can to -- with the charge. The only
22 thing that he could do was to stand in front of Your Honor
23 and accept responsibility for it.

24 I -- I don't believe at any point -- I know I didn't
25 and I don't believe Ms. Walker mentioned to Your Honor that

1 before coming to court, there was an offer made in this case.
2 I discussed that offer with Gary. It was 25 years for both
3 charges. The only reason we -- that he chose not to take
4 that offer because -- is because he wanted the opportunity to
5 try to ask the Court for less.

6 So neither -- neither side mentioned that -- that
7 there was an attempt to resolve the case. And he never said,
8 "I'm not taking that. I'm going to trial." It was, "Can I
9 just go in there and try and ask the judge for something
10 less," which is what we did.

11 And Your Honor, during the plea, Ms. Walker asked the
12 Court for 30. She had informed me, and I informed Gary, that
13 if he turned down the 25, she would come to court and ask for
14 the 30 on a straight-up plea, which is what she did. We --
15 we all knew that was going to happen.

16 I believe at that point I asked Your Honor to consider
17 10 years based on a number of factors, Judge. And maybe I --
18 maybe I -- I -- I made a request that was too low. Maybe --
19 I feel as though, when Gary addressed the Court, he didn't
20 express himself how he planned on expressing himself.

21 THE COURT: Let me tell you, I remember this plea,
22 very well. I remember Mr. Thomas very well. I've thought of
23 Mr. Thomas a lot since it happened. Happened in November,
24 that's right before Thanksgiving, that's right before
25 Christmas. It's certainly something that I have kept with me

1 as a judge.

2 And I'll tell you that I had not expected to give him
3 the sentence that I had either until Mr. Thomas spoke. And
4 when he spoke, he said that the victim needed to be forgiven,
5 too. And there was a lot of blame put on the victim and not
6 personal blame taken. And I believed that the victim needed
7 to be protected.

8 I looked at Mr. Thomas's date of birth, and I went
9 over all of the normal plea colloquy things to remind him
10 that the sentence was up to me, that he was facing up to 40
11 years, was he -- you know, did he realize that? Was he
12 knowingly and voluntarily entering into that plea? He was
13 and upon hearing what he had to say for himself, and what --
14 the anger that he still had towards this victim, who he
15 blamed because he believed she was talking with another man
16 or doing whatever he thought she was doing; made me realize
17 that if he was not incarcerated, that victim, who he
18 attempted to kill with a two-by-four, would be at risk of
19 being victimized again.

20 So I'm just explaining to you where that 40-year
21 sentence came from and now I'll let you speak. But just so
22 you understand that it wasn't that you asked for 10 years. I
23 mean, you certainly did nothing wrong. You represented your
24 client, you represented your client well. I wasn't expecting
25 to give him the sentence I did until he spoke for himself.

1 MS. PINNOCK: And yes, Your Honor, that was something
2 I was going to attempt to address the best way that I can.

3 The whole time that I had represented Gary I did not
4 get a feeling of anger towards his -- his now ex-wife.
5 That's not the feeling that I got from speaking to him.

6 I believe I addressed this, you know, during my
7 presentation in November. It -- whether it was true or not,
8 he had, in his mind, convinced himself that things were
9 happening and that's what led up to this one evening.

10 You know, there was -- the only other -- you know,
11 violence in -- in Gary's history was 24 years ago. I think
12 24 years ago and 23 years ago there was -- there's a
13 conviction for a pointing and presenting, but that's it.

14 And through the years and through my representation of
15 him, I didn't -- I personally didn't get the feeling of
16 anger. And that's where I think it -- it -- it -- it went
17 downhill. It went south very quickly as he was talking.

18 And I explained this to him at -- you know, back in
19 November, in a holding -- in the holding cell this morning
20 -- that's why I write things down. You know, I stand in --
21 in court on a regular basis and I address -- you know, I
22 address Your Honor, I address juries. I write things down
23 so that I can make sure I get them out how I want them to
24 come out.

25 And sometimes, when something sounds perfect in my

1 head, it doesn't always come out of my mouth perfect. And
2 I -- I think that's -- it's the difference between somebody
3 who has to do it on a regular basis and somebody who -- who
4 truly believes that they're expressing themselves clearly
5 and how they want to come across.

6 I think that was lost. You know, there was -- there
7 -- there -- there -- there was and there still is remorse.
8 That -- that's still there. He just cannot get that
9 presented, you know, out of his body, out of his mind. He
10 cannot get that out himself.

11 You know, I discussed with him this morning if he --
12 if he was -- you know, wanted to talk today, and we decided
13 that it'd be better for me to speak for him so he doesn't
14 get lost in his -- in his thoughts and just, you know,
15 start spewing words that -- that could be taken, you know,
16 out of context, in the wrong way.

17 And you know, some of the things he told me again
18 this morning, you know, nothing -- he didn't -- he -- he
19 didn't have this -- this -- you know, this brilliant plan
20 to do this. This is not how he pictured anybody -- you
21 know, a situation -- he pictured anybody having to go
22 through.

23 He fully acknowledges that he hurt his ex-wife. He
24 hurt her family. He's hurt her -- his family. You know,
25 he -- he acknowledges that he has hurt all of these people.

1 He want -- he wants to make -- he wanted to make it
2 right. He wants to make it right. I don't know what else
3 could be done in the future to make it right.

4 You know, the marriage is now over. You know, that
5 was -- that was pending when we were in court in November.
6 He was not challenging anything. That is over. He's doing
7 his best to -- to let that part of his life go.

8 You know, that -- and that's a process. That's not
9 something we can just turn off, you know, like a light
10 switch. If you are in -- in a relationship, in a marriage,
11 you know, he is a very religious person and he had -- you
12 know, and the vows -- you know, it's hard -- it was hard
13 for him to let it go.

14 But even after he came to court, you know, he was
15 telling, "It -- it -- it's hard for me to do, but I'm
16 trying to do it. I'm trying to get past. I'm trying to
17 let it go."

18 So he does -- he -- he's doing everything he -- he
19 can do. I just -- I knew exactly when things started going
20 south in November and, you know if I could step in and stop
21 and say, "No. Let me say this," I would. Maybe I should
22 have.

23 But he's always expressed to me that he was sorry.
24 He's always expressed to me that he does have remorse. I
25 don't know -- I don't know why -- you know, everybody deals

1 with -- with issues and deals with -- with serious
2 situations differently. You know, some people bottle
3 everything up and at the end -- you know, at the end of the
4 day, they explode with emotion.

5 What Gary did, and what Gary does is because of
6 his strong faith, he -- it -- you know ---

7 THE COURT: Beating his wife had nothing to do with
8 his strong faith.

9 MS. PINNOCK: No, ma'am. And I -- I'm not trying to
10 -- I'm not trying to -- to say it did. I'm saying his
11 reaction and how he's dealing with what he did.

12 He did what he did. And there's no excuse for it.
13 We have never made an excuse for it. And how he -- how he
14 responded to that was the only way he knew how.

15 He prayed about it. He said this multiple times, he
16 gave it to God and -- and he's going to continue to pray
17 about it. That's all he -- that's how he processes things.
18 So I think that's just a difference between somebody who
19 would stand in court, you know, with the -- with the basic,
20 you know -- it's not basic, but the typical, you know,
21 expression of -- of remorse and guilt that we see, and more
22 often than not -- versus somebody who -- who is telling,
23 you know, and has told me and has stood in court and said,
24 you know, they are -- they are sorry and they're -- they're
25 remorseful, but not having the emotional breakdown that we

1 see so often in this courtroom.

2 THE COURT: And I just want to make it clear, I was
3 not expecting him to grovel or sob about what had happened.
4 But I will say I did not expect him to say that God needed
5 to forgive the victim for the things that she had been
6 doing. That was unexpected to me. And that is what
7 predicated my sentence in that -- this case.

8 MS. PINNOCK: Your Honor, again, all I can say about
9 that is if I could -- if I could have spoken for him, you
10 know ---

11 THE COURT: Well, sure. If you could've been there
12 that night, it wouldn't have happened.

13 I -- I -- I get that. You -- you can say lovely
14 things on his behalf and you have and you've done a good
15 job of representing him.

16 But when he spoke on his own -- own behalf, it -- it
17 -- it -- it said volumes. And he -- he said to the victim
18 what he wanted to say to the victim, and I said to the
19 defendant what I believe the justice system ought to have
20 said to him.

21 Let me talk to Ms. Walker and I'll have you reply to
22 her.

23 MS. WALKER: Thank you, Your Honor. For the record,
24 the victim is in the courtroom and would like to address
25 Your Honor at the appropriate time.

1 I know Your Honor remembers this. (Indicates) This
2 is what he used to almost beat his wife to death. Your
3 Honor, he went to her house -- and it wasn't one evening
4 that got out of control, this was after a period of
5 following her, of stalking her, of going to her job and
6 saying that he's going to call all of the doctor's that she
7 works with and say -- and tell him -- tell them about this
8 affair that she was having that never happened.

9 And when she says he had a -- one violent night in
10 the past, that also was a night of domestic violence.

11 Your Honor, Ms. Pinnock said that he did the only
12 thing he could do, which was stand up and accept
13 responsibility for what he did.

14 He pled guilty, but he never actually accepted
15 responsibility for what he did. He blamed it on the
16 victim.

17 On his jail phone calls, after he was sentenced,
18 Your Honor, that I've turned over to Ms. Pinnock, he blames
19 it on me.

20 He blames it on the victim's sister because she's
21 the one who introduced him -- introduced her to the man
22 that he [sic] was having an affair with.

23 He wants to know what Mazandra, the victim in this
24 case, was crying about in the courtroom. He said (as
25 read): "Her sister started all of this anyway. She's the

1 one who introduced Mazandra to that guy.

2 "The Solicitor, Mazandra, and Mazandra's sister went
3 on -- went in there and put on a show."

4 He said that he wants to be like Christ, and that
5 this "will be his suffering."

6 Because he still doesn't acknowledge or recognize
7 the fact that he's not the one who suffered at the hands of
8 this. The victim is the one who suffered at the hands of
9 this.

10 He -- when his father's talking to him, his father
11 says to him (as read): "Son, the cause of your problem is
12 your sister-in-law. She caused you to be what you're in
13 now."

14 He said, "That's true."

15 And he said -- but he said (as read): "It's
16 Mazandra's fault, too."

17 He said, "It's her fault?"

18 (As read) "Yes, sir. I'm glad that you saw that,
19 Dad. I knew all along that the problem -- what the problem
20 was, and it was her sister. She got what she wanted, she
21 got her sister back. But this is going to come back to
22 them.

23 "The forces of evil, her family, are against me.
24 God knows what happened, and He knows everything that was
25 behind all of this."

1 And lastly, Your Honor, the thing that struck me the
2 most was that he said (as read): "Dad, I just can't let
3 her go."

4 Your Honor, at a motion to reconsider, you can
5 always -- you can go up as well. He faced a maximum of 50
6 years in this case and you gave him 40.

7 And when Ms. Pinnock says and -- Ms. Pinnock and I
8 do this a lot. Tracy is very passionate and she zealously
9 advocates for her clients the way she's supposed to.

10 But she can't save him from himself. She can't step
11 in and make him feel remorse that he doesn't feel. The
12 only thing that we can do, Your Honor, is protect the
13 victim in this case from this Defendant who still can't let
14 her go.

15 And I would ask Your Honor to, at the very least,
16 stick by the -- the sentence that you gave in November.
17 Because when I -- when I asked for 30 years, I, too, was
18 shocked, when he came in here and blamed the victim for
19 what happened to her. He said that he was the one in his
20 household who was cooking and cleaning as though that
21 somehow negates the value of her life.

22 Your Honor, he has been convicted of criminal
23 domestic violence in the past. He tried to beat the woman
24 that he loved -- and the vows that he held so closely, that
25 he's having a hard time of letting go -- to death.

1 And I think that the sentence that you gave in
2 November reflects that, and I'd ask Your Honor to stick by
3 it and listen to the victim in this case at the appropriate
4 time.

5 THE COURT: If she wishes to speak, she may speak
6 now.

7 MS. BROWN: Natasha Brown from the Solicitor's
8 Office reading for Ms. Mazandra Robinson.

9 (As read) "My thoughts and feelings and expression
10 in regards to Mr. Thomas's requesting for a reduction of
11 his sentence: I do not think a reduction in his sentence
12 should be granted. I express this because I endured life-
13 threatening injuries, which I now have lost some hearing in
14 my right ear, memory loss due to traumatic brain injury,
15 decreased judgment, challenges in planning or problem
16 solving, changes in mood and personality, trouble with
17 speaking and forming words.

18 "To lose one third of my lung, there are times that
19 I have shortness of breath. I also have a greater risk for
20 falls due to my balance being off, just to mention a few of
21 my trials and tribulations, all of these complications and
22 challenges. Why?

23 "Once again, this request shows how manipulative you
24 are, how you want things to go your way. It's not enough
25 for me to endure all of these complications, but within six

1 months, have to face you once again and be reminded of my
2 plight to recover.

3 "Can I please put an end to this chapter in my life?
4 How can I move on when I am frequently reminded of that
5 horrific period/night?

6 "Mr. Thomas, you do not consider the consequences of
7 your crime. For the record, our daughter is hurt, and is
8 once again seeking counseling.

9 "Reducing the sentence will not help South -- the
10 State of South Carolina. I would also like to point out
11 how I requested for an order of protection before this
12 happened to me and it was denied.

13 "You were and still are determined to make my life a
14 living hell. It is time for the State of South Carolina to
15 stand against these violent acts. Thank you."

16 THE COURT: Thank you, ma'am.

17 MS. WALKER: I don't have anything else, Your Honor.

18 THE COURT: All right. Ms. Pinnock, anything in
19 reply.

20 MS. PINNOCK: Yes, Your Honor, briefly. The phone
21 calls, there were a number of phone calls. Ms. Walker did
22 not mention the calls that -- that Gary made to his friend,
23 Michael, and to his parents where he said (as read):

24 "There is no excuse for what I've done, and I tried to show
25 the Court remorse because I am sorry for what I've done."

1 So picking bits and pieces of a conversation -- the
2 bulk of these conversations, Your Honor, are based around
3 praying and getting past it.

4 So picking out, you know, one or two sentences from
5 multiple phone calls and presenting them, I would say, in
6 -- incompletely, I think paints the wrong picture about
7 what was actually talked about on the phone.

8 So there were -- there are a number of other phone
9 calls, there are a number of other things said. And there
10 are two in particular that were not brought up that --
11 where he tells his family, "There is no excuse for what
12 I've done. And I -- I tried to show the Court that I was
13 remorseful because I am sorry for what I've done."

14 So those are also things that Gary has said, you
15 know, after coming to court.

16 Your Honor, the -- the -- I -- I pulled a copy of
17 the Family Court file, Judge. It was mentioned to you in
18 November, about the order of protection. I pulled that
19 file. The order of protection was denied, Your Honor.

20 The allegations in that were not based on physical
21 abuse. The allegations were made based on excessive phone
22 calls, "... phone calls after I asked him to stop."

23 That's what was put on the application, that's what
24 was submitted, and that's what was denied by -- by the
25 Family Court judge.

1 There was no allegation presented of any physical
2 abuse from Gary to his ex-wife. So I just wanted the
3 record to be clear on that. I -- I pulled it because I
4 didn't have it with me the first time, I should have had it
5 the first time, but I can make it a part of the record. If
6 Your Honor would like to see it, I can hand it up.

7 THE COURT: Sure.

8 (Ms. Pinnock hands a document to the Court.)

9 MS. PINNOCK: So that -- there was a request, but it
10 was denied based on the reasons that were the Family Court
11 file.

12 Gary is now 53?

13 THE DEFENDANT: I'll be 53 on my birthday.

14 MS. PINNOCK: He's turning 53 this year, Your Honor.
15 His release date from the Department of Corrections is
16 2052. That would make him 89 years old.

17 The -- I don't -- I tried to -- to -- to present to
18 the Court Gary's mental state during that time. And I -- I
19 did my best to explain, you know, the beliefs and
20 conclusions he could come to and how that escalated over
21 the months, how he got more and more agitated about it; and
22 on -- on -- on that single night, he snapped. There's no
23 other way of explaining it.

24 This was not something that was going on over and
25 over and over and over again. This was one night that he

1 snapped, and he can't change what happened. But the judge
2 -- the -- but the law does not take into consideration, you
3 know, a heat of passion, an emotional state when an
4 incident happens with attempted murder. It does take that
5 into consideration.

6 There's a difference. You know, somebody can be
7 charged with murder for example, but if there's evidence of
8 heat of passion, it's, you know, voluntary manslaughter.
9 So it does recognize it in certain aspects, but it does not
10 make, you know, a -- it does not differentiate for this
11 charge, which is why I tried to -- to -- to paint the
12 picture and -- and try to -- I tried to explain as best I
13 could what was going on with him mentally; because I do
14 think that that, you know, has an affect -- it -- or it
15 should have an affect on somebody, you know, pleads guilty
16 to that charge.

17 I -- I would -- I would, you know -- I presented it
18 in hopes that, you know, it would shed some light on Gary's
19 mental state at that point.

20 Your Honor, a 40-year sentence is a life sentence.
21 It is a life sentence. There is no other way of -- of
22 looking at it. He is 52 years old. Statistically -- and
23 this -- reality, not just based on numbers, people don't
24 live to 89 years old in prison. That is a life sentence.

25 He was originally charged with the attempted murder.

1 It carries 30 years. It did not -- it's -- it doesn't even
2 carry a life sentence. The State brought the armed robbery
3 charge at a later date. So when he was originally
4 arrested, he didn't even have two charges.

5 THE COURT: Right.

6 MS. PINNOCK: You know, they -- they presented ---

7 THE COURT: What he stole was her purse, to look at
8 her phone, to see if she was cheating on him.

9 MS. PINNOCK: I don't know if -- if he took it for
10 the purposes of looking for her phone, but the purse was
11 taken. So that charge was brought, he was arrested in
12 August.

13 (To the defendant) I believe it was August, right?

14 THE DEFENDANT: Yes, August 23rd.

15 MS. PINNOCK: That charge was not brought to him
16 until February of 2015.

17 So Judge, he's ultimately been sentenced to life on
18 a charge that I think, you know, was created -- it was not
19 the intention of him getting a life sentence.

20 What I'm asking you to consider -- I'm not asking
21 you to reconsider for 10 years. If you would reconsider
22 for something -- 15 or 20, that still does not shed a great
23 -- there -- there's really not an overly great possibility
24 that he's still gonna make it out because going in at 52,
25 it's very difficult to serve that amount of time. It's 85

1 percent. You know, he's on Level 3 yard. The -- you know,
2 the deck is stacked against him with any kind of
3 significant sentence. But Judge, a 40-year sentence is
4 just a life sentence. He will not make it out. You know,
5 he is a healthy, you know, 52 year old, but he's not going
6 to live to 90 years old in prison.

7 Your Honor, so I would ask if you could reconsider.
8 If you would consider 20, 15 -- I -- I don't think we can
9 present anything else to you.

10 THE COURT: All right. I've listened carefully to
11 your arguments. This is a serious case, as I said to you,
12 Mr. Thomas, I've been thinking of you since I meted out the
13 sentence. There's absolutely no doubt about that I've
14 carried this with me.

15 I'm going to take this under advisement and I'm
16 going to issue an order. I think this case deserves and
17 order, either of explanation for why the sentence was so
18 harsh or an explanation for why I'm changing my mind.

19 But I'm going to take it under advisement and make a
20 decision. It won't be -- it won't take me long to make a
21 decision. Nobody needs to worry that this is gonna be
22 something that happens a month from now. It will happen
23 within a week or two. So I will get this decision out
24 quickly. Good luck.

25 MS. PINNOCK: Thank you, Your Honor.

1 MS. WALKER: Thank you, Your Honor.

2 (Marked Court's Exhibit No. 1, Family Court
3 document.)

4 (Marked Court's Exhibit No. 2, CD of phone calls.)

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-- END OF TRANSCRIPT OF RECORD --

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CERTIFICATE

1
2 I, the undersigned Bonnie H. Kelly, Official Court
3 Reporter for the Fifth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the hearing
7 of the captioned cause, relative to appeal, in the Fifth
8 Circuit Court for Richland County, South Carolina, on the
9 19th day of May, 2016.

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

12
13
14 E/ BONNIE H. KELLY

15 Bonnie H. Kelly, CVR

16 Official Court Reporter

17
18 Columbia, South Carolina

19 September 19, 2017
20
21
22
23
24

STATE OF SOUTH CAROLINA

County of Richland

GARY WAYNE THOMAS 366010

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

vs.

State of South Carolina

Name of Respondent.

2017 CP4000046

In the Court of Common Pleas

APPLICATION FOR
POST-CONVICTION RELIEF

JENNETTE W. McBRIDE
C.C.P. & G.S.

2017 JAN -5 PM 1:12

RICHLAND COUNTY
FILED

INSTRUCTIONS — READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make 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 Lieber Correctional Institution
P.O. Box 205 Ridgeville, SC 29472

2. Name and location of Court which imposed sentence Richland County General Session
Court 1701 Main St Columbia, SC 29202

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) Docket no# 2015GS4000183

(b) Docket no# 2015GS4000196

(c) _____

4. The date upon which sentence was imposed and the terms of the sentence:

(a) 11/9/2015 - Attempted murder 30yrs

(b) 11/9/2015 - Armed Robbery 10yrs

(c) _____

5. Check whether a finding of guilty was made

- (a) after a plea of guilty Pled Guilty
- (b) after a plea of not guilty N/A
- (c) after a plea of nolo contendere N/A

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

NO, TRIAL COUNSEL fail to inform me my Right to file one

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

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

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

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

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

(c) the date of each such result:

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

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

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

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

- (a) TRIAL COUNSEL fail to file one
- (b) N/A
- (c) N/A

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

- (a) I'm not alleging that I'm being held in custody unlawfully.
- (b) it's more important that is of the imposition of sentence.
- (c) N/A

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

- (a) Due to the fact I'm in no way A CAREER CRIMINAL, AND
- (b) Should have not Receive the MAX on the Attempted
- (c) MURDER CHARGE.

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

(a) any petition in a State Court under South Carolina Law? Motion to Reconsider Sentence

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? no

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? no

(d) any other petitions, motions or applications in this or any other Court? no

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. ORDER Denying motion for Reconsideration
- ii. N/A
- iii. N/A
- iv. N/A

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

- i. In the Court of General Sessions Fifth Judicial Circuit
- ii. N/A
- iii. N/A
- iv. N/A

(c) the disposition thereof:

- i. Denied
- ii. NA
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. June 29th 2016
- ii. N/A
- iii. N/A
- iv. N/A

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

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

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

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

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

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) N/A
- (b) N/A
- (c) N/A

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? N/A
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? MOTION TO RECONSIDER SENTENCE

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. TRACEY E. PINNACK
1701 MAIN ST. POST OFFICE BOX 192 COLUMBIA, SC 29202
- ii. N/A
- iii. N/A

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

- i. PLEA HEARING
- ii. MOTION TO RECONSIDER SENTENCE
- iii. N/A

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

See Attachment to Question

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, GARY Wayne Thomas, 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.

Gary W Thomas

RICHLAND COUNTY
FILED
2017 JAN -5 PM 1:13
JEANNETTE W. McBRIDE
C.C.P. & G.S.

SWORN to and subscribed before me this 19th
day of December, 2016

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

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

I, GARY Wayne Thomas, 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.

Gary W Thomas
Applicant

SWORN or affirmed to and subscribed before me this
19th day of December, 2016

Ludrean Bryant
Notary Public

My Commission Expires May 26, 2020

Question (18) State clearly the Relief you seek in 49
filing this Application.

Due to the fact that I was misrepresented due to ineffective assistance of Counsel, And was taking advantage of totally. with limited or absolutely no knowledge about the Judicial System. If my attorney would have investigated this case from the very beginning, she would have seen that this was clearly a criminal Domestic Violence of High and Aggravated nature, And not Attempted Murder. The fact that we were living together, which we were a household member according to the statutory law S.C. Code Ann SS 16-25-10. she did no investigation. As a officer of the Court she also should have challenged the validity of the indictment. According to the Sentencing Sheet, Defendant waives presentment to Grand Jury, which was not initial by Defendant. ALSO my attorney should have recommended that my sentence on the ARM Robbery charge should had been BAN concurrently and not consecutively. In closing, had I known that I was going to get the max on the attempted murder charge, I would have insisted on going to trial.

Dec, 19, 2016

Dear Clerk of Court,

Enclosed you will find a copy of my
(PLR) application. If you could please
send me a copy, when it is stamped and
filed in your court. Thank you for your time
in this matter.

Sincerely,
Raymond

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Gary Wayne Thomas, #366010,

2017-CP-40-0046

Applicant,

v.

RETURN AND MOTION TO DISMISS

State of South Carolina,

Respondent.

RICHLAND COUNTY
FILED
2017 DEC 15 PM 9:13
JEANNETTE WOODBRIDGE
C.C.P. & S.S. CLERK

Respondent, making its Return to the application for post-conviction relief (PCR) filed January 5, 2017, by Gary Wayne Thomas (Applicant), would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted at the February 2015 term of the Richland County Grand Jury for armed robbery (2015-GS-40-00196) and attempted murder (2015-GS-40-00183). On November 9, 2015, before the Honorable Tanya Gee, Applicant pled guilty and was sentenced to confinement for consecutive terms of thirty (30) years for the attempted murder offense and ten (10) years for the armed robbery offense. Applicant was represented by Tracy Elaine Pinnock, Esquire. Meghan Walker, Esquire, prosecuted the case. Applicant was to be given credit for time served. Applicant did not appeal his plea or sentence.

II.

In his first and current application for post-conviction relief, Applicant alleges that due to the fact that he is 'in no way a career criminal,' he should not have received the maximum

sentenced allowed for the murder charge. Applicant alleges he was "misrepresented due to ineffective assistance of counsel."

Attached and incorporated herein are the records of the Richland County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, and the records from this post-conviction relief action. Respondent reserves the right to amend this Return amend receipt of any relevant information.

III.

Respondent submits that this action should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 ("the Act"). Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the offense he currently challenges on November 9, 2015. Accordingly, Applicant was required to file this Application on or before November 9, 2016. Applicant did not file this Application until January 5, 2017; after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). In

addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ...that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, Respondent moves to dismiss this application for failure to file within the time mandated by the Act.

IV.

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

V.

WHEREFORE, Respondent moves to summarily dismiss the application as untimely.

Respectfully submitted,

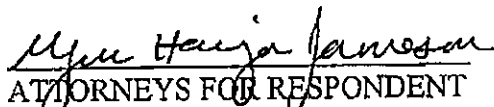
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By: 
for ATTORNEYS FOR RESPONDENT
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Columbia, S.C. 29211

12/12, 2017

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

GARY WAYNE THOMAS,)
APPLICANT,)
VS.)
STATE OF SOUTH CAROLINA,)
RESPONDENT.)

TRANSCRIPT
OF
RECORD
2017-CP-40-0046

December 5th, 2018
Columbia, South Carolina

B E F O R E:
THE HONORABLE JOCELYN J. NEWMAN, Judge.

A P P E A R A N C E S:
LEAH B. MOODY
ESQ.
Attorney for the Applicant

LINDSEY A. MCCALLISTER
ASSISTANT ATTORNEY GENERAL
Attorney for the State

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

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THE COURT: Yes, ma'am.

MS. MCCALLISTER: May it please the Court.

Gary Wayne Thomas versus the State of South Carolina.
2017-CP-40-0046.

Your Honor, Mr. Thomas was indicted in February of 2015 by the Richland County Grand Jury for one count each of armed robbery and attempted murder. He was represented on those charges by Tracy Pinnock, and Megan Walker prosecuted the case for the State.

On November 9th, 2015, he pled guilty before Judge Gee and was sentenced to confinement for consecutive terms of 30 years for the attempted murder, and 10 years for the armed robbery. He did not appeal that plea or sentence, Your Honor. He filed this Application on January 5th, 2017, and Ms. Leah Moody was appointed to represent him.

Your Honor, the State originally answered this as a Return and a Motion to Dismiss, and a Conditional Order of Dismissal was signed. That motion was based on the Statute of Limitations. However, I believe, either in Mr. Thomas' -- I believe, in Mr. Thomas' response to the Conditional Order of Dismissal, there had been a -- there was a Motion for Reconsideration that was filed. And so that pushed the Statute of Limitations out. So, his

1 Application is timely.

2 So, the State would withdraw their motion -- the Motion
3 to Dismiss, and we are prepared to go forward with an
4 evidentiary hearing today.

5 THE COURT: Okay. Ms. Moody.

6 MS. MOODY: Thank you, Your Honor.

7 May it, may it please the Court.

8 At this time I'd like to call Mr. Gary Thomas to the
9 stand.

10 GARY THOMAS, being first duly
11 sworn, testified as follows:

12 THE CLERK: Have a seat in the witness stand please.

13 THE WITNESS: Yes, ma'am.

14 THE CLERK: State your name for the record.

15 THE WITNESS: Gary Wayne Thomas.

16 DIRECT EXAMINATION

17 BY MS. MOODY:

18 Q Mr. Thomas, where are you currently incarcerated?

19 A Lieber Correctional Institution, Ridgeville, South
20 Carolina.

21 Q Okay. And do you recall the day that you committed to
22 Lieber?

23 A I believe it was February of 2016.

24 Q And what charges were you committed to Lieber on?

25 A I was committed to Lieber Correctional Institution on

Gary Thomas - Direct examination
by Ms. Moody

1 the charges of first degree murder -- I mean -- I'm sorry.
2 Attempted murder and armed robbery.

3 Q And did you have an attorney representing you with
4 those charges?

5 A Yes, I did, ma'am.

6 Q And who was that attorney?

7 A Attorney Ms. Pinnock.

8 Q Ms. Pinnock?

9 A Ms. Pinnock, yes, ma'am.

10 Q Okay. And then is -- was she your only attorney that
11 you had representing you?

12 A Yes, she was.

13 Q Okay. At any other time did you have another attorney?

14 A Well, he wasn't a hired attorney. Just someone that
15 was giving me legal advice.

16 Q Okay. And who was that?

17 A Nathaniel Roberson.

18 Q Okay. At anytime did you have Ms. walker?

19 A Ms. walker?

20 Q Yes, or was Ms. Pinnock your attorney the entire time?

21 A She was my attorney the entire time.

22 Q And with Ms. Pinnock, did you have an opportunity to
23 meet with her about these charges?

24 A Yes, ma'am, I did.

25 Q When was your first meeting?

Gary Thomas - Direct examination
by Ms. Moody

1 A I do not recollect my first meeting.

2 Q Was it at the time of arrest?

3 A Afterwards.

4 Q Okay. How far afterwards?

5 A I probably say about anywhere between three to four
6 months afterwards.

7 Q Okay. And during that time, what, if anything,
8 occurred with the Court?

9 A Could you repeat the question again please?

10 Q Within a three, excuse me, the three months that you
11 had not met with Ms. Pinnock, what, if anything, occurred in
12 Court?

13 A Nothing to my recollection.

14 Q And when you met with her the first time, what did
15 you-all discuss?

16 A Well, we really didn't get a chance to discuss anything
17 because I was still trying to process what had happened, the
18 events that had occurred. I was still, you know, in a --
19 still trying to process. It was probably until I'll say
20 about three or four months later when she eventually told
21 me, you know, the offenses that I was -- the charges that I
22 was facing that I began to somewhat, you know, open up to
23 her.

24 Q Okay. So, at the first meeting, are you testifying
25 that you didn't discuss your case?

Gary Thomas - Direct examination
by Ms. Moody

1 A Well, not detailed. Not detailed we didn't.

2 Q Okay. What do you recall discussing with your attorney
3 at that first meeting?

4 A Well, actually I was asking her that -- what I was
5 saying, I kept, kept repeating that I just couldn't believe
6 that, you know, this had, had happened, and I really didn't,
7 you know, get an opportunity really to discuss much of
8 anything with her.

9 Q Did you give her -- what about your background did you
10 share with Ms. Pinnock?

11 A Yes, I shared my background with her.

12 Q What about your background?

13 A That I was an associate minister at First Nazareth
14 Baptist Church, and that I was attending Allen University in
15 the field of religion, and I had just completed one year,
16 that me and my ex-wife, we had previously separated prior to
17 the incident, and that, at the time, I was believed, I was
18 believed that she was having an affair, and this what
19 constituted, you know, the outcome.

20 Q So, what you shared was the victim in your case was
21 your ex-wife.

22 A Could you repeat the question again, ma'am?

23 Q So, basically what you shared with Ms. Pinnock, the
24 victim in the case was your ex-wife?

25 A Yes, ma'am.

Gary Thomas - Direct examination
by Ms. Moody

1 Q Okay. And so you shared with Ms. Pinnock, if I'm
2 correct, what led to the charges they had you arrested for?

3 A That's correct.

4 Q Okay. And what, if anything, did she tell you about
5 the charges that you were in custody for?

6 A Other than the time that I was facing.

7 Q Now, was that basically all that you discussed with Ms.
8 Pinnock?

9 A Well, basically that was it, ma'am, yes.

10 Q Did you have another opportunity to meet with Ms.
11 Pinnock?

12 A I will say anywhere between four to five times.

13 Q Four to five times?

14 A Yes, I can't really be exact, but somewhere in that
15 area, four to five times.

16 Q And what did you discuss with her during those
17 meetings?

18 A The possibility of seeing if we can, you know, go
19 before the Judge and see if we can get anywhere between 10
20 to 15 years on both charges.

21 Q Okay. And so you ultimately were convicted, correct?

22 A Yes, ma'am.

23 Q Okay. And that's what brought about your
24 Post-Conviction Relief Application?

25 A Yes, ma'am.

Gary Thomas - Direct examination
by Ms. Moody

1 Q Okay. In your Post-Conviction Relief Application, you
2 stated some grounds for why you filed your Application.

3 A That's correct.

4 Q Would you please tell the Court what those grounds are?

5 A The first one is -- could I read it out to you, ma'am?

6 Q Yes, sir.

7 A Okay. Prior to plea hearing, Applicant asserts
8 ineffective assistance of his initial counsel for failing to
9 do an independent examination and challenging the Court's
10 jurisdiction due to the insufficiency of the indictment to
11 whether or not such was fraudulently true bill. The record
12 will reflect that the indictments are contradicting and
13 conflicting in nature as it relates to the signature on the
14 indictments that the Grand Jury met or whether such was
15 constitutionally soren (phonetic) and impaneled.

16 If it pleases the Court, I would like to make this
17 exhibit part of the record?

18 Q What record?

19 What exhibit do you have?

20 A Oh, these true bills with the signatures of it.

21 Q Okay. The Court already has your true billed
22 indictments.

23 A Okay.

24 Q Okay. Now, let's go back to this.

25 You are challenging the indictment?

Gary Thomas - Direct examination
by Ms. Moody

1 A Yes, ma'am.

2 Q And you felt like your attorney should have challenged
3 the indictment?

4 A Yes, ma'am, that's true.

5 Q Okay. And you just read something into the record --

6 A Uh-huh. (Affirmative).

7 Q -- as to that indictment?

8 A Yes, ma'am.

9 Q Are you challenging the signature on the indictment?

10 A That is correct.

11 Q Okay. And why are you challenging the signature on the
12 indictment?

13 A Well, according to Rule 60(b)(3) relief from a judgment
14 or order, and according to South Carolina Code anistry
15 (phonetic) Subsection 17-19-90, objection to the facts in
16 indictments states that every objection to any indictment
17 for any defect apparent on the face therefore should be
18 taken by demurrer on motion to squash such indictment before
19 the jury shall be sworn and not afterwards. The language
20 for Rule 60(b)(3) states (b), grounds for relief from a
21 final judgment, order, or proceeding frog (phonetic) whether
22 previously called intrinsic or extrinsic misrecep (phonetic)
23 -- misrepresentation or misconduct by opposing party.

24 Q Okay. Let me stop you right there.

25 You're saying that something was wrong with the

Gary Thomas - Direct examination
by Ms. Moody

1 indictment, correct?

2 A Yes, ma'am.

3 Q Okay. What exactly was wrong?

4 A The signature. There are -- in comparison, it shows a
5 variation in signing which were alleged signed the same day
6 on February the 11th, 2015. As I stated, I have them
7 superimposed and I put both of them together, and it showed
8 that they're totally two different signatures, which was
9 alleged signed on February 11th, 2015.

10 Q Okay. Now---

11 THE COURT: Hold on. Hold on right there.

12 Let me interrupt your questioning.

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Mr. Thomas, you have a sister named Erica?

15 THE WITNESS: No, ma'am, I don't.

16 THE COURT: You don't?

17 MS. MOODY: His---

18 THE COURT: Your wife's -- who is Erica Thomas?

19 THE WITNESS: Erica Thomas, I have no idea, ma'am.

20 THE COURT: Ms. Moody.

21 MS. MOODY: I don't know Ms. Thomas.

22 THE COURT: Ms. McCallister.

23 MS. MCCALLISTER: I, I don't know an Erica.

24 THE COURT: Okay.

25 MS. MOODY: I don't know what you're looking at.

Gary Thomas - Direct examination
by Ms. Moody

1 THE COURT: Well, I'm looking at the transcript of
2 plea, and I'm just sort of skimming it.

3 MS. MOODY: Can you tell me---

4 THE COURT: But---

5 MS. MOODY: ---what page?

6 THE COURT: Page 15 and this person says my name is
7 Erica Thomas and I am his sister.

8 MS. MOODY: Line --?

9 THE COURT: Line 5.

10 Is that the plea or is that---

11 MS. MOODY: That's correct. It -- well, it -- I read
12 it and it says it's his sister, but---

13 THE COURT: You don't have a sister named Erica Thomas?

14 THE WITNESS: No, ma'am, I have a sister named Tara
15 Pamais. Her maiden name is Tara Thomas.

16 THE COURT: Spell her name.

17 THE WITNESS: T-A-R-A.

18 THE COURT: Oh, okay. Was she there at the plea?

19 THE WITNESS: Yes, she was, ma'am.

20 THE COURT: Okay. Ms. McCallister.

21 MS. MCCALLISTER: I'm sorry. I sort of missed that.
22 Ms. Pinnock is gonna check her notes about who was present
23 at the plea and---

24 THE COURT: He says he has a sister named Tara --

25 THE WITNESS: Pamais.

Gary Thomas - Direct examination
by Ms. Moody

1 THE COURT: -- maiden name Thomas. And so it could
2 be---

3 MS. MOODY: Erica.

4 THE COURT: I mean it does say Erica, but Tara and
5 Erica are similar enough that the court reporter could have
6 made a mistake. I only interrupted because I'm fairly good
7 friends with someone named Erica Thomas---

8 THE WITNESS: Yes, ma'am.

9 THE COURT: ---and I just wanted to make sure it wasn't
10 the sister and there's no problem here.

11 THE WITNESS: Yes, ma'am.

12 MS. PINNOCK: I have Tara in my notes.

13 THE COURT: Okay. And Tara and Erica are similar
14 enough that I guess that's a typo in the transcript.

15 Okay. I just---

16 THE WITNESS: Yes, ma'am.

17 THE COURT: ---wanted to make sure I didn't need to
18 disclose some relationship to your sister or---

19 THE WITNESS: Yes, ma'am.

20 THE COURT: ---et cetera.

21 Okay. So, I'm sorry, Ms. Moody. Continue.

22 MS. MOODY: Okay. Thank you, Your Honor.

23 Mr. Thomas, I believe we were discussing the
24 indictments.

25 A Yes, ma'am.

Gary Thomas - Direct examination
by Ms. Moody

1 Q And you stated in the record that you compared the
2 signatures on the indictments.

3 A That's correct.

4 Q And you found issue with those indictments, correct?

5 A Yes, ma'am.

6 Q Okay. And specifically you're talking about the
7 attempted murder indictment---

8 A That's correct.

9 Q ---and the armed robbery indictment?

10 A That's correct.

11 Q Okay. And the signature that you're speaking of in
12 this is the action -- under the action of the Grand Jury
13 true billed stamp?

14 A Yes, ma'am, it is.

15 Q Okay. And so you felt that your attorney should have
16 objected to---

17 A Correct.

18 Q ---those signatures?

19 A Correct.

20 Q All right. And this again was a plea?

21 A Ma'am?

22 Q And this again was a plea?

23 A Yes, ma'am.

24 Q All right. Was there anything else wrong with the
25 indictment?

Gary Thomas - Direct examination
by Ms. Moody

1 A No, ma'am.

2 Q Beg the Court's indulgence.

3 (Pause.)

4 Q As to your armed robbery, are you certain there was
5 nothing else wrong with the indictment?

6 A Other than both of them have conflict, conflicting
7 signatures.

8 Q Okay. As to the indictment, in the body of the
9 indictment, would it -- how it describes the offense---

10 MS. MCCALLISTER: Your Honor, object to the leading.

11 A Yes.

12 THE COURT: Overruled.

13 Okay.

14 A It states that Gary Wayne Thomas did, along with
15 codefendants, in Richland County on or above (sic)
16 August the 23rd, 2014, while armed with a deadly weapon,
17 take and carry away the personal property from or in the
18 immediate presence of Masandra Thomas.

19 Q Okay. Now, did you have a codefendant charged along
20 with you on this particular charge?

21 A No, I didn't, ma'am.

22 Q Okay. So, is that one of the issues---

23 A That's another issue.

24 Q ---you have with it?

25 A Yes, ma'am.

Gary Thomas - Direct examination
by Ms. Moody

1 Q Okay. And, to your knowledge, did your attorney
2 correct that?

3 A No, she didn't, ma'am.

4 Q Okay. All right. So, outside of the signature in this
5 particular allegation that along with codefendants, you do
6 not have any other issues with your indictment?

7 A No, ma'am.

8 Q Okay. All right. What else did you -- do you feel
9 that your attorney did not do in your case?

10 A Prior to hearing, counsel failed to have indictments
11 squashed for attempted murder due to the fact she was well
12 aware that the Applicant and victim were husband and wife,
13 and that the Applicant should have been charged with
14 criminal domestic violence high, aggravated nature. In
15 order---

16 Q Okay.

17 A Supporting facts.

18 Q All right. Well, let me ask you the question.

19 A Yes, ma'am.

20 Q All right. So, did you have an opportunity -- well,
21 what opportunity did you have with your attorney to discuss
22 your charges as it relates to whether you were charged
23 appropriately?

24 A None.

25 Q When did you realize or when did it come to your

Gary Thomas - Direct examination
by Ms. Moody

1 attention that maybe your charge should of been something
2 else?

3 A Well, concerning I've been incarcerated almost four
4 years, I've had ample time to review all my issues and my
5 indictments and so forth. So, that's when it came to my
6 attention.

7 Q Okay. So, it wasn't during the time you were being
8 represented by Ms. Pinnock?

9 A No, ma'am.

10 Q All right. So, what facts -- you were getting ready to
11 read some facts?

12 A Yes, ma'am.

13 Q What facts do you allege support a different charge?

14 A In order for an indictment to be one of a domestic
15 nature in violation of the criminal domestic violence laws
16 of this state, the alleged offender must meet a certain
17 criteria according to South Carolina Code Subsection
18 16-25-10-65. Household member is defined as follows.

19 Q Okay.

20 A We---

21 Q Okay. Well, you don't have to define---

22 A Yes, ma'am.

23 Q ---the household, but you're, you're stating that it's
24 the CDV statute, and you discovered that from your research?

25 A Yes, ma'am.

Gary Thomas - Direct examination
by Ms. Moody

1 Q All right. So, at anytime during the representation by
2 Ms. Pinnock were you presented with any plea offers to
3 different charges or another charge?

4 A Well, there was an offer for 25 years that's indicated
5 in the transcript and---

6 Q But for what charge?

7 A Both charges.

8 Q Okay. So, I'm, I'm trying to get to there were no
9 other charges discussed, no changing -- other than changing
10 it to what you ultimately pled to attempted murder?

11 A Yes, ma'am.

12 Q Okay. So, at what point did you discuss any kind of
13 defense with your attorney?

14 A Well, I asked her after -- well, this would go into my
15 next claim.

16 Q Okay.

17 A Okay. You want me to finish this supporting -- oh, I
18 mean go into that next claim?

19 Q Well, with respect to giving the case -- well, not the
20 case, but the statute number, the Judge is aware---

21 A Yes, ma'am.

22 Q ---of the statute numbers.

23 A Yes, ma'am.

24 Q You don't have to define that for her, but do you -- if
25 you have any other facts.

Gary Thomas - Direct examination
by Ms. Moody

1 A Pertaining to that claim, no, ma'am.

2 Q Okay. So, your next claim is counsel---

3 A Counsel failed to move to make a motion for a
4 continuance during plea hearing in order to do a independent
5 examination into the alleged accusation that was stated by
6 the solicitor, which was on Transcript Page 10, Lines 7 and
7 9, that the victim of the pointing and presenting was the
8 Applicant's first wife. Counsel goes on record, Transcript
9 Page 15, Line 5 through 8, stating "we have not discussed
10 that with the solicitor whatsoever about, you know, with the
11 pointing and presenting, who the victim was in that case.
12 None of that." Statement made by solicitor helped bolster
13 the Judge decision.

14 Q All right. So, that issue is -- it relates to your
15 prior record?

16 A Yes, ma'am.

17 Q Okay. And you wanted your attorney to object to that
18 or ask for a continuance?

19 A Yes, ma'am.

20 Q All right. In the record, as you read it, she did
21 object to it.

22 You agree with that?

23 A I don't recall.

24 Q You just read it.

25 A I mean -- I'm sorry. Yes, ma'am.

Gary Thomas - Direct examination
by Ms. Moody

1 Q All right. So, she objected, but you felt that she
2 should of taken it a step further and continued --

3 A And that's correct.

4 Q -- to investigate that particular charge?

5 A Yes, ma'am.

6 Q When you met with her and your attorney and gave her
7 your background, did you not share your prior record with
8 her?

9 A No, ma'am, I did not. As far as that charge right
10 there, I did not. I don't recall sharing it with her.

11 Q And is there a reason why?

12 A Well, as I recollect, I don't think it was asked of me.

13 Q Okay. So when -- all right. So, are you testifying
14 that your attorney did not ask you for your prior record?

15 A To my recollection I don't think so.

16 Q All right. Did you have an opportunity to review your
17 rap sheet with your attorney?

18 A Yes, we did.

19 Q Okay.

20 A I think so.

21 Q All right. Do you recall -- what, if anything, do you
22 recall on your rap sheet related to this particular charge
23 with your ex-wife?

24 A There was a criminal domestic violence charge.

25 Q And so when discussing your prior record that -- each

Gary Thomas - Direct examination
by Ms. Moody

1 individual charge, what, if anything, did your attorney ask
2 you about those particular charges?

3 A How did I plead. I told her that I, I came in and pled
4 guilty to those charges.

5 Q Okay. What facts did she ask in terms of the actual
6 underlying charge?

7 Did she ask you about any facts?

8 A Not to my recollection.

9 Q All right. And so, in Court that day, were you aware
10 that the solicitor would use your prior record or discuss
11 your prior record with the Court?

12 A No, I wasn't sure.

13 Q Okay.

14 A I wasn't sure that she would.

15 Q And so, when your attorney objected, you felt that --
16 well -- so, are you testifying, when your attorney objected,
17 you felt that she should have moved for a continuance---

18 A Yes, ma'am.

19 Q ---to discuss those charges?

20 A Yes, ma'am.

21 Q Okay. Did you mention anything or did you say anything
22 to your attorney at that time about it?

23 A No, I didn't, ma'am.

24 Q Okay. Did she say anything to you about it?

25 A No, she didn't.

Gary Thomas - Direct examination
by Ms. Moody

1 Q Okay. And so what you're testifying here today is that
2 you feel that -- well, are you -- what are you testifying as
3 to the Judge's -- the impact it had on the Judge?

4 A Well, I felt like that she should have objected to what
5 the solicitor has said further during independent
6 examination to whom that person was because, like I said, I
7 think it bolstered the Judge's decision stating that it was
8 a first wife.

9 Q Okay. All right. And did you, after your plea, did --
10 were you able to discuss this particular pointing -- it's
11 pointing and presenting, correct?

12 A Yes, ma'am.

13 Q Did -- were you able to discuss that with Ms. Pinnock?

14 A No, ma'am.

15 Q During the motion -- well, the hearing for the Motion
16 to Reconsider, had you -- did you share anything about the
17 charge then with Ms. Pinnock?

18 A No, ma'am.

19 Q Did she ask you any questions?

20 A No, ma'am, she did not.

21 Q All right. Is there anything else you would like to---

22 A Yes.

23 Q ---tell the Court about that particular allegation?

24 A Supporting facts.

25 Q Okay.

Gary Thomas - Direct examination
by Ms. Moody

1 A Prosecutor failed to supply Applicant with the Brady
2 material, which is evidence in prosecutor possession or
3 knowledge that is favorable to the defense, and material to
4 quit or punishment which totally violated my due process
5 according to Brady versus Maryland, and the holding that
6 suppression of evidence by the prosecutor or prosecution
7 denied due process as well as Rule 3.8(a)(d), special
8 responsibilities of a prosecutor. Documents submitted to
9 the Clerk of Court referring information that was not
10 included in its motion to discovery. That's an exhibit.

11 Q Okay. So, this is a different issue.

12 A Same issue.

13 Q The same issue.

14 So, we'll just put that kind of in just some regular
15 terms.

16 A Yes, ma'am.

17 Q Are you saying that the information about the pointing
18 and presenting was on -- the prosecutor had documentation of
19 that?

20 A That's correct.

21 Q Okay. And, at the plea, the prosecutor handed
22 something up to the Court.

23 A Well, she acknowledged that in Court and I felt that
24 this information should have been given to my attorney at
25 the time.

Gary Thomas - Direct examination
by Ms. Moody

1 Q Well now let's be clear. Either she just spoke about
2 it on the record --

3 A Uh-huh. (Affirmative).

4 Q -- or she had a actual physical -- I mean a, a tangible
5 document that she handed to the Court.

6 A I'm not sure.

7 Q Okay. So you saw her talking to the Judge, correct?

8 A Yes, ma'am.

9 Q Okay. And at the time that she talked about your prior
10 record, she -- are you saying she did not hand anything or
11 she did hand something to the Judge?

12 A It's possible that she did hand something to the Judge.
13 I'm not sure. I, I do not recollect.

14 Q Okay. All right. So, going on that same issue, at --
15 the bottom line is you wanted your attorney to investigate
16 it further?

17 A Yes, ma'am.

18 Q Okay. And, by investigating it, you feel like she
19 should of asked for a continuance?

20 A Correct.

21 Q Okay. All right. Are there any other facts related to
22 this particular claim?

23 A No, ma'am.

24 Q Okay. What -- could you please state for the Court
25 your next issue?

Gary Thomas - Direct examination
by Ms. Moody

1 A During motion to consider sentence, counsel failed to
2 stipulate any grounds that would have been favorable in
3 obtaining relief during this hearing. This were her last
4 opportunity to bring forth any and all of my issues.

5 Q So, during the Motion to Reconsider your conviction --

6 A Yes, ma'am.

7 Q -- you wanted your lawyer to offer up more information
8 to the Court?

9 A Yes, ma'am.

10 Q Okay. And do you recall what she said to the Court
11 about your sentence?

12 A I know one statement she made she said she found it
13 very unreasonable to hear that I received 40 years for those
14 charges.

15 Q So, let's talk about that.

16 The amount of time that you received---

17 A Yes, ma'am.

18 Q ---on your charges, your attorney informed the Court
19 that she thought the sentence was a bit much?

20 A Yes, ma'am.

21 Q Okay. And going into your plea, what had you discussed
22 about the possible sentencing range you could receive?

23 A Well, like I stated, I was under the impression that,
24 by going in, you know, pleading, that the Judge would be
25 lenient to the 10 to 15 years that we was asking for.

Gary Thomas - Direct examination
by Ms. Moody

1 Q Okay. So but what did you discuss about the possible
2 sentencing range that you were exposed to on pleading to the
3 two charges?

4 A What she mentioned that, even if we turn down the 25
5 years, that the solicitor would come in there asking for 30
6 years.

7 Q Okay. And that's on the attempted murder?

8 A That's on both charges.

9 Q Okay. So, you-all discussed your plea in terms of --
10 in light of you turned down the offer for 25 years?

11 A Yes, ma'am.

12 Q Correct?

13 And so, in essence, you pled straight up without a
14 recommendation or negotiation with the State?

15 A Well, at that time I didn't understand what she meant
16 by that, you know, pleading, you know, straight up. So, I
17 just took her at face value that she, in her representation,
18 would, you know, represent, represent me to the best of her
19 knowledge.

20 Q Okay. So -- and, and it's not -- I'm -- I guess now
21 you understand what pleading straight up is?

22 A Correct.

23 Q Okay. Meaning the solicitor did not tell the Court any
24 deal that you worked out with the State, correct?

25 A Yes, ma'am.

Gary Thomas - Direct examination
by Ms. Moody

1 Q Okay. And so understanding that you were pleading
2 straight up, you were exposed to the sentencing range for
3 the particular charges?

4 A That's correct.

5 Q Okay. And those two charges being -- they were
6 attempted murder?

7 A Yes, ma'am.

8 Q All right. And armed robbery?

9 A Yes, ma'am.

10 Q All right. And, on the attempted murder, you
11 understood that the Judge could sentence you up to 30 years?

12 A Yes, ma'am.

13 Q And, on the armed robbery, the Judge could sentence you
14 up -- from 10 to 30?

15 A Correct.

16 Q Okay. And with that -- knowing that, you went before
17 the court understanding that you-all were gonna ask for 10
18 to 15 years?

19 A That's correct.

20 Q Okay. And what specifically did you-all -- what did
21 you and your attorney discuss that led you to believe that
22 it would be 15 -- 10 to 15 years that the Judge would
23 sentence you?

24 A Well, prior to plea hearing, Applicant plea was induced
25 by counsel's strategy, which was based primarily on the fact

Gary Thomas - Direct examination
by Ms. Moody

1 that she and her colleagues had brain stormed Applicant's
2 case and that she did not see how Applicant would fair in an
3 open Court, that it would probably be in the best of
4 Applicant's interest to plea considering that the Judge was
5 fairly new to the bench, and had not been tainted by the
6 Solicitor's Office, and, therefore, may be lenient to the
7 request of 10 to 15 years as stated on record.

8 Q Okay. And so, based off of that advice, you went
9 forward with a plea, turned down the 25 years?

10 A That's correct.

11 Q Okay. But you understood that going in front of the
12 Judge without a plea offer -- well, without a recommendation
13 or a negotiation, you were exposing yourself to possibly 60
14 years?

15 A At -- well, not at that time, but I realize it now.

16 Q Okay. All right. And, at the least, the 10 on the
17 armed robbery?

18 A Yes, ma'am.

19 Q All right. And so what did you ask your attorney about
20 turning the offer down?

21 A Well, I think it's in the transcript stating that I did
22 not actually, you know -- I said that well, let's, let's go
23 and see what the Judge would say, you know, as far as would
24 she be lenient to the 10 to 15 years.

25 Q But I'm asking you what did you -- I mean like what

Gary Thomas - Direct examination
by Ms. Moody

1 questions did you have for your attorney as you listened to
2 her tell you to turn -- well, listened to her advise you as
3 to the amount of time y'all would ask for --

4 A well---

5 Q -- if that makes sense?

6 A No, can you repeat the question and re---

7 Q So, I'm trying to get---

8 A ---rephrase it.

9 Q I'm -- so, did you have -- I guess my question is what
10 question -- did you question the 10 to 15 years or did you
11 just say okay, let's go see what the Judge will do?

12 A Let's go see what the Judge would do.

13 Q Okay. All right. So, is -- going back to the Motion
14 to Reconsider, you're stating your attorney did not give any
15 factors --

16 A That's correct.

17 Q -- of why the Judge should reconsider a sentence?

18 A That's correct.

19 Q Okay. What other factors do you think she should of
20 given?

21 A Well, considering that it was a criminal domestic
22 violence high and aggravated nature, she should have brought
23 forth that, and, the pointing and presenting, she should
24 have brought forth that, and that the solicitor stated that
25 she wasn't looking for the sentence to run consecutive but

Gary Thomas - Direct examination
by Ms. Moody

1 to run concurrently, which was stated in the, the, the
2 record.

3 Q In the plea?

4 A Yes, ma'am.

5 Q Okay. So -- okay. You said generally you wanted your
6 attorney to talk about the pointing and presenting.

7 What specifically did you want her talk -- to talk
8 about on the pointing and presenting?

9 A That it wasn't my first wife.

10 Q Okay. Well, who was the pointing and presenting with?

11 A It was a male.

12 Q Okay. Did you tell that to your attorney?

13 A Well, we never discussed that.

14 Q All right. And the other issue you discussed, you
15 mentioned, I'm sorry, that your -- you wanted your attorney
16 to explain to the judge was the --?

17 A Criminal domestic violence high and aggravated.

18 Q Okay. That's as to the charge?

19 A Yes, ma'am.

20 Q All right. So -- but you realize that you were before
21 the Court on attempted murder and the armed robbery --

22 A Yes, ma'am.

23 Q -- correct?

24 So, explain to the Court why she should of mentioned
25 the criminal domestic violence.

Gary Thomas - Direct examination
by Ms. Moody

1 A Cause I felt that the charge was over -- I was
2 overcharged on the attempted murder charge that, according
3 to, you know, Statute 16-25-10, criminal domestic violence
4 high and aggravated nature, that's the charge I should have
5 been charged with from the beginning.

6 Q Okay. And other than being a family household member,
7 what other basis would you say that -- I mean you've said
8 you were overcharged. I'm not sure what I -- you, you mean
9 by that.

10 MS. MCCALLISTER: Okay. Your Honor, I just -- I have
11 to enter an objection to this. I, I understand he's trying
12 to put his allegations out there, but I think she's asking
13 him about legal issues and legal conclusions that he maybe
14 can not---

15 MS. MOODY: I just want to hear -- what I'm trying to
16 get to is not asking him a legal conclusion. He has a
17 reason why he felt he should of been charged with it, and I
18 just wanted him to tell me the facts of what -- why he
19 should be charged with it.

20 THE COURT: So, your objection is overruled. I, I
21 think I understand where Ms. Moody's going.

22 Q So, can you please tell the Court why you think your
23 attorney should have -- well, excuse me. Let me go back.

24 You said you overcharged?

25 A Yes, ma'am.

Gary Thomas - Direct examination
by Ms. Moody

1 Q Are you talking about as to the sentence or what, what
2 are you talking about?

3 A The charge itself. The attempted murder charge.

4 Q So, do you feel that you would of gotten a lesser
5 sentence if it was CDV?

6 A Yes, ma'am.

7 Q Okay. So, CDV -- just a regular CDV?

8 A No.

9 Q CD---

10 A Criminal domestic high and aggravated nature.

11 Q Okay. And what is the sentencing range you -- do you
12 recall?

13 A I think it's anywhere between 10 to 20 years. I'm
14 not---

15 Q Okay.

16 A ---actually sure.

17 Q So, you wanted something less than 30?

18 A Correct.

19 Q Okay. And do you realize that your attorney did the
20 Motion to Reconsider to get you something less than 30?

21 A Yes, ma'am.

22 Q Okay. And so what other -- I mean I guess I'm trying
23 to understand why telling the Judge about CDV would have
24 made a difference if your only concern was the time.

25 A Could you repeat that question again, ma'am?

Gary Thomas - Direct examination
by Ms. Moody

1 Q I'm trying to understand why was it important for your
2 attorney to mention the CDV high and aggravated nature --

3 A Yes, ma'am.

4 Q -- when the -- what you were concerned about was the
5 amount of time that you received?

6 A I think it would of been a big difference in the, in
7 the time that I received if she had of mentioned it.

8 Q Okay. Is there any other mitigating circumstances or
9 facts that your attorney failed to mention to the Court than
10 the Motion to Reconsider?

11 A No, ma'am, that's it.

12 Q All right. Do you have any other issues for the Court?

13 A Excuse me.

14 (Pause.)

15 A Other than a conclusion, ma'am.

16 Q So, one point you did not go back to was you had -- you
17 don't remember having a defense discussion with your
18 attorney?

19 A Not to my recollection as far as a, a detailed defense.
20 Not to my recollection, ma'am.

21 Q All right. All right. So, now based on all of this,
22 you -- your attorney didn't do certain things as you have
23 relayed to the Court.

24 A Yes, ma'am.

25 Q How has this -- your attorney's failure to do those

Gary Thomas - Direct examination
by Ms. Moody

1 things caused you harm?

2 A Well, 40 years for me at the age of 55 is a life
3 sentence within itself, and I truly believe that, if we had
4 went to trial, the outcome would of been totally different.

5 Q So, it was the amount of time that you received?

6 A Yes, ma'am.

7 Q Okay. And is there any other harm that you suffered
8 due to your attorney's ineffective assistance of counsel?

9 A No, ma'am.

10 Q All right. And what relief are you seeking from the
11 Court?

12 A A new hearing.

13 Q A new---

14 A Trial.

15 Q ---trial.

16 Okay.

17 A A trial. I'm sorry. A trial.

18 Q All right. You want a new trial, and do you understand
19 that, if you are successful in this PCR hearing, you start
20 over?

21 A Correct.

22 Q Are you aware that that means any plea offers,
23 negotiations that you-all had with the solicitor's office,
24 you're not entitled to that?

25 A Correct.

Gary Thomas - Direct examination
by Ms. Moody

1 Q And, outside of that, is there anything else you would
2 like to relay to the Court about your attorney's ineffective
3 assistance of counsel?

4 A No, ma'am.

5 Q Thank you. No further questions. Please answer any
6 questions the State may have.

7 A Yes, ma'am.

8 THE COURT: Ms. McCallister.

9 MS. MCCALLISTER: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. MCCALLISTER:

12 Q Okay. Mr. Thomas, you -- do you recall the day that
13 you went in front of the Judge to do this plea?

14 You remember going into, into the courtroom?

15 A Yes, ma'am.

16 Q Okay. And do you remember the Judge kind of having a
17 conversation with you and asking you some questions?

18 A Correct.

19 Q Okay. And the Judge explained to you the potential
20 sentences that you could be facing, correct?

21 A That's correct.

22 Q And you knew that, when you went in there, that you
23 were pleading to this armed robbery, and you were pleading
24 to attempted murder, not a CDV?

25 A Yes, ma'am.

Gary Thomas - Cross-examination
by Ms. McCallister

1 Q Okay. And you told the Judge that that was what you
2 wanted to do?

3 A Yes, ma'am.

4 Q Okay. And you -- I think you said to Ms. Moody you
5 wanted to do that.

6 You, you were aware of this 25 year offer that was out
7 there.

8 A Yes.

9 Q And you turned that down?

10 A Yes.

11 Q Because you wanted to go in and ask the Judge for
12 something in the 10 to 15 year range?

13 A That's correct.

14 Q Okay. And your attorney actually did that, correct?

15 A Yes, ma'am.

16 Q Okay. But the Judge didn't go for it?

17 A Yes, ma'am.

18 Q Okay. And then when the Judge didn't go for it, your
19 attorney pretty much immediately filed a Motion for
20 Reconsideration, correct?

21 A Well --.

22 Q Within a few days.

23 A Somewhat. But I wasn't really aware that she was doing
24 that. As she stated, she said that Gary, Gary didn't know
25 that I was doing this. So, obviously I didn't have any

Gary Thomas - Cross-examination
by Ms. McCallister

1 knowledge of this until after the fact.

2 Q Okay. But you don't have an issue with the fact that
3 she filed that Motion for Reconsideration. You wanted her
4 to.

5 You wanted reconsideration, correct?

6 A Well, she filed it based upon what she felt I needed.
7 I didn't know anything about this Motion to, Motion to
8 Reconsider until after the fact.

9 Q Okay. So, you're saying, when you were -- when, when
10 you were brought to Court that day for the Motion for
11 Reconsideration, you didn't know what was going on?

12 A Yes, I did. I did know.

13 Q Okay.

14 A Yes.

15 Q So, you knew that it had been filed?

16 A Yes, ma'am, I thought she was talking about, you know,
17 doing the, the plea hearing. I'm sorry.

18 Q No.

19 Okay. So, after the plea hearing, your attorney told
20 you she was gonna file this Motion for Reconsideration?

21 A No, she did not tell me.

22 Q Okay. She told you about it after she actually had
23 already filed it.

24 A Well, actually I received the latter statement she had
25 done that.

Gary Thomas - Cross-examination
by Ms. McCallister

1 Q Okay. Okay. So, when you showed up that day, you
2 weren't surprised by what you were coming here for?

3 A No, ma'am, I wasn't.

4 Q Okay. Okay. And you had a chance to speak at your
5 plea, correct?

6 A Yes, that's correct.

7 Q And you had a chance to speak at the Motion for -- at
8 the hearing on the Motion for Reconsideration.

9 A Yes, ma'am.

10 Q Correct?

11 Okay. And you chose to spoke to the -- you chose to
12 speak to the Judge, correct?

13 A Well---

14 Q At the plea.

15 A At the plea, I, I, I spoke, but I was advised by my
16 attorney then not to, you know, speak---

17 Q Okay.

18 A ---at the Motion for -- Motion for Reconsideration.

19 Q Okay. But all these issues that you've brought up with
20 things that you thought your attorney should do about the
21 indictment, and this charge, that -- something that the
22 solicitor said, when you had your chance to speak, you
23 didn't bring those issues up to the Judge, did you?

24 A Well, during the motion for---

25 Q No, during the plea.

Gary Thomas - Cross-examination
by Ms. McCallister

1 A well, during the plea, no, I didn't.

2 Q Okay. I think that's all the questions I have.

3 THE COURT: Okay. Anything further, Ms. Moody?

4 MS. MOODY: No, ma'am.

5 THE COURT: All right. You can go sit back next to
6 your lawyer.

7 THE WITNESS: Thank you, ma'am.

8 THE COURT: Thank you.

9 Any additional witnesses, Ms. Moody?

10 MS. MOODY: No, ma'am.

11 THE COURT: Ms. McCallister.

12 MS. MCCALLISTER: Thank you, Your Honor.

13 Your Honor, the State would call Tracy Pinnock.

14 TRACY PINNOCK, being first duly
15 sworn, testified as follows:

16 THE CLERK: Thank you. Have a seat in the witness
17 stand please.

18 (WHEREUPON, the witness complies.)

19 THE CLERK: State your name for the record.

20 THE WITNESS: Tracy Pinnock.

21 DIRECT EXAMINATION

22 BY MS. MCCALLISTER:

23 Q Ms. Pinnock, did you represent Mr. Thomas on the
24 charges that we're here about today?

25 A I did.

Tracy Pinnock - Direct examination
by Ms. McCallister

1 Q And how did you come to represent him?

2 A Well, I was appointed to represent Mr. Thomas on his
3 case. He was originally arrested around August 23rd of
4 2014. When I went to meet with him initially, he informed
5 me that he was being represented by Mr. Roberson. So, I did
6 not go back and see Mr. Thomas until November. At that
7 point he contacted my office and said that he was not
8 retaining counsel. So, when we got that confirmation from
9 Mr. Thomas and Mr. Roberson, I went back to meet with him in
10 November.

11 Q Okay. And can you explain just sort of briefly the
12 facts of this case and how this arose?

13 A Sure. So, Mr. Thomas was charged with attempted
14 murder. Initially he was not charged with armed robbery I
15 don't believe. I think that was a directly presented
16 indictment, but the allegations were that Mr. Thomas had
17 assaulted his estranged wife with a 2X4 in her front yard or
18 the front yard of her parent's home. Ms. Thomas suffered
19 pretty significant injuries, was in the hospital for
20 approximately three months, and that's kind of the minimum
21 basis for the allegations.

22 Q Okay. And then what was the basis of the armed robbery
23 charge?

24 A Oh, it was reported that Mr. Thomas had taken his
25 estranged wife's purse after the assault, and left the scene

Tracy Pinnock - Direct examination
by Ms. McCallister

1 with it. So, that's where she -- that's why she directly
2 presented the armed robbery.

3 Q Okay. And did you talk about these two charges with
4 Mr. Thomas during your meeting with him?

5 A I did.

6 Q Okay. How many times did you meet with him total?
7 Do you know?

8 A Approximately, approximately 11 times is what I have
9 documented. Again, my first initial meeting was in
10 September. I did not go back to see him until November.
11 So, around 11 times between November and when he pled.

12 Q Okay. And did you discuss discovery with him?

13 A Yes, we did. We went over -- I did not receive the
14 discovery because I was not -- the Solicitor's Office did
15 not have me as the attorney of record. So, when I -- when
16 we reinitiated contact with Mr. Thomas, it looks like I got
17 the discovery at some point in the -- late November, early
18 December. I took the discovery down to the jail for our
19 initial review in January of '15.

20 Q Okay. And did you discuss any defenses that Mr. Thomas
21 might have to these two charges?

22 A We discussed a lot about Mr. Thomas' case. As far as
23 defenses go, I can't say that, you know -- what we pretty
24 much -- the, the basis of most of our conversations were the
25 allegations of infidelity in the relationship, and, you

Tracy Pinnock - Direct examination
by Ms. McCallister

1 know, kind of the actions and the concerns leading up to the
2 incident date.

3 It was made aware to me early on that Mr. Thomas wanted
4 to try to resolve his case outside of trial. We did discuss
5 trial later on during my representation. That was around
6 the time where the solicitor made the offer, and we
7 discussed either, you know, pleading to something or going
8 forward at trial. But that's really the only time that
9 trial -- a, a serious conversation about going to trial came
10 up was after they started making or after they made that
11 initial offer.

12 Q Okay. And the initial offer was 25 years?

13 A Yes.

14 Q Is that right?

15 Okay.

16 A And that is the only offer that she made in this case.

17 Q Okay. And he turned that offer down?

18 A Yes.

19 Q Do you recall his reasoning for doing so?

20 A Let me see what I have written down. According to my
21 notes, he indicated that he did not want to take a solid 25
22 because he wanted initially to ask for probation. My notes
23 indicated that I explained to him that we can't ask for
24 probation for armed robbery because it starts at 10, and his
25 response was -- that's when we started talking about either

Tracy Pinnock - Direct examination
by Ms. McCallister

1 going to trial or just having the opportunity to ask for
2 less than 25 during a plea.

3 Q Okay. You heard his testimony here today where we
4 talked about he felt like he shouldn't have been charged
5 with attempted murder and it should of been CDVHAN---

6 A Yes.

7 Q ---instead.

8 Did you have discussions with him about that?

9 A I do not recall any conversation we had about the
10 CDVHAN.

11 Q Okay. He never brought that up to you as an issue?

12 A No.

13 Q Okay.

14 A I don't have anything in my, in my notes about it at
15 least.

16 Q In your opinion, after getting the discovery and
17 reviewing the file, was the charge of attempted murder
18 appropriate?

19 A I mean legal definition wise, they could have -- you
20 know, they could charge him with attempted murder. I mean I
21 guess, by definition, they could of charged, you know,
22 lesser offenses with the assaults. They could of charged
23 CDVHAN. But factual, and by definition, they could also go
24 forward on the attempted murder.

25 Q Okay. So, that was a decision that was made by the

Tracy Pinnock - Direct examination
by Ms. McCallister

1 solicitor's office---

2 A Yeah, I had, had no control.

3 Q ---that you don't have any control over?

4 A No.

5 Q And that your client doesn't have any control over?

6 A No.

7 Q Okay. And once they filed that indictment for
8 attempted murder, you talked to him about what that meant,
9 and what those elements were that they would have to prove
10 in order to convict him of that?

11 A Yes, we did.

12 Q Okay. So, when he went into the plea that day to plead
13 to attempted murder, he knew what he was doing in terms of
14 what he would have to admit to.

15 Is that right?

16 A Yes.

17 Q Okay. Did he ever bring up this issue to you about the
18 signatures on the indictments?

19 A No, we never discussed any sort of signature.

20 Q Okay. Did you have any reason to believe that there
21 are -- that the indictments were defective in any way?

22 A No.

23 Q Okay. I assume -- did you look at those indictments
24 when you got the file or got discovery?

25 A We did. And when I say no, I'm, I'm, you know,

Tracy Pinnock - Direct examination
by Ms. McCallister

1 answering your question as far as signature goes. My notes
2 do indicate that I discussed something about the armed
3 robbery indictment with the solicitor. I don't have any
4 details written down about what our conversation was.

5 Q Okay.

6 A But I did discuss something about that indictment with
7 her prior to him coming to Court.

8 Q Okay. Okay. But the signature issue, he didn't raise
9 that to you, and that's not something that you thought was
10 an issue --

11 A No.

12 Q -- based on your overview?

13 A No.

14 Q Okay. Could the issue that you discussed with the
15 solicitor have been the issue of the wording of the
16 indictment that there was a codefendant?

17 A Yeah, I mean my notes -- yeah, just -- I discussed
18 issues with the indictment with the robbery charge.

19 Q Okay.

20 A It would of been the body.

21 Q Were you aware, through discovery in your discussions
22 with the solicitor, that they weren't alleging that there
23 was a codefendant?

24 A Yes, there's no codefendant involved in this case.

25 Q And did you explain that to Mr. Thomas, that there was

Tracy Pinnock - Direct examination
by Ms. McCallister

1 no codefendant?

2 A The best I can say is I would -- believe we talked
3 about that.

4 Q Okay.

5 A But there's never been any allegation of a codefendant.

6 Q Okay. So, in your opinion, that was just like whoever
7 was typing up the indictment just made an, an error when
8 they were typing it?

9 A That's what I believe it was.

10 Q Okay.

11 A Yes.

12 Q And the factual basis that was presented for that
13 charge during his plea did not have any allegations of a
14 codefendant?

15 A No.

16 Q Okay. Okay. So, you guys -- you, you get to the plea.
17 He turns down the 25 year offer, and ultimately decides just
18 to plead straight up.

19 A Yes.

20 Q Okay. Did you explain to him what that meant to plead
21 straight up without a recommendation or negotiation?

22 A I did. I explained that to him at the detention center
23 prior to him coming to Court, and then I would of explained
24 it to him again when he got to the courthouse. When I go
25 through the advice of rights, I discuss, you know, all

Tracy Pinnock - Direct examination
by Ms. McCallister

1 aspects of going in and pleading guilty straight up. I did
2 explain to him that the solicitor was gonna be asking for 30
3 years because that's what she told me she was gonna ask for.
4 So, having that knowledge, I passed that knowledge along.

5 We then discussed what we were going to ask for because
6 I advise all of my clients who are entering into what we
7 call straight up pleas is it's better to ask for something
8 than to leave it just wide open.

9 Q Uh-huh. (Affirmative).

10 A So, he and I discussed what we would be asking for as
11 far as the sentence goes.

12 Q Okay. And that was 10 years, is that right, or 10 to
13 15 years?

14 A I believe it was 10 to 15.

15 Q Okay. And that was what Mr. Thomas told -- conveyed to
16 you that he was comfortable with in terms of the sentence?

17 A Yes, that's ultimately---

18 Q Okay.

19 A ---what we agreed to ask for in holding.

20 Q Okay. Mr. Thomas spoke at the plea, correct?

21 A Yes, he did.

22 Q Can you talk about that?

23 Were you aware that he was going to speak?

24 A I was aware that he was intending to address the Court,
25 yes.

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by Ms. McCallister

1 Q Were you aware of what he was going to say to the
2 court?

3 A No, I was not.

4 Q Okay. Did you ask him what he was going to say before
5 you guys went in there?

6 A I did.

7 Q Okay.

8 A I asked him at the jail before he came over to plea,
9 and then I asked him again that morning, in the holding
10 cell, what he was planning on saying to the Judge.

11 Q Okay. In your opinion, did Mr. Thomas' presentation to
12 the Judge have an effect on the sentence that was ultimately
13 rendered?

14 A Unfortunately I think it did.

15 Q Okay.

16 A I don't believe that it was expressed in the way that
17 Mr. Thomas was intending on it -- on, on -- intending to
18 express himself. So, I do believe it had a negative effect
19 on his sentence.

20 Q Okay. And did the -- okay. So, you go in there and
21 the solicitor asks for 30 years like she told you that she
22 would, correct?

23 A Yes.

24 Q And you asked for your 10 to 15?

25 A Yes.

Tracy Pinnock - Direct examination
by Ms. McCallister

1 Q And Mr. Thomas speaks and then, ultimately, the Judge
2 decides that it's gonna be 30 and a consecutive 10---

3 A Correct.

4 Q ---right?

5 Did the judge explain her reasoning for that too?

6 Do you recall?

7 A If -- I can go back and check. Give me a second.

8 (Pause.)

9 A I don't personally recall -- I mean the transcript that
10 I have does not say that she explained anything at that
11 point.

12 Q Okay.

13 A But she did, when we came back for the Motion to
14 Reconsider, address her reasonings for giving that kind of
15 sentence.

16 Q Okay. And maybe I'm -- maybe I'm getting myself
17 confused but okay. So, let's, let's just stop there and
18 talk about that then.

19 So, she gives this 40 year sentence.

20 A Yes.

21 Q And you filed a Motion for Reconsideration within a few
22 days after the plea.

23 Is that right?

24 A Yes.

25 Q Okay. Did you tell Mr. Thomas that you were gonna file

Tracy Pinnock - Direct examination
by Ms. McCallister

1 that motion?

2 A I don't recall ever telling him that I was going to.

3 Q Okay.

4 A But I just filed it.

5 Q Okay. Did you let him know you had filed it once it
6 was filed?

7 A Yes, I did.

8 Q Okay. Did he ever -- did you have a chance to talk to
9 him before that motion was heard about what -- to explain to
10 him what the motion would be about?

11 A I spoke to him in the holding cell on the day that the
12 motion was scheduled for before coming up to Court.

13 Q Okay. And what did you tell him about the motion?

14 A I mean I would have just explained to him what the
15 motion was for and why I filed it.

16 Q Okay.

17 A And then we discussed some of the things that we were
18 going to be talking about, and there was some phone calls
19 that the solicitor had informed me that she was gonna be
20 presenting to the Judge during the motion. So, he and I
21 discussed the content of those phone calls.

22 Q Okay. And what was, what was the content of those
23 phone calls just generally?

24 A Generally, there was one to his dad, and these were
25 all -- these were calls made after the initial plea.

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by Ms. McCallister

1 If you give me a second, I can go through my notes.

2 (Pause.)

3 A In some of them -- I mean in, in most of them they're,
4 you know, they're speaking about just their, their faith,
5 and, you know, not giving -- not losing the faith.

6 Q Well, maybe I can help you out and rephrase the
7 question.

8 A Okay.

9 Q The, the calls that were played, these were jail calls.
10 Is that right?

11 A Yes.

12 Q From him?

13 A They were calls made from Alvin S. Glenn.

14 Q From -- to or from him and his family while he was in
15 jail after the plea.

16 Is that right?

17 A Yes.

18 Q Okay. And the solicitor played those calls during the
19 Motion for Reconsideration because, at that point, the
20 State -- even though they had only been asking for 30, they
21 were essentially asking the Judge not to reconsider.

22 Is that right?

23 A Yes.

24 Q Okay. And you've discussed those phone calls with him
25 before he came up to do the motion.

Tracy Pinnock - Direct examination
by Ms. McCallister

1 Is that right?

2 A Yes, I did.

3 Q Okay.

4 A And I don't believe they were played in Court. I
5 believe she gave them to the judge to listen to after.

6 Q Okay.

7 A But I listened to them, took notes on them, and
8 discussed them with Mr.---

9 Q Okay.

10 A ---Mr. Thomas.

11 Q So, in your opinion, those phone calls, was there
12 something in those phone calls that was not helpful to Mr.
13 Thomas?

14 A Best I can remember, honestly no.

15 Q Okay.

16 A I mean I didn't think they were that damaging.

17 Q Okay.

18 A So, I didn't -- I mean I don't really understand her
19 ultimate purpose in those. I didn't think they were that
20 detrimental.

21 Q Okay. And you were able to present your own arguments
22 and your own reasoning for reconsideration.

23 Is that right?

24 A Yes.

25 Q Do you recall kind of what your argument was based on?

Tracy Pinnock - Direct examination
by Ms. McCallister

1 A Well, I filed the motion because, you know, this 40
2 years kind of shocked me. I was not ex -- I was not
3 expecting it. So, I mean we talked about -- nobody brought
4 up the fact that there had been a plea offer in the
5 original, in the original plea. We talked about -- let's
6 see.

7 Just -- from reviewing the transcript, just -- I think
8 I brought up that it was going to be, you know, the
9 equivalent of a life sentence for him based on his age. I
10 tried to address the issues that I, that I saw when he was
11 addressing the Judge the first time and I tried to fix it,
12 and just talking to -- talking about him is the best that I
13 can recall.

14 Q Okay. And ultimately the Judge kind of then, in the
15 Motion for Reconsideration, explained the basis for that
16 sentence?

17 A Yes, she did.

18 Q Is that right?

19 And her explanation was -- it was partly to do with the
20 fact that she felt like Mr. Thomas was not showing
21 appropriate remorse.

22 Is that right?

23 A Correct. That's how I interpreted it also.

24 Q Okay. And did Mr. Thomas, when you talked to him that,
25 that morning before the motion, did he -- did you guys talk

Tracy Pinnock - Direct examination
by Ms. McCallister

1 about the issue of -- that he brought up that he wanted you
2 to talk about the pointing and presenting charge or the CDV
3 charge?

4 Did he talk about that at all?

5 Do you recall?

6 A Give me one second. I don't have anything written down
7 in my notes from that day that we -- about the pointing and
8 presenting or the CDV.

9 Q Okay. So, to your knowledge, he didn't tell you that
10 he wanted that addressed in the motion?

11 A No, not that I can recall, no, ma'am.

12 Q Okay. And let's talk about that pointing and
13 presenting issue a little bit.

14 You did object to the way the solicitor characterized
15 that charge during that plea.

16 Is that right?

17 A Yeah, I mean that's what the transcript says. I didn't
18 have an independent memory of doing it.

19 Q Okay. And you tried to -- you -- but he did have a
20 previous charge.

21 Is that right?

22 A Yes, he did.

23 Q Okay. So, the issue was only the issue of who the
24 victim was. Not the fact that there was this previous
25 charge on his record.

Tracy Pinnock - Direct examination
by Ms. McCallister

1 A Correct. He did have a conviction. We just didn't
2 have any information provided to us that the -- you know,
3 who the victim in that case was, and---

4 Q Okay.

5 A ---I don't recall ever asking Mr. Thomas who the victim
6 in that case was.

7 Q Okay. And did he -- do you recall him saying that that
8 was a problem for him or that was an issue for him --

9 A No.

10 Q -- the way the solicitor characterized that charge?

11 A No.

12 MS. MCCALLISTER: Okay. Beg the Court's indulgence,
13 Your Honor.

14 THE COURT: Yes, ma'am.

15 (Pause.)

16 Q So, when the solicitor said that about that original
17 charge, you don't recall him asking -- saying to you during
18 the plea hey, we should move to continue this?

19 A No.

20 Q Okay. Would you -- do you think that would of been a
21 successful motion had you made that motion?

22 A I, I don't think so.

23 Q Okay. When Mr. Thomas went into the courtroom to enter
24 this plea the first time, whose decision was that?

25 A It was his.

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by Ms. McCallister

1 Q And he -- do you feel that he understood the charges
2 that he was pleading to, and the potential sentence that he
3 was exposing himself to?

4 A Yes, he did.

5 MS. MCCALLISTER: Okay. That's all I have, Your Honor.
6 Thank you.

7 THE COURT: Cross-examination.

8 MS. MOODY: Thank you.

9 May it please the Court.

10 CROSS-EXAMINATION

11 BY MS. MOODY:

12 Q Ms. Pinnock, you're not testifying that it was Mr.
13 Thomas' responsibility to discern whether or not he should
14 accept a plea?

15 A Whether it was his responsibility to decide if he was
16 going to plea?

17 Q To accept the plea -- well, let me rephrase it.

18 A Okay.

19 Q It wasn't his responsibility to be able to understand
20 the -- whether or not he should of accepted the 25 years
21 versus pleading straight up?

22 A Well, that is his decision and I would of -- I
23 discussed that with him about what benefits, and, you know,
24 the consequences, you know, what the evidence in the case
25 was, what we were working, you know, what we were fighting

Tracy Pinnock - Cross-examination
by Ms. Moody

1 against, and what we had to work with. So, the decision to
2 accept an offer and not accept an offer is always my
3 client's decision.

4 Q Right.

5 A I never tell anybody to do anything.

6 Q Okay. But you're giving him advice, correct?

7 A Yes, I advise him.

8 Q Okay. And when you advised him, did you ever think
9 that you might of advised him to take the recommendation
10 from the State, but you-all could ask for the 10 to 15 years
11 as opposed to pleading straight up?

12 A No, the 25 that was offered to him was a negotiated
13 sentence. So --.

14 Q Did you explain that it was a negotiated sentence?

15 A Yes, I explained to him that his offer was 25 on both
16 charges, and, during that meeting, again, he said he did not
17 want to take it so that we could have the opportunity to ask
18 for less because, in that situation, it was either 25 or
19 nothing. So, to ask for less, he decided he wanted to go in
20 straight up after we ended that conversation.

21 Q So, when you declined the 25, did you make a counter to
22 the State?

23 A I don't have anything listed here other than I did
24 speak with the solicitor to see if she -- if there was
25 anything that I could do to get her to reduce the attempted

Tracy Pinnock - Cross-examination
by Ms. Moody

1 murder and she said no.

2 Q Did you counter with a specific offer of a
3 recommendation versus a negotiated plea of 25 years with the
4 ability to ask for the 10 to 15 years or whatever sentence
5 you thought were -- was appropriate?

6 A Did I ask her for a cap of 25?

7 No, I don't recall ever doing that.

8 Q No, I'm not saying a cap. A recommendation of 25
9 years.

10 A No, I, I don't recall ever having that conversation
11 with her, no.

12 Q So, the only thing that you asked for was or the only
13 thing you did was you declined the plea offer, correct?

14 A I told her that Mr. Thomas was not accepting the plea
15 after he said he was not accepting the plea, right.

16 Q All right. So, you declined the plea offer?

17 A Uh-huh. (Affirmative).

18 Q All right. And then tell me again what you said in
19 terms of the charges, just to plead straight up?

20 A No. So, let me get to that date in my notes.

21 According to my notes during that meeting, you know, I
22 relayed the offer to him, which was a 25 on both charges.
23 He told me that he would rather go in there straight up to
24 see what happens, and see if we could ask for less.

25 Q well, let me stop you right there.

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by Ms. Moody

1 Did he tell you straight up?

2 A Yes.

3 Q So, he used the term straight up?

4 A Yes, I explained the three different types of pleas,
5 how we typically categorize them. There's straight up.

6 There's recommendations and negotiations. So, I explained
7 that to everybody when we're, when we're talking about
8 negotiated pleas or recommendations or going straight up.

9 At some point he said that he wanted to go straight up or,
10 you know, be able to ask for probation. I explained to him
11 that probation wasn't an option because we were starting at
12 10, and then the conversation ended with him saying that he
13 wanted to go straight up and see what happens.

14 Q But what did you tell Megan Walker?

15 I guess that's what---

16 A Uh-huh. (Affirmative).

17 Q Megan Walker, what did you tell her in terms of he
18 declines the plea, and he'll plead straight up?

19 A I don't, I don't have the exact words that I used when
20 I was talking to her. I can't answer that.

21 Q Okay. So, you don't recall whether then you gave
22 another recommendation -- I mean, excuse me, a counter?

23 A I don't have anything written down. So, I can't answer
24 that.

25 Q Okay. So, was that -- that was the only offer I

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by Ms. Moody

1 believe you testified, correct?

2 A Yes, that's the only offer she ever extended to him.

3 Q All right. And you didn't tell the Judge, during the
4 plea, about the plea offer that you originally received?

5 A No, I just, for some reason, didn't bring that up.

6 Q Okay. And you didn't bring up the issue of the
7 indictment being incorrect to the Judge or the --?

8 A No. No, there's nothing in the record that says we
9 talked about the indictment, no.

10 Q And you didn't think it was important to correct the
11 indictment?

12 A well, I'm not saying that I -- my note says that I
13 spoke to Ms. Walker about the body of that indictment. What
14 we talked about and what the conclusion was I don't have
15 anything written down about. So --.

16 Q But I'm not talking about what you talked about with
17 Ms. Walker. I'm talking about what you talked about with
18 the Judge.

19 At the time that Mr. Thomas was entering his plea, I'm
20 asking did you not think it was important to note to the
21 Court that the indictment was incorrect as stated that he
22 had a codefendant?

23 A I -- the record doesn't say I said anything. I don't
24 have any explanation I can give you as to why it was not
25 addressed.

Tracy Pinnock - Cross-examination
by Ms. Moody

1 Q But did you think -- do you think that's important now
2 to inform the Court that the indictment might be incorrect?

3 A I mean I, I don't, I don't know really how to answer
4 that. It was never alleged during his case or during the
5 plea that he had a codefendant. So, I can't say that -- I,
6 I don't know. That's the best I can say.

7 Q Okay. I'm -- I guess I'm asking that because the
8 indictment's the official charging paper, and that's the
9 document, if you went to trial, you'd have to have an
10 indictment, correct?

11 A Right.

12 Q Okay. And so the Court is sitting and reviewing the
13 indictment and going over the charges with the client having
14 a conversation, and different things that are -- these
15 things are -- issues.

16 I'm just saying don't you think that that's important
17 to inform the Court if the State has not informed the Court?

18 A Yeah, I mean if there's a defect, yes, we probably
19 should of had it corrected.

20 Q All right. You earlier testified that -- well, nobody
21 brought up the 25 years, that there was a 25 year offer.

22 You didn't bring it up during the plea, and you didn't
23 bring it up in the Motion to Reconsider, did you?

24 A I did bring it up in the Motion to Reconsider. I did
25 not bring it up in the original guilty plea because we were

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by Ms. Moody

1 asking for less than 25. We did not want her to sentence
2 him to 25. We wanted less than that.

3 Q Right. I understand that.

4 A So --.

5 Q But he was facing potentially 60 years, and wouldn't it
6 have given the Court some kind of idea where the State
7 originally was, and why you decided to accept or come before
8 the Court on a straight up plea?

9 A I mean I guess it could of had an effect on her. I, I
10 don't really know, but I did not bring up that offer because
11 we were trying to get less than that. But I did bring it up
12 in the Motion to Reconsider.

13 Q Even though the State offered -- requested 30 years,
14 that 25 is less than the 30 years, correct?

15 A Correct. But Mr. Thomas had told me he did not want
16 the 25. So, we were trying to get less.

17 Q But he didn't want the 30 either, did he?

18 A No.

19 Q Okay. So, telling the Court that the State originally
20 offered 25 might of like brought her down from the 30 too,
21 correct?

22 A I guess it could have. I, I don't really know if she
23 would of considered it.

24 Q But you didn't tell the Judge about that until the
25 Motion to Reconsider, correct?

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by MS. Moody

1 A Right. I did not bring it up in the original plea.

2 Q All right. And that motion was not successful,
3 correct?

4 A The Motion to Reconsider?

5 Q Right.

6 A Correct.

7 Q So, when you again hear this is a situation where you
8 didn't tell somebody something, you didn't tell Mr. Thomas
9 that you were filing a Motion to Reconsider or discuss the
10 Motion to Reconsider before you filed it?

11 A No. So, after the 40 year sentence, I said -- I mean
12 that was a shock to me. So, I went ahead and filed the
13 Motion to Reconsider so we could try to go in and get a
14 lesser sentence cause I felt it was appropriate to ask.

15 Q Okay. But you didn't think it was important to talk to
16 your client about what else he would of like wanted to
17 correct or consider -- have the Court consider --
18 reconsider?

19 A I spoke to him before we went up into Court.

20 Q But the day of.

21 That's the day of, right?

22 A Correct, that morning of, in holding, we discussed what
23 we were going to present to the Judge, what I was planning
24 on saying to the Judge. So, I did speak to him before we
25 went in there. we didn't have any new information to

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by Ms. Moody

1 provide to the Court. It was literally me just trying to
2 see if the Judge would reconsider it because I considered 40
3 years kind of a, a shock.

4 Q So, what, if anything, do you think the pointing and
5 presenting -- the effect on the judge hearing that?

6 Do you think that it affected the Judge?

7 A I, I don't know.

8 Q But you thought enough of it to object to it in the
9 record, correct?

10 A Well, that piece -- that one statement that she made
11 about who the victim was in the case --

12 Q Uh-huh. (Affirmative).

13 A -- I had never talked to Mr. Thomas about it. He had
14 never told me who the victim in that case was. I was
15 unaware that she was going to be naming an individual from
16 another case. I knew that she was gonna be reading his, his
17 record out to the Court because that's common practice for
18 anybody who pleads. But I did not know that she was gonna
19 be going into specifics. So, that's why I mentioned that we
20 don't have any information as far as the specifics of the
21 case.

22 Q Okay. So, after hearing that and your filing the
23 Motion to Reconsider, you didn't think it would be important
24 to know the specifics of that pointing and presenting to try
25 to influence the Judge to give a lesser sentence?

Tracy Pinnock - Cross-examination
by MS. Moody

1 A No, I, I did not address that.

2 Q So, what specifically did, did you think -- what -- I
3 mean I know, from the transcript, that you gave some
4 information.

5 what was your strategy or your thought process as to
6 what you were gonna say to the Judge to get her to
7 reconsider the sentence?

8 A Honestly, my goal was to try to, for lack of a better
9 term, fix what had been presented by Mr. Thomas. That was
10 my ultimate goal.

11 Q Fix what was presented by Mr. Thomas?

12 A Yes, ma'am. My personal feeling about it is what -- I
13 thought things kind of turned for the worse because I tried
14 to explain to the Court that I, I felt that he was
15 expressing -- trying to express himself in some way that was
16 not expressed the way he intended it to. So, I was trying
17 to assist him in what I believed he was trying to address to
18 the Court in a -- I guess be more cohesive or coherent
19 fashion to see if that would convince her to reduce the
20 sentence.

21 Q So, you didn't think that the pointing and presenting
22 could of also like impacted that situation seeing as this
23 was a subsequent wife, and it gives off the impression that
24 this is -- if he's displeased, that that's a -- he -- it
25 results in some level of violence?

Tracy Pinnock - Cross-examination
by Ms. Moody

1 A No, I, I did not bring that up. That was not part of
2 my plan.

3 Q So, let me be correct here. You didn't bring up the
4 issue with the indictment. You didn't bring up the plea
5 offer that was originally given to Mr. Thomas that was less
6 than what the State asked for in Court. You did not bring
7 up or research the issue on the pointing and presenting, and
8 you did not consider requesting the ability to act -- taking
9 the -- or you didn't advise the client that he could take a
10 recommendation and still ask for a lesser time in his
11 sentence?

12 A He was not offered a recommendation of 25. He was
13 offered 25.

14 Q Right.

15 A That's a negotiated sentence. A negotiated sentence is
16 we can not ask for less. It's an agreed upon number.

17 Q I can -- I understand that. I'm clear on what a
18 negotiated versus recommendation is.

19 I'm saying your counter to the State would of been
20 we'll take a recommendation of 25, but we want to ask to --
21 ask for something less?

22 A I don't have anything saying that I ever asked Ms.
23 walker for what you're describing as a cap of 25.

24 Q Right.

25 So---

Tracy Pinnock - Cross-examination
by MS. Moody

1 A We did not---

2 Q The only---

3 A I don't have anything saying I, I did that, no.

4 Q It was one offer and then it was pleading straight up,
5 correct?

6 A Based on my notes, Mr. Thomas made that decision.

7 Q Right.

8 After being advised by you, correct?

9 A Yes, we discussed it. Again, we talked about the
10 offer. We talked about the consequences. We discussed
11 going to trial. He made the decision that he wanted to go
12 in, plead, and see what happened.

13 Q Now, earlier you, you testified about discussing, or
14 maybe that was Mr. Thomas, you discussed the case with your
15 colleagues.

16 A Yes.

17 Q Okay. And what did y'all discuss?

18 A So, anytime that we have a case that looks like it
19 might be proceeding to trial or if we just need a second
20 opinion on something, we have the ability in my office to
21 bounce ideas off of each other. So, to make sure I was not
22 missing something or to see if anybody else had any ideas
23 of, you know, something that I could present as far as a
24 defense or mitigation, I ran Mr. Thomas' case by one or two
25 of my colleagues trying to figure out what, what it is we

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by Ms. Moody

1 could possibly do as far as a defense goes.

2 So, that's what I mean when I say, you know, I
3 brainstormed. We discussed it trying to figure out, you
4 know, what our best course of action would be, what, if any,
5 legal issues we had just to kind of get an outsider's
6 opinion cause sometimes a second mind sees something that --
7 you know, an outsider can see more than the person whose
8 been looking at it for weeks and weeks and weeks.

9 Q And so what was the outcome of those discussions?

10 A We -- nobody was really able to come up with a great
11 theory of defense if we had proceeded to trial. The, the
12 evidence in the case was not good. So, that's just what we
13 were left with.

14 Q And so what, if anything, did y'all discuss about
15 mitigation?

16 A Well, in mitigation, you know, I dis -- I discussed Mr.
17 Thomas' background with him. I knew---

18 Q But not with him. I'm, I'm saying mitigation with your
19 colleagues.

20 If you ran the case by your colleagues --

21 A Uh-huh. (Affirmative).

22 Q -- I'm assuming you might of talked about mitigation --

23 A Uh-huh. (Affirmative).

24 Q -- as to trial versus plea.

25 Did you-all discuss mitigation?

Tracy Pinnock - Cross-examination
by MS. Moody

1 A I -- I'm sure we talked about something. I couldn't
2 tell you exactly what.

3 Q I mean -- so, I guess I'm trying to get around to how
4 it became a good decision for him to plead straight up. I
5 mean after you explained to him, and he made his decision, I
6 get all that.

7 A Uh-huh. (Affirmative).

8 Q But there was no other counter on the 25 negotiated,
9 and you testified that you did not go back and ask or try
10 and get another deal. You just said straight up.

11 A No, I said I don't recall if I had any other
12 conversations with Ms. walker about any other offers. So,
13 it was not -- just to, I guess, back up and clarify some
14 things, it was not, you know, on September 26th of '15,
15 Mr. Thomas said that I'm pleading guilty and he was brought
16 to Court the next day. We met a number of times after that,
17 and, at some point, he told me -- well, we discussed, you
18 know, why, why don't we just go to trial because there's no
19 true benefit of pleading.

20 He told me that he would like to talk to his family,
21 and then let me know what his final decision was. I went
22 back and checked on him to see what his final decision was.
23 He told me, at that point, that he had decided to plea. So,
24 it was not a same day oh, we're just going in there and
25 saying we're not doing this. It was we discussed it.

Tracy Pinnock - Cross-examination
by Ms. Moody

1 Q I'm---

2 A He had some time. He talked to his family, and that's
3 the decision he came to. I can't explain why he came to
4 that decision.

5 Q well---

6 A So --.

7 Q But that's not what I'm getting at. I'm not getting to
8 the point that he came to that decision. I understand that
9 it might of been some time.

10 A Uh-huh. (Affirmative).

11 Q And I, I didn't mean to imply that there, you know, it
12 was like one, one discussion and then you come in the
13 courtroom. That's not what I'm implying.

14 I'm asking, in terms of going back and forth on plea
15 offers, you don't necessarily have to give a counter on that
16 day that you receive the plea offer.

17 A Uh-huh. (Affirmative).

18 Q Quite possibly, you don't -- I mean you might come back
19 a week later, correct---

20 A Right.

21 Q ---and give an offer, a, a counter.

22 A Uh-huh. (Affirmative).

23 Q And I'm not talking about his thought process.

24 So, I'm asking you what, if any other solution, did you
25 present to Mr. Thomas before he ultimately said he was going

Tracy Pinnock - Cross-examination
by MS. Moody

1 to accept -- he was gonna go forward on a plea and plead
2 straight up?

3 A Do you want me to -- I'm not sure if what I have
4 written down in my notes, but if you give me a minute I can
5 go back through everything, and see exactly what we talked
6 about.

7 Q Well, let me just ask you this.

8 Is it in your normal practice to write down the offers
9 that you received from the State?

10 A I typically will get those either through email or
11 through a conversation. If I get the offers, I will write
12 them down somewhere so I can make sure to relay it properly
13 to my client, yes.

14 Q And, likewise, if you have a counteroffer, you would
15 write that down too?

16 A If we discussed counteroffers, yes, I would of written
17 that down.

18 Q All right. And so, here in your notes, the only offer
19 you discussed with him was a 25 negotiated. There was no
20 counteroffer, and then there was no other kind of
21 combination of how to request the 10 to 15 versus the
22 State's request for 30 concurrent on the record.

23 A I just need to refer back to see if I wrote anything
24 down.

25 (Pause.)

Tracy Pinnock - Cross-examination
by Ms. Moody

1 A No, ma'am, the only thing that I have written down as
2 far as numbers or, you know, anything that we had planned
3 was to ask, ask for the minimum concurrent on both charges.

4 Q And the minimum on the attempted murder is what?

5 A Is it two?

6 I think, I think it's two.

7 Q And you didn't ask for two?

8 A We couldn't ask for two because he's charged with armed
9 robbery. So, we can't ask for anything less than 10.

10 Q Okay. So, I guess the correction to your -- which the
11 minimum -- I'm just trying to be clear on what you're
12 asking.

13 A The minimum that we can ask for---

14 Q would of been 10?

15 A Right, which is---

16 Q Based on the armed robbery being the lowest?

17 A Right.

18 Q Okay. All right. No further questions. Thank you.

19 THE COURT: Anything further?

20 MS. MCCALLISTER: Just very briefly.

21 REDIRECT EXAMINATION

22 BY MS. MCCALLISTER:

23 Q This 25 year offer, did you negotiate that or did the
24 solicitor just bring that to you?

25 How did that come about?

Tracy Pinnock - Redirect examination
by Ms. McCallister

1 A No, I, I don't have every conversation I ever had
2 written down with the prosecutor. So, we were going -- we
3 had discussed Mr. Thomas' case a number of times, and she
4 came around to offering him the 25 after a number of
5 discussions. So, that's how that came up. She didn't just
6 approach me with it. We had been discussing Mr. Thomas'
7 case for some time before that ever happened.

8 Q Okay. So, at that point, you, you had these
9 discussions with her. So, you kind of knew where she was on
10 this case. You kind of knew her feeling about this case.

11 A Yes.

12 Q And you said you talked to her about reducing the
13 attempted murder charge, and she was not willing to do that.

14 A Yes, she refused and she, she -- my notes say that she
15 is 100 percent not interested --

16 Q Okay.

17 A -- in reducing anything.

18 Q Based on your discussions with her, did you feel like,
19 if you had offered a plea to 10 years, that she would of
20 accepted that as a counteroffer?

21 A No.

22 Q Okay. And did you explain that to Mr. Thomas?

23 A I would have explained that at some point especially
24 when I brought him the 25 year offer. This was not a
25 situation that Ms. Walker had ever made -- had ever made me

Tracy Pinnock - Redirect examination
by Ms. McCallister

1 believe that she was ever going to agree to the minimum.

2 Q Okay. And I think you said you felt that the plea
3 really turned bad when Mr. Thomas started talking?

4 A Correct.

5 Q So that would of been after the solicitor's
6 presentation?

7 A Correct.

8 Q Is that right?

9 Okay. So, after that pointing and presenting charge
10 was brought, you still felt okay after that?

11 A I, I did. Like -- and I'll keep saying that I, I was
12 shocked at 40. That's not what I would of expected from a
13 plea.

14 Q Right.

15 A So --.

16 Q Which is why you filed the Motion for Reconsideration?

17 A Correct.

18 Q Okay. And during the Motion for Reconsideration, the
19 Judge indicated, from your recollection or I guess the
20 transcript -- it's in the transcript, but the Judge
21 indicated that it had to do with the, with the fact that she
22 felt like he hadn't shown remorse in his presentation to
23 her?

24 A That's pretty much what she said.

25 Q Okay. Thank you. That's all.

1 THE COURT: Step down.

2 Any additional witnesses from the State?

3 MS. MCCALLISTER: No, Your Honor.

4 THE COURT: Ms. Moody.

5 MS. MOODY: Thank you, Your Honor.

6 Based on the testimony that you've heard today, I would
7 ask the Court grant the -- Mr. Thomas his relief that he
8 sought.

9 In essence, this case appears to be, and this may not
10 have been stated in the record, and you heard the testimony,
11 it was not a trial situation based on what counsel testified
12 that she discussed the case with her -- prior -- with her
13 colleagues about any possible defenses that could aid Mr.
14 Thomas in this case. So, basically what it leads to is this
15 particular case being a plea.

16 Based on the testimony that was presented, there's
17 several things that I guess I would imagine or I think that
18 would cause the defense counsel to be adversarial in the
19 process because we have a duty to be adversarial in
20 representing our clients. Adversarial not in the sense that
21 they're uncivil, but adversarial in terms of trying to do
22 the best for their attorney (sic), and I think it hinges on
23 mitigation.

24 I think, in this particular case, and the testimony
25 came that nobody brought it up, that's essentially what

1 happened here. Nobody brought up anything on behalf of Mr.
2 Thomas in terms of the objection to the pointing and
3 presenting, the information was not researched, and I
4 understand counsel did not look at it on the record and say
5 specifically because she did not know that the State was
6 gonna bring up the pointing and presenting and get into the
7 specific details of it. She neither asked for a continuance
8 nor did she bring it up in the Motion to Reconsider. Matter
9 of fact, she didn't tell Mr. Thomas that she was filing a
10 Motion to Reconsider or even discuss with Mr. Thomas
11 anything else that he might have wanted the Court to know in
12 reconsidering his sentence.

13 As you heard the testimony, she was concerned about
14 what he said in mitigation. Mr. Thomas is not the lawyer
15 here. Mr. Thomas is the client. And, granted, by the facts
16 of the case, yes, they were not the best set of facts to be
17 working with coupled with there was not really a particular
18 defense that could be asserted on his behalf and taken to
19 trial.

20 He was before the Court, and they have been a plea
21 offer presented to him for 25 years. Granted it was
22 negotiated. But they're so many different alternatives to
23 the State having the ability to ask for the 25 and
24 presenting their case, and then having Mr. Thomas ask for
25 the 10 to 15 years. Whether or not he would of gotten it is

1 not up to Megan walker and the State to decide what the
2 sentence is. And so there were other ways of helping and
3 aiding Mr. Thomas in this case.

4 But going back to the mitigation point, the plea offer
5 wasn't brought up. The pointing and presenting issue was
6 not researched. The Motion to Reconsider was not discussed
7 with the client until the day of.

8 So, if there was any other information that Mr. Thomas
9 could of provided her and assisting in his defense, albeit
10 to get a lower sentence, it was not presented. In fact, Mr.
11 Thomas went -- the harm that he has is that he went before
12 the Court on a straight up plea, and he received not a
13 concurrent sentence, but a consecutive sentence. And I
14 would say, because nobody brought up or raised issue with
15 some of the things that were said in the plea, and they
16 didn't do it in the reconsideration, and granted whatever
17 Mr. Thomas said in the record that was so impactful (sic) on
18 the Judge to give him a consecutive sentence, and it was a
19 shock as the -- Ms. Pinnock said. It was a shock to her.

20 He still deserved somebody standing in Court with him
21 offering mitigation to help him accomplish what he thinks is
22 a reasonable sentence. Granted he might not get it, but
23 that's what he wanted was 10 to 15 years.

24 And so, Your Honor, I think that he went in off of a --
25 well, there just was no attempt to be adversarial. State v.

1 Ard. There was no attempt to be adversarial on his behalf.

2 There was a criminal record that was there. There was
3 no investigation of it, and even at the least, even if you
4 didn't think to look at it before the plea, during the plea
5 when the solicitor went into the specific details, there was
6 no research on it.

7 And so the defense, whether or not they think that --
8 they agree with whatever's in the criminal record or the
9 facts or what have you, they still have a duty and
10 obligation to be adversarial on behalf of the defendant
11 because the defendant's life, his liberty is at stake. And
12 so I feel like that was not done here.

13 Going back to the indictment, the indictment was
14 incorrect on the armed robbery. It wasn't brought up. I
15 mean it was brought up to Megan walker, but it was still
16 allowed to be presented to the Court as it was, incorrect,
17 and I understand, going into trial, you would have to like
18 raise those objections or what have you, and that's the
19 typical thing you would do to move -- quash the indictment
20 at -- before the jury is struck.

21 But, in this instance, it still needed to be corrected
22 because this is the record of the Court. It was not even
23 brought up.

24 And so I would argue, Your Honor, that the bare minimum
25 was done on behalf of Mr. Thomas. Even as horrific or ugly

1 the facts in this case, he still deserves to have
2 representation in the courtroom, whether it's a plea or a
3 trial, in an effort to offer mitigation to give him, you
4 know, or to try to, or at least ask for the amount of time
5 that he was facing that he thought and that his attorney
6 thought maybe was a reasonable sentence.

7 You heard the testimony from the attorney that they
8 thought that Judge Gee was gonna be a more lenient judge
9 because she was new to the bench. I knew Judge Gee. She
10 was nice as she could be. Matter of fact, we went to the
11 same high school. But to assume that she's gonna be lenient
12 after hearing these facts I think is, you know, not
13 reasonable. I think, after hearing his comments or as bad
14 as they might have been, to rehabilitate what he said, I
15 think the least that could of been done, in a Motion to
16 Reconsider, is everything you got.

17 Those charges, the pointing and presenting, should have
18 been researched to explain and correct for the Court. It
19 left the Court with the opinion that he had a pointing and
20 presenting against another female.

21 That was not explored. She didn't touch -- she, she
22 testified she didn't talk to Mr. Thomas until the day of.
23 At that point there was no, there was no time to go back and
24 try and research that issue.

25 Further, Mr. Thomas already had received a sentence and

1 then the phone records come in, and that, I, I imagine, that
2 was very impactful as well.

3 So, Your Honor, I would just say, based on State v.
4 Ard, that nobody brought it up. It wasn't adversarial.
5 Even though it -- despite the fact that it was not a trial,
6 it was not adversarial that allowed the defendant to be able
7 to appeal to the Judge's decision in her process of
8 sentencing him.

9 Thank you.

10 THE COURT: All right. The Court finds that the plea
11 counsel was not ineffective in this matter.

12 To the extent that there was any defect in her
13 performance, there is no competent evidence before the Court
14 from which the Court could find that there's a reasonable
15 probability that, but for counsel's errors, he would not
16 have pled guilty -- the Applicant would not have pled
17 guilty. That's certainly absent in this case.

18 But back to plea counsel's performance, I, I don't find
19 the, the failure on her part or falling below the standard
20 required of her.

21 Specifically as to the pointing and presenting, you
22 know, there may have been an error in the description of
23 that offense stated by the prosecutor. Whether Ms. Pinnock
24 had a duty to research that in advance is not clear, but to
25 the extent that there was an error, the Applicant was

1 standing right there and made no attempt to correct the
2 error by his own testimony, which is corroborated by Ms.
3 Pinnock.

4 As soon as Ms. Walker said the pointing and presenting
5 was against his first wife, so the -- he has a pointing and
6 presenting conviction from his first wife, the Applicant was
7 present and heard that. Made no attempt to correct that
8 either by telling his lawyer to correct it or when he spoke
9 to the Court himself or on reconsideration. None of that
10 happened.

11 The Motion for Reconsideration, it sounds like
12 something that could be supported in his testimony that the
13 Applicant wanted even though he may not have known in
14 advance that it was going to be filed. He wanted it to be
15 filed, and that's a time sensitive thing.

16 So, I think had Ms. Pinnock not filed it, whether she
17 told him in advance or not, he'd be here to claim that she
18 didn't file it knowing that he wanted a lesser sentence, and
19 it's clear from the transcript that Ms. Pinnock did what she
20 could, what she should, and that the Applicant talked
21 himself into prison for a longer period of time, and Judge
22 Gee explains that on a Motion for Reconsideration that she
23 finds no defect in the fact with Ms. Pinnock's performance.
24 She said that repeatedly.

25 I draw the same conclusion, and she specifically said

1 that she had not expected to give him that sentence until
2 Mr. Thomas spoke. And so, you know, certainly Ms. Pinnock
3 can't control what he says.

4 It was the, you know, impression that Judge Gee got of
5 Mr. Thomas and his mental state that resulted in the
6 sentence that he received, and Judge Gee even goes through
7 what plea counsel did and did not do, and Ms. Pinnock, at
8 one point, blamed herself for maybe requesting a sentence
9 that was too low, and, and Judge Gee corrects her and says
10 that had nothing to do with it, and they did discuss the
11 pointing and presenting conviction although they didn't --
12 there was no correction of the victim, who the victim was in
13 the Motion for Reconsideration. But Ms. Pinnock highlights
14 that in talking about it being a very long time, but Judge
15 Gee is clear that the decision turned on Mr. Thomas'
16 statement to the Court.

17 As to the indictment, and clearly there's an error or
18 everyone agrees that there were no codefendants in the armed
19 robbery, the Court finds that that doesn't render the plea
20 invalid, that the body of the indictment and the statutes
21 cited thereon are sufficient to have put Mr. Thomas on
22 notice of the crime that was charged against him, and that
23 was simply a scrivener's error that would not render the
24 plea invalid.

25 If I've missed anything, I'll make sure that I clear it

1 up in my written order. But, for all those reasons, the
2 Application for Post-Conviction Relief is denied.

3 MS. MOODY: You want to address the CDVHAN?

4 THE COURT: Oh, I mean that -- okay. The's the CDVHAN?

5 MS. MOODY: Yes.

6 THE COURT: That could have been charged. It -- I
7 know -- I mean that's -- that was a possibility. The State
8 decided to go with a greater charge, which was not
9 inappropriate legally speaking.

10 The allegations against Mr. Thomas warrant or merit
11 charging him with that crime, and certainly Ms. Pinnock has
12 nothing to do with which crime is charged. But I don't find
13 the charge to be inappropriate given the allegations against
14 him.

15 I know he wishes that it had been a lesser charge, and
16 a lesser charge also would of been appropriate, the CDV --
17 not a lesser charge. A different charge would have also
18 been appropriate. But charging him with attempted murder is
19 not inappropriate, and there was some discussion of plea
20 negotiations.

21 You know, the Applicant has a theory that Ms. Pinnock
22 should have made a counteroffer to the 25 year negotiated
23 plea offer, but Ms. Pinnock made it clear that Mr. walker
24 wasn't gonna budge because she was 100 percent not
25 interested in reducing anything. And so -- and, and she

1 would of never, ever agreed to a minimum sentence or at
2 least Ms. Pinnock got the impression that she would never,
3 ever agree to a minimum sentence, which sounds like any
4 counteroffer would of been futile in her opinion. Moreover,
5 the Applicant or any criminal defendant is not entitled to
6 have a plea offer of any kind.

7 Have I addressed everything now?

8 MS. MOODY: Yes, ma'am.

9 THE COURT: Okay. So, the Application is denied.

10 MS. MOODY: Thank you, Your Honor.

11 MS. MCCALLISTER: Thank you, Your Honor.

12 THE COURT: Thank you.

13

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15 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

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2
3 I, Pamela E. Green, Official Court Reporter for the
4 State of South Carolina, do hereby certify that the
5 foregoing is a true, accurate and complete Transcript of
6 Record of the proceedings had and evidence introduced in the
7 trial of the captioned case, relative to appeal, in the
8 Court of Common Pleas Nonjury for Richland County, South
9 Carolina, on the 5th day of December, 2018.

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

12
13
14
15 June 1st, 2020
16
17

18 
19 _____

20 PAMELA E. GREEN, Court Reporter
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22
23
24
25

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 Gary Wayne Thomas (SCDC #366010),
 Applicant,
 v.
 State of South Carolina,
 Respondent.

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT
 Civil Action No. 2017CP4000046

ORDER OF DISMISSAL

2020 JAN 29 AM 10:13
 FILED
 RICHLAND COUNTY
 CLERK OF COURT
 C.C.P., C.S., J.E.C.

This matter comes before the Court upon Application for Post-Conviction Relief (“Application”) filed by Applicant Gary Wayne Thomas (“Applicant”) on January 13, 2017. Respondent filed its Return and Motion to Dismiss¹ on December 12, 2017. On December 5, 2018, a hearing was conducted at the Richland County Judicial Center. Applicant was present along with his counsel, Leah B. Moody, Esquire. The State was represented by Lindsey A. McCallister, Esquire.

For the reasons set forth below, the Application for Post-Conviction Relief is DENIED; and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. He was indicted at the February 2015 term of the Richland County Grand Jury in indictment 2015-GS-40-00196 for Armed Robbery and indictment 2015-GS-40-00183 for Attempted Murder. Applicant was represented on these charges

¹ The State moved to dismiss based on the statute of limitations. The motion was withdrawn once the State learned of Applicant’s post-guilty plea motion and the date of the Court’s ruling on the same.

by Tracy E. Pinnock, Esquire ("Plea Counsel"). Meghan Walker, Esquire, from the Fifth Circuit Solicitor's Office prosecuted the case.

On November 9, 2015, Applicant pled guilty to both charges as indicted. The Honorable Tanya Gee sentenced him to consecutive terms of imprisonment of thirty years for Attempted Murder and ten years for Armed Robbery, giving him credit for the time he had already served as a pre-trial detainee. Applicant did not appeal his conviction or sentence, but he filed a motion for reconsideration in which he asked for a reduction of his sentence. The motion for reconsideration was heard on May 19, 2016, and denied by Order dated June 29, 2016.

On January 5, 2017, Applicant filed the instant PCR Application in which he alleged that he is *not* being unlawfully detained by that he is "in no way a career criminal," and should not have received the maximum sentence allowed for Attempted Murder. However, during the evidentiary hearing Applicant also alleged that he was "misrepresented due to ineffective assistance of counsel." Specifically, via his testimony, Applicant alleged (1) failure to challenge indictment setting forth incorrect facts; (2) failure to move for a continuance or otherwise object after the solicitor incorrectly recited the factual background of Applicant's previous domestic violence conviction; (3) failure to sufficiently explain the terms of the plea agreement leading to an involuntary guilty plea; and (4) failure to adequately argue or address issues in the motion for reconsideration.

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has also had the opportunity to observe each witness who testified at the evidentiary hearing, to closely pass upon their credibility, and to weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. §17-27-80 (2003).

Page 2 of 19
Order of Dismissal

Thomas (SCDC #366010) v. State, 2017CP4000046

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 a PCR Application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Id.* at 686; *see also 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), SCRCP.

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. Specifically, where an applicant has pled guilty, he must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

I. Insufficiency of Indictments

Applicant contends that Plea Counsel was ineffective for failing to challenge the indictment which set forth incorrect facts. First, Applicant alleges that the signatures (of the Grand Jury's foreperson) on the two indictments don't match one another, even though the indictments bear the same dates of issue. Second, he believes that Plea Counsel should have challenged the fact that the indictment for Armed Robbery erroneously states that Applicant had a co-defendant. Finally, Applicant believes that Plea Counsel should have moved to quash the indictment for Attempted Murder because the more appropriate charge was Criminal Domestic Violence of a High and Aggravated Nature ("CDVHAN"). The Court disagrees.

Plea Counsel testified that over approximately eleven meetings with Applicant, he raised concerns about there not having been a co-defendant, but they did not discuss the signatures on the indictments. She also conceded that the State never alleged that Applicant had a co-defendant in the commission of the armed robbery and, therefore, she should have asked that the indictment be corrected. While Plea Counsel did discuss the indictment with the prosecutor, she couldn't recall the substance of those discussions. Ultimately, she concluded that the mention of a co-defendant was simply a scrivener's error.

Plea Counsel also stated that Applicant never asked her to address the charge of Attempted Murder instead of CDVHAN. Even if they had discussed the issue, Plea Counsel believes that either charge would have been appropriate, given that the victim was Applicant's ex-wife. Applicant admitted that he didn't discover this "error" until he got to SCDC.

An indictment is a notice document, and any challenges to its sufficiency "shall be taken by demurrer or on motion to quash... before the jury shall be sworn and not afterwards." S.C. CODE ANN. §17-19-20 (2003). "The indictment must state the offense with sufficient certainty

and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer, and whether he may plead an acquittal or conviction thereon.” *State v. Guthrie*, 352 S.C. 103, 108, 572 S.E.2d 309, 311-12 (Ct. App. 2002). Further, the “test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.” *Id.* Additionally, the South Carolina Code states, in pertinent part:

If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged.

S.C. CODE ANN. §17-19-100 (2015).

In this case, the indictment discussed by Applicant did, in fact, cite the correct statute such that Applicant knew the nature of the offense he was required to defend, as well as the date, location, and identity of the alleged victim. Any reference to a codefendant was merely a scrivener’s error which did not render the indictment – or the guilty plea – invalid. Furthermore, even if Counsel had moved to quash the indictment, the State could have asked to amend instead; and because the amendment would not change the nature of the offense, that motion would likely have been granted.

Additionally, although CDVHAN may also have been *an* appropriate charge, the Court finds that attempted murder was not an *inappropriate* charge. Plea Counsel had no control over the State’s decision as to which crime to charge. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“so long as the prosecutor has probable cause to believe that the accused committed

an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.”).

Applicant has not met his burden of proving that Plea Counsel was deficient in any way regarding the indictments and has failed to show that he was prejudiced by Plea Counsel's failure to move to quash the indictment. Therefore, this allegation is denied and dismissed with prejudice.

II. Applicant's Prior Record

Applicant next claims that Plea Counsel was ineffective for failing to move for a continuance of his guilty plea or otherwise object when the prosecutor recited erroneous information about Applicant's prior conviction for criminal domestic violence (“CDV”). When Applicant's criminal history was discussed during the guilty plea, the court was informed about the CDV conviction as well as a conviction for Pointing and Presenting a Firearm (“P&P”), which the prosecutor alleged was the result of Applicant pointing a gun at his first wife. Applicant argues that the victim of the P&P was actually a man, not his ex-wife, and that Plea Counsel was ineffective for failing to challenge this.

In his testimony, Applicant admitted that during his meetings with Plea Counsel, they never discussed the underlying facts leading to the CDV conviction; and he testified that they never discussed the P&P charge at all, although they did review his RAP sheet. In response, Plea Counsel testified that Applicant never asked her to clarify or correct the details of his prior convictions. While she didn't anticipate that the prosecutor discussing details of Applicant's previous criminal charges, Plea Counsel stated that the only issue was the identity of one of the victims; and she did not believe she had a successful argument on that issue.

While the prosecutor may (or may not) have erred in identifying the victim of Applicant's prior conviction for P&P, the Court finds that this alleged error was harmless. Applicant has not

demonstrated that Plea Counsel was deficient in failing to correct the prosecutor. In fact, Applicant was present during the guilty plea and addressed the court at that time, yet he too neglected to correct the alleged erroneous information. Moreover, the record is clear that Plea Counsel did, in fact, object to the court's consideration of the prior convictions in determining Applicant's sentence because they were so remote in time. The Court cannot find that Plea Counsel was deficient in this regard or that Applicant was prejudiced by Plea Counsel's conduct. Therefore, this allegation is denied and dismissed with prejudice.

III. Involuntary Guilty Plea

Applicant's next argument is that Plea Counsel failed to sufficiently explain to him the terms of his guilty plea, rendering the plea involuntary. Again, the Court disagrees.

Applicant testified that he met with Plea Counsel a number of times about his case and told her that he was willing to serve ten to fifteen years in prison. He also testified that he rejected a twenty-five-year plea offer made by the State, believing that Plea Counsel could get him a lesser sentence. Applicant believed that although the prosecutor intended to seek a thirty-year sentence, the court would be lenient in sentencing him because he pled guilty.

According to Applicant, he did not know the meaning of a "straight up" plea and wasn't aware that by entering such a plea he was exposing himself to a possible sixty-year sentence. While he understood that both Attempted Murder and Armed Robbery have potential thirty-year sentences, Applicant testified that he believed his sentence would be in the range of ten to fifteen years because that would be Plea Counsel's request. He also admitted that the court advised him of the possible maximum sentence for each charge, yet he still opted to plead guilty.

Plea Counsel disputed key portions of Applicant's testimony, stating that she explained the meaning of "straight up" to him during meetings at the jail and at the courthouse. These discussions occurred after Applicant rejected the State's twenty-five-year plea offer because he wanted a probationary sentence (which Plea Counsel explained was not an option). According to Plea Counsel, Applicant became so comfortable with her explanations that when they again discussed the twenty-five-year plea offer, Applicant asked to plead "straight up," using that terminology himself. She also informed Applicant of the maximum possible sentence for each of the charges and the possibility of a trial. Plea Counsel also testified that she never told Applicant how to resolve the case; she merely gave him advice, and the decision to enter a "straight up" plea was his.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish that 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 PCR 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 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).

In this case, much of Applicant's testimony is refuted by the record and is, therefore, not credible. The Court finds the plea colloquy dispositive as to these issues, as the record clearly establishes Applicant pled guilty freely and voluntarily. Applicant informed the court that he had

discussed the charges with Plea Counsel, that he understood their discussions, that he did not need more time to speak to Plea Counsel, and that he was satisfied with her advice. Both Plea Counsel and the court explained the minimum and maximum sentences Applicant faced on each charge, and Applicant indicated his understanding and informed the court he wished to plead guilty. It is clear that Applicant's decision was freely and voluntarily made. It is also clear that the court determined Applicant's sentence based on his lack of remorse or apology.

Accordingly, the Court finds that Plea Counsel's representation of Applicant was not deficient, and Applicant was not prejudiced by her representation. While Applicant is entitled to waive his right to trial and enter a guilty plea, he is not entitled to any particular plea offer or sentence. *See, e.g., State v. Miller*, 375 S.C. 370, 388, 652 S.E.2d 444, 453 (Ct. App. 2007) (“[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced. . . . However, a defendant has no constitutional right to plea bargain.”) (internal citations omitted). Therefore, this allegation is denied and dismissed with prejudice.

IV. Motion for Reconsideration

Finally, Applicant argues that Plea Counsel failed to adequately argue or address issues in his motion for reconsideration of his sentence. The Court disagrees.

According to Plea Counsel, she filed a motion for reconsideration of Applicant's sentence without first telling Applicant. She did so because she believed that Applicant's comments during the guilty plea had a negative effect on his sentence. Therefore, her strategy for the reconsideration was to “fix” what Applicant had said during the plea. Applicant testified that Plea Counsel advised him not to speak during the reconsideration hearing.

Applicant complains that Plea Counsel was ineffective because she failed to give the court any reasons why his sentence should be decreased. He wanted Plea Counsel to raise issues of whether CDVHAN was a more appropriate charge, address the misstatement about his prior criminal convictions, and point out that he was sentenced to consecutive prison terms even though the State had not requested that. Overall, Applicant was upset because at the time of his plea he was fifty-five years old, making forty years' imprisonment a *de facto* life sentence.

According to Plea Counsel, she spoke to Applicant on the morning of the reconsideration hearing and explained the issues she intended to present to the court. While she did not tell the court about the State's twenty-five-year plea offer during the initial guilty plea (because Applicant wanted a lesser sentence), she mentioned it during reconsideration to entice the court to lower Applicant's sentence.

"A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2009). "[W]hen the State fulfills its agreement to recommend a specific sentence, the fact that the judge does not accept the recommendation does not affect the validity of the plea." *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). Further, "the authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

The Court finds that Plea Counsel properly filed a motion for reconsideration because she identified multiple grounds to support the motion – the plea court had not been informed of the State's twenty-five year offer, the imposition of a *de facto* life sentence, and Applicant's issues

with expressing himself appropriately to the court. Although Counsel did not consult with Applicant prior to filing, she immediately informed him what she had done and why. Applicant clearly welcomed the motion even if he did not know in advance it would be filed. Additionally, the Court finds credible Plea Counsel's testimony that she met with Applicant on the morning of the motion hearing and explained the issues she planned to raise, and Applicant never asked her to address his prior record.

This Court has also reviewed the transcript of the reconsideration hearing and finds the sentence imposed by the plea court was a result of Applicant's actions, not those of Plea Counsel. The court clearly articulated its reasoning in imposing the forty-year sentence, explaining:

...I had not expected to give him the sentence I had either until Mr. Thomas spoke. And when he spoke, he said that the victim needed to be forgiven too. And there was a lot of blame put on the victim and not personal blame taken. And I believed the victim needed to be protected. . . .

[A]nd upon hearing what he had to say for himself.. the anger that he still had towards this victim, who he blamed because he believed she was talking to another man or whatever he thought she was doing; made me realize that if he was not incarcerated, that victim, who he attempted to kill with a two-by-four, would be at risk of being victimized again.

So I'm just explaining to you where that forty-year sentence came from. . . . But just so you understand that it wasn't that you asked for ten years. I mean, you certainly did nothing wrong. You represented your client, you represented your client well. I wasn't expecting to give him the sentence that I did until he spoke for himself.

In addition, Plea Counsel articulated a valid strategy for discussing the State's plea offer when she did.

The Court can find no deficiency in Plea Counsel's representation and no prejudice to Applicant in the motion, except by his own actions. *See, e.g., Watson v. State*, 370 S.C. 68, 72,

634 S.E.2d 642, 644 (2006) (citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992)) (“Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Accordingly, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Plea Counsel was not deficient in any manner, and Applicant was not prejudiced by Plea Counsel’s representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

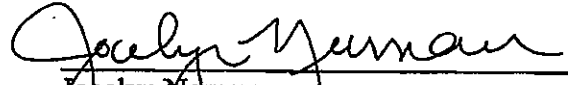
IT IS, THEREFORE, ORDERED that the Application for Post-Conviction relief is DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that Gary Wayne Thomas (SCDC #366010) be remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED.

Page 12 of 15
Order of Dismissal

Thomas (SCDC #366010) v. State, 2017CP4000046


Jocelyn Newman

January 27, 2020
Columbia, South Carolina.

WITNESSES

(S) J. Sullivan

- Richland County Sheriff

DOCKET NO. 2015GS4000183

The State of South Carolina

County of

Richland

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.

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2015

101

THE STATE
vs.

Gary Wayne Thomas

ARREST WARRANT NUMBER

2014A4010203036

ACTION OF GRAND JURY

TRUE BILL

Connie Lumpkin
Foreperson of Grand Jury

Date: FEB 11 2015

VERDICT

Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029

CDR Code: 3410

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeanette Williams
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

Foreperson of Petit Jury

Date:

WITNESSES

(S) J Sullivan

- Richland County Sheriff

ARREST WARRANT NUMBER

DP15004

ACTING FOREPERSON OF GRAND JURY
TRUE BILL

Comore Simpson
Foreperson of Grand Jury

Date: FEB 11 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS4000196

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2015

101

THE STATE

vs.

Gary Wayne Thomas

Indictment for
ARMED ROBBERY

SC Code: 16-11-0330(A)

CDR Code: 0139

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.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W. W. Wade
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

WITNESSES

(S) J. Sullivan

Richland County Sheriff

DOCKET NO. 2015GS4000196

The State of South Carolina

County of

Richland

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

Defendant

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.

ARREST WARRANT NUMBER

DP15004

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2015

101

THE STATE

vs.

Gary Wayne Thomas

ACTION OF GRAND JURY
TRUE BILL

Foreperson of Grand Jury

Date: FEB 11 2015

VERDICT

Indictment for
ARMED ROBBERY

SC Code: 16-11-0330(A)

CDR Code: 0139

Foreperson of Petit Jury

Date:

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette Williams
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

WITNESSES

(S) J. Sullivan

Richland County Sheriff

DOCKET NO. 2015GS4000183

The State of South Carolina

County of

Richland

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.

ARREST WARRANT NUMBER

2014A4010203036

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2015

101

THE STATE
vs.

Gary Wayne Thomas

ACTION OF GRAND JURY

TRUE BILL

Patricia Lumpkin
Foreperson of Grand Jury

Date: FEB 11 2015

VERDICT

Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029

CDR Code: 3410

Foreperson of Petit Jury

Date:

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Janette W. W. W. W.
C.C.C. P&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

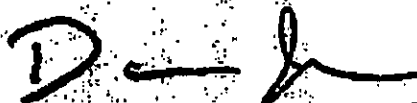
INDICTMENT

At a Court of General Sessions, convened on February 11, 2015,
the Grand Jurors of Richland County present upon their oath:

ATTEMPTED MURDER

That Gary Wayne Thomas did in Richland County on or about August 23, 2014, did with the intent to kill, attempt to kill MAZONDA THOMAS with malice aforethought, either expressed or implied. All in violation of SC Code of Laws § 16-3-29 (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

FILED