

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

—————  
Certiorari to Horry County  
William H. Seals, Circuit Court Judge  
—————

**RECEIVED**

**Jan 27 2021**

S.C. SUPREME COURT

CLIFFORD WAYNE POWELL, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000754

—————  
APPENDIX  
—————

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**THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:**

**PLAINTIFF’S EXHIBIT #5 (USB WITH DISCOVERY).**



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Exhibit retained by Clerk of Court.

1 (The hearing commenced at approximately  
2 10:09 a.m.)

3 THE COURT: Please be seated, please.

4 MS. LIVESAY: Judge, apparently there was a  
5 misunderstanding. We made an offer of a cap of 25  
6 years on voluntary manslaughter for a recommendation  
7 for the Court. They've told us now that they are not  
8 interested in taking that offer and that they want to  
9 proceed to trial on May the 8th; is that correct?

10 MR. McCOY: Not May the 8th. I'm protected until  
11 the 11th.

12 MR. IRVIN: May I speak?

13 THE COURT: Yeah.

14 MR. IRVIN: I've always told him that it was a  
15 negotiated cap of 25.

16 THE COURT: That's what she said, manslaughter.

17 MR. IRVIN: Never have I said differently to the  
18 State or otherwise.

19 THE COURT: Isn't that what you said, a cap of 25?

20 MS. LIVESAY: Yes. But what their problem is that  
21 they are saying they want it negotiated. What I  
22 offered was I'm recommending a cap of 25 years.

23 THE COURT: Well, what's the max on it, 30?

24 MS. LIVESAY: The max is 30 years on voluntary  
25 manslaughter. We offered that. The original charge

1 was murder. So I brought it down, of course, to be  
2 reasonable to plead to voluntary manslaughter with a  
3 cap of 25 years. That was the offer I extended to  
4 them.

5 THE COURT: All right. Then the discrepancy is  
6 whether it's a negotiated cap or recommended cap?

7 MR. IRVIN: Yes, sir.

8 MR. McCOY: Yes, sir.

9 THE COURT: Right?

10 MS. LIVESAY: I mean, yes. I mean, my  
11 understanding is I told them I was recommending a cap  
12 of 25 years.

13 THE COURT: And they want you to say I'm  
14 negotiating a cap?

15 MS. LIVESAY: That's what they are saying. That's  
16 what their argument is, yes.

17 THE COURT: Okay. All right, so the deal is off;  
18 right? Is that what you're telling me?

19 MR. IRVIN: Let me tell the Court. I have prior  
20 to today, we had talked about an Alford plea. We  
21 changed our idea on the Alford plea based on my  
22 co-counsel Johnnie McCoy's comments last night in  
23 talking with our client last night, okay, yesterday.

24 We had never -- I had never said the  
25 recommendation. I'd always said that it was a

1 negotiated plea. I've never said that to him, and I  
2 have to go with that.

3 THE COURT: You understand what the difference  
4 between negotiated cap and recommended?

5 MR. McCOY: Absolutely, Your Honor. And I was  
6 appointed to this case in late February to insure that  
7 if Mr. Irvin had any difficulties with health issues  
8 that we'd have somebody here just in case. So as far  
9 as plea negotiations are concerned, everything has been  
10 handled with Mr. Irvin.

11 What I can tell you is every time I've been with  
12 him talking with this man, he's always said negotiated  
13 cap, negotiated cap. Now, we're here today to plead to  
14 manslaughter, and he's going to address the Court and  
15 the family about -- and he's going to do an allocution.  
16 And the only problem is, judge, you know how it is when  
17 they get back in that room if one thing changes.

18 So our issue now or Jim's issue now is he's been  
19 telling this guy, our client, for several months, you  
20 know, the best we can do is a negotiated cap, a  
21 negotiated cap. And now it's a recommendation on a  
22 cap. I mean, we're fighting over 5 years. I  
23 understand it, judge.

24 THE COURT: Let me see you guys.

25 (WHEREUPON, a brief recess was taken at

1 10:12 a.m.)

2 THE COURT: Thank you, thank you, please be  
3 seated. Is there a sentencing sheet?

4 CLIFFORD W. POWELL, JR., after being duly sworn,  
5 testified as follows:

6 MS. LIVESAY: Judge, this is Clifford Powell.  
7 He's here with his co-counsel, Jim Irvin and Johnnie  
8 McCoy. He was originally indicted for murder. That  
9 indictment number ends in 3666. He is here to plead to  
10 the lesser included of voluntary manslaughter. The  
11 State is making a recommendation of a cap of 25 years.  
12 Voluntary carries from zero to 30.

13 THE COURT: All right. Mr. Powell, how are you  
14 today?

15 THE DEFENDANT: I'm okay, sir.

16 THE COURT: Mr. Powell, you are here today with  
17 your attorneys, Mr. Irvin and Mr. McCoy; is that  
18 correct?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And you are before me, I'm informed,  
21 on the charge of voluntary manslaughter; is that  
22 correct?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And that charge is different from the  
25 charge which you were indicted for. You were indicted

1 for murder. Have your attorneys explained the  
2 difference in the charges to you?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And what you're pleading to?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you understand what voluntary  
7 manslaughter means?

8 THE DEFENDANT: Yes, sir, I do.

9 THE COURT: Okay. You've had ample time to  
10 discuss that with your attorney?

11 THE DEFENDANT: Yes, sir, I have.

12 THE COURT: Do you need to ask me any questions  
13 about it?

14 THE DEFENDANT: No, sir.

15 THE COURT: Okay. Now, Mr. Powell, were you aware  
16 that this charge carries up to 30 years?

17 THE DEFENDANT: Yes, sir, I am.

18 THE COURT: Okay. All right. Now, Mr. Powell,  
19 have you had an opportunity to go over the evidence,  
20 the discovery materials, that have been provided by the  
21 State to your attorneys?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Okay. And have you discussed that  
24 with them?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And have they explained to you how the  
2 State would attempt to use those materials or the  
3 matters discussed or reflected in those materials  
4 against you if you were to have a jury trial?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Okay. So there's no question that  
7 Mr. Irvin and Mr. McCoy have discussed with you the  
8 matter of a jury trial?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Okay. And do you understand what a  
11 jury trial is?

12 THE DEFENDANT: Yes, sir, I do.

13 THE COURT: Generally speaking, do you understand  
14 how it works?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you have any questions for me about  
17 how a jury trial would work?

18 THE DEFENDANT: No, sir.

19 THE COURT: Okay. Do you realize, sir, that you  
20 have an absolute right to be tried by a jury; you  
21 understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Okay. And do you realize, sir, that  
24 if you plead guilty, which you do not have to do, I  
25 want to make that very clear, you do not have to enter

1 any kind of a plea, you have the primary and absolute  
2 right to be tried by a jury; you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. But if you choose to plead  
5 guilty, you would be forfeiting, you would be giving up  
6 permanently, forever, your right to be tried by a jury  
7 on this charge or the charge that you were indicted  
8 for. Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Okay. When you do that, Mr. Powell,  
11 there's a little more to it than would be indicated by  
12 saying, I give up my right to a jury trial. Because  
13 associated with a jury trial are many, many, many other  
14 very important rights, rights that go along with a jury  
15 trial. And I will tell you right now that if  
16 Mr. McCoy, Mr. Irvin, Ms. Livesay and I sat down with  
17 you and discussed them with you for a month, we could  
18 probably not cover every nuance, every right that's  
19 associated with a jury trial.

20 But I would like to point out a few of those  
21 rights, a few of those rights that at least in my view  
22 are some of the more important ones. And I point them  
23 out to you just by way of illustration, give you an  
24 idea of what I'm talking about when I speak of these  
25 rights.

1           For instance, you have what we call the Fifth  
2 Amendment right. You probably have heard of that  
3 right. It's what we call, refer to commonly, as your  
4 right to remain silent. Most people associate that  
5 with an arrest or questioning by the police. It also  
6 extends into a trial. What it means is that if you had  
7 a trial, no one could make you testify. Certainly you  
8 would have the right to testify on your own behalf, you  
9 could do that in a jury trial. But if you chose to,  
10 you would not have to say a word and no one could make  
11 you do it.

12           This right is so important that if you chose to  
13 remain silent, I would tell the jury they could not use  
14 that against you in any form or fashion, they could not  
15 even consider it in their deliberations. You also have  
16 the right to have an attorney, we often refer to that  
17 as your Sixth Amendment rights. Of course you got an  
18 attorney here with you today in a plea. But I would  
19 suggest to you that in a trial, an attorney's duties  
20 are quite different.

21           Because in a trial, there could be no conviction  
22 unless the State put up enough evidence to convince  
23 each and every one of the 12 jurors that you were  
24 guilty beyond a reasonable doubt. We call that the  
25 burden of proof that the State has to meet. That's

1 another right that you have. I would tell the jury  
2 that they couldn't convict you unless they were  
3 unanimously convinced of your guilt beyond a reasonable  
4 doubt.

5 But in that process, the State would have to  
6 convince a jury by putting up evidence, testimony.  
7 They may have physical evidence, I don't know, but  
8 typically we see a mixture. Mr. McCoy and Mr. Irvin  
9 would have the right, you would have the right to  
10 confront all of the witnesses the State had against  
11 you. They could challenge all of the evidence that  
12 they have against you.

13 See, in a plea, the State doesn't have to put up  
14 the witnesses or the evidence, the attorneys don't have  
15 the opportunity to challenge it. You give up that  
16 very, very important right in a jury trial if you plead  
17 guilty.

18 Also, you would have the right through your  
19 attorneys to put up evidence, witnesses, physical  
20 evidence, that might be helpful to you if you had any.  
21 That would also be an opportunity that the attorneys  
22 would have to assist you in your defense.

23 You have many rights like this. But if you plead  
24 guilty, you give them up; do you understand?

25 THE DEFENDANT: Yes, sir, I do.

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

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You've discussed that fully with your  
4 attorneys?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Okay. All right. I want you to talk  
7 to me a little bit about your attorneys. I looked at  
8 your sentencing sheet, and it indicates that the date  
9 of the offense is June of 2014. And I believe before  
10 we began these proceedings the attorneys told me that  
11 you were arrested sometime shortly after?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: After that, okay. So you have been in  
14 jail now about three years; is that right?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Okay. And during that time, have you  
17 had the benefit of counsel?

18 THE DEFENDANT: Yes, sir, I have.

19 THE COURT: And are you satisfied with your  
20 attorneys?

21 THE DEFENDANT: Extremely.

22 THE COURT: Do you need any more time to discuss  
23 this matter with your attorneys?

24 THE DEFENDANT: No, Your Honor.

25 THE COURT: Have they answered all of your

1 questions?

2 THE DEFENDANT: Clearly, yes, sir.

3 THE COURT: Okay. All right. They've met all of  
4 your expectations?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Okay. Now, I can't give you legal  
7 advice, but I would be happy to answer any questions  
8 that you might have concerning this process, this  
9 procedure that we're engaged in right here. Do you  
10 have any questions for me about what we're doing or  
11 anything like that?

12 THE DEFENDANT: No, sir, I don't.

13 THE COURT: All right. Well, Mr. Powell, I see  
14 here that you are 35; is that correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Okay. And Mr. Powell, how far did you  
17 go in school?

18 THE DEFENDANT: Two years at Horry-Georgetown  
19 Technical College.

20 THE COURT: Okay. Did you receive any special  
21 training in any field there?

22 THE DEFENDANT: Just criminal justice.

23 THE COURT: Okay.

24 THE DEFENDANT: Two years.

25 THE COURT: What kind of work have you done,

1 Mr. Powell?

2 THE DEFENDANT: I've owned -- I started off with  
3 my ex-wife with an ice crime business and went from  
4 there. And I opened an air brush business with her,  
5 and we built our empire from there. And things just  
6 fell apart.

7 THE COURT: Okay. So you've been engaged in the  
8 business world over the course of your work career?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Okay. Have you ever had any mental  
11 health problems, addiction issues, anything of that  
12 nature, that you feel would impair your ability to  
13 understand what we're doing here today?

14 THE DEFENDANT: No, sir.

15 THE COURT: Okay. Have you taken in the last 48  
16 hours any substance that would be intoxicating, drugs,  
17 alcohol, anything like that?

18 THE DEFENDANT: No, sir.

19 THE COURT: Okay. Mr. Powell, I asked you these  
20 questions because I want to know if there is any reason  
21 in the world that you can think of or suggest to me  
22 that might keep you from fully appreciating what we're  
23 doing here and the consequences of your plea.

24 THE DEFENDANT: Absolutely clear, Your Honor.

25 THE COURT: Okay, you understand.

1 THE DEFENDANT: Yes, I do.

2 THE COURT: All right. I'd be happy to answer any  
3 questions you have. Okay, all right. I want you to  
4 listen carefully to Ms. Livesay. Ms. Livesay is going  
5 to tell me why you were charged with this.

6 MS. LIVESAY: Yes, sir, Your Honor. On June  
7 the 1st of 2014 in the early morning hours of around  
8 1:30 a.m., 2 a.m., Angela Powell, the victim of the  
9 attempted murder that's been dropped, was out  
10 celebrating her birthday with three other friends,  
11 including the victim Charles Royal.

12 When they were out that night, they saw Clifford  
13 Powell. There was no altercation at that time, no  
14 issues. She saw him, he saw her, there was a brief  
15 speaking, that was the end of it. They then make  
16 arrangements all to come back to Angelina Powell's  
17 apartment to continue hanging out for her birthday.  
18 Her and Mr. Royal, the victim, get there first. They  
19 get out of the vehicle.

20 Charles Royal is walking up first. Clifford  
21 Powell is there waiting. They both approach, there's  
22 some words exchanged. The Defendant then shoots the  
23 victim six times with a 9 millimeter. He then holds  
24 the gun up to Angelina Powell's head, makes some  
25 statements to the gist of, you would be dead too, but I

1 still love you. He then takes off running.

2 The six gunshot wounds to the victim were all to  
3 the right side, the right back of the head, the right  
4 elbow, the right abdomen, the right thigh and below the  
5 kneecap. I just bring that up because the State  
6 believes it's indicative of some sort of defensive  
7 position where he's leaning to the right. And the  
8 shots are fired.

9 He then takes off running. There is a fence that  
10 separates where the victim's apartment is to where the  
11 Defendant lives. A witness sees him run to that fence,  
12 climb over the fence. He then is seen minutes later at  
13 a trash can or a dumpster a few blocks down, a witness  
14 sees him dumping things into the dumpster. He gets  
15 back in the vehicle, takes off to his apartment.

16 Later on what's found in that dumpster is a  
17 9 millimeter, two holsters and 9 millimeter bullets.  
18 The State through investigator Popp and the ATF was  
19 ultimately able to trace that gun back to Clifford  
20 Powell. He goes back to the apartment, the roommate  
21 testifies he then sees the Defendant in a towel,  
22 indicating that he had showered. He says he then tells  
23 him that he is going to the gold club.

24 Later on that night he's at the gold club, the  
25 police of course come to the scene. Angelina Powell

1 immediately identifies Clifford Powell, she recognizes  
2 his voice and she recognizes all the clothes he's  
3 wearing. The police immediately go pick up Mr. Powell  
4 and interview him. At that time, of course, he denies  
5 any sort of involvement with the murder.

6 The police arrest him, of course, on the evidence  
7 of Ms. Powell's eye witness testimony and the testimony  
8 from the witness seeing him throw the items in the  
9 dumpster. Those are the facts. The victim's family is  
10 here, and they want to be heard whenever you're ready,  
11 judge.

12 THE COURT: All right. Mr. Powell, the solicitor  
13 has described the basis for the State's case, the basis  
14 for the charge against you. Do you understand it?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Is that what occurred?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Okay. And did you shoot and kill the  
19 victim in this matter?

20 THE DEFENDANT: Yes, sir, I did.

21 THE COURT: Now, Mr. Powell, I am told that the  
22 State is recommending a cap of 30 -- excuse me -- 25  
23 years in this matter. Do you understand, though, that  
24 I could sentence you from zero to 30, that's the  
25 sentence range?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: You understand that. I'm not bound by  
3 any caps. I would certainly consider it, but I'm not  
4 bound by it; you understand that?

5 THE DEFENDANT: Yes, sir, I do.

6 THE COURT: Okay. Now, Mr. Powell, has anybody  
7 promised you anything, threatened you in any way, has  
8 anyone done anything inappropriate or improper, has  
9 anyone mistreated you in any way to make you feel as  
10 though you had to enter this plea?

11 THE DEFENDANT: No, sir.

12 THE COURT: Okay. Are you entering this plea  
13 freely and voluntarily?

14 THE DEFENDANT: Yes, sir, I am.

15 THE COURT: Now, have you had plenty of time to  
16 think about it?

17 THE DEFENDANT: Yes, sir, I have.

18 THE COURT: Do you need to discuss it further with  
19 your attorneys?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: Okay. Do you believe, Mr. Powell,  
22 considering all the circumstances of this case, that  
23 this plea would be in your best interest?

24 THE DEFENDANT: Yes, sir, I do.

25 THE COURT: Okay. All right, sir. Now,

1 Mr. Powell, I therefore find that this plea is made  
2 freely, voluntarily, knowingly and intelligently after  
3 the advice of very competent counsel with whom you tell  
4 me you're satisfied. And I will then accept your plea  
5 to this charge.

6 Mr. Powell, I want to advise you that in a moment  
7 I'll be sentencing you. You certainly may appeal my  
8 sentence. But your right to do so would require, let  
9 me put it that way, would require your filing of a  
10 notice of intent to appeal within the next ten days.  
11 Now, I'm sure you don't know what that is or where you  
12 would do that, but Mr. Irvin and Mr. McCoy do. And it  
13 would be their obligation to assist you in getting that  
14 notice of intent to file.

15 And you would do so; wouldn't you, Mr. McCoy?

16 MR. McCOY: I would, Your Honor.

17 THE COURT: And Mr. Irvin?

18 MR. IRVIN: Yes, sir.

19 THE COURT: Okay. Thereafter, if you could not  
20 afford an appellate attorney to perfect your appeal to  
21 go forward with it, one would be appointed for you at  
22 no cost to you; do you understand?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Okay. All right. I'll hear from the  
25 victims.

1 MS. LIVESAY: Thank you, judge. Okay.

2 MS. KENNEDY: Your Honor, my name is Sherry  
3 Kennedy. I'm Charles Royal's mother. Since my son's  
4 death, life has been crazy. I have a granddaughter  
5 that won't never know her father. She asks me  
6 questions like, when is my daddy going to wake up, when  
7 is my daddy coming back. Mr. Powell, he took my son's  
8 life. I'm sorry. I'm angry, I'm angry all the time.  
9 I can't find any happiness in nothing because my son is  
10 gone, he was my one and only son. And he just took his  
11 life with no regard.

12 And, Your Honor, I understand the 25 years, but I  
13 definitely think he deserves more because I can never  
14 have my son back. He's alive, he gets to see his  
15 family, he gets to visit with his family. But I don't,  
16 my granddaughter don't. And I been coming here month  
17 after month through all these trials, and I see his  
18 face. And he don't even look like he's remorseful, he  
19 don't even act like he's remorseful. We haven't gotten  
20 an apology, we haven't gotten anything. And I'm just  
21 -- I'm sorry. It's just so -- okay. I'm done.

22 THE COURT: Okay, thank you.

23 MS. POWELL: I'm Angelina Powell, ex-wife of  
24 Clifford Powell. And it happened three -- almost three  
25 years ago, and -- but it's still all feeling the same.

1 And it's definitely not involuntary murder. It was  
2 premeditated, he wanted to kill me. He didn't want to  
3 kill the other guy. He didn't want to kill Charles  
4 Royal, he planned to kill me on my birthday. And I'm  
5 sure he planned for it so many times, but he didn't do  
6 it until that day.

7 So there is no reason for him to get out. So many  
8 bond hearings he tried to get out saying he's not  
9 guilty. After three years he decided to plead guilty  
10 finally, because he is a coward. He was scared to say  
11 that it was him. And it's stupid for him to say that  
12 it wasn't him because I saw him, he talked to me, and I  
13 recognize him from the first sight when I saw him.

14 And he doesn't deserve any freedom at all. And 25  
15 years, it's very low for him to get out. And I don't  
16 know when he get out what, if he's going to look for me  
17 and my family again. He took a life from the family,  
18 he took life for no reason.

19 So many times he told me he want to kill me, but I  
20 didn't take it serious. And then when we're separated,  
21 he filed for divorce first. He kicked me out so many  
22 times from the house, but I keep coming back because I  
23 want to fix it. And then, finally, I gave up and left.  
24 And it still was more than one and -- a year after  
25 everything he did this.

1           He follow me around everywhere, everywhere I go  
2 with friends he's -- I understand Myrtle Beach is a  
3 small town, you can see people everywhere the same, but  
4 he was stalking me everywhere. So it's up to you,  
5 judge, to give judgment. But he doesn't deserve low  
6 punishment.

7           THE COURT: Thank you, ma'am.

8           MS. KIMBALL: Your Honor, my name is Rashema  
9 Kimball. I am the aunt of Charles Royal. And I just  
10 want to come before you today to let you know that we  
11 have been going through this for two years, ten months,  
12 25 days, to this day with the pain and the hurt that he  
13 has caused our family.

14           I have a great niece who will never, never know  
15 her father. And I just think that this -- you should  
16 just never, never see the light of day. We have to  
17 deal with this everyday. We go and visit him at his  
18 gravesite, not in the jail cell or not in a home, you  
19 know. So I just think that he deserves to stay locked  
20 up.

21           THE COURT: Thank you.

22           MS. GEE: Your Honor, I'm Earleen Gee, and I'm a  
23 owner of a cafe on Ocean Boulevard, and I saw Charles  
24 every single day for four years. He considered me his  
25 second mother. He told everyone I was his number two

1 mom. I told everyone he was my -- I claimed him as my  
2 number two son.

3 The morning after the shooting his roommate came  
4 to the cafe, was eating and he was bragging about how  
5 CJ had just murdered Charles. I said, what do you  
6 mean. He says -- CJ came into the apartment and he  
7 said he was leaving, and he said he was -- I don't use  
8 these words.

9 THE COURT: Who is CJ?

10 MS. GEE: That's what I know Clifford by is CJ.

11 THE COURT: All right.

12 MS. GEE: I'm sorry. His roommate Robert said  
13 that CJ left the room, and he said that he was going to  
14 go kill him a nigger. And said he came back later and  
15 he was covered in blood. He went and took a shower, he  
16 changed clothes, and then he went out.

17 Now, he told me that in the restaurant. I didn't  
18 believe him. I went right down the street to where he  
19 worked. Charles was trying to make -- he was trying to  
20 make his daughter proud of him. He finally got his  
21 life straight. He had a good heart and was a good  
22 soul. He didn't deserve to die. He was wanting to  
23 live, he wanted to show his daughter that he was a good  
24 father. He loved his little girl.

25 He loved me and I loved him. He doesn't deserve

1 to get out in 25 years. He doesn't deserve to get out  
2 in 30 years. You ought to die in jail. That's what --  
3 I'm sorry.

4 MR. CARIANOUS: Your Honor, my name is James  
5 Carianous. I am the owner of the cafe. I knew Charles  
6 for probably four years prior to his death. He used to  
7 come by the cafe everyday. He treated me like a mentor  
8 and a second father. He even brought me Father's Day  
9 presents. But he used to come to me just for advice.  
10 He introduced me to his family, they all came up, and  
11 he told me how much he wanted to be a better person for  
12 them and for his daughter.

13 All I could say is that a very, very good man has  
14 left us. And I believe that he'll never be replaced,  
15 and he's in our hearts all the time. But I also  
16 believe that 25 years is not enough. Thank you.

17 THE COURT: All right, thank you.

18 MR. ROYAL: My name is Charles Royal. My son had  
19 issues in his life. He moved up in Myrtle Beach to  
20 make a better man of himself.

21 I remember the second time I was up here and I  
22 looked at Clifford, and I wanted to kill him because he  
23 took something precious from me that I would never see  
24 again. I don't want him to die because God gave me a  
25 forgiving heart. And I know that justice is in your

1 hands, and I know that my family is mourning because I  
2 don't get to see my son again.

3 I was raised in the streets, I know the streets.  
4 But God has changed my heart. I don't hate Clifford, I  
5 pray that he will allow for God to come into his heart  
6 to at least have a heart to say that I'm sorry or  
7 something, you know what I'm saying. Because we need  
8 closure, and I'm not wishing for him to get life. I  
9 don't know what I want.

10 But I do know this here, that I love my son, I'll  
11 never get to see my son. And on my birthday, his  
12 birthday, I have to go through all of these emotional  
13 traumas. I feel for his family have to sit here and go  
14 through this, having to hear all of this. And I didn't  
15 know it at that time that he shot my son in the  
16 bike(bite). Because I had to get a body bag for them  
17 to keep his innards inside of him before they buried  
18 him.

19 And it never crossed my mind to get even, never  
20 crossed my mind to be hateful. And it took everything  
21 that I had to just to come up here. I wanted everybody  
22 else to get out their emotions what they had to say.  
23 Charles is my only grandchild, he was my only son. And  
24 I won't get to spend life with him anymore in the  
25 natural.

1           And I leave everything into your hands. I don't  
2 -- like I said, I don't hate him. God took hate out of  
3 my heart. I just -- I need closure just to hear him  
4 say, you know what, I'm sorry, at least show some kind  
5 of remorse, you know.

6           I have a lot of anger and frustration, upset, and  
7 that come from the flesh side of me. But my spiritual  
8 side will not allow me to address him in a way that I  
9 know would not be pleased with God. So I stand before  
10 you today, judge, just saying, you know, whatever your  
11 judgment would be, I accept it. Thank you.

12           THE COURT: Thank you.

13           MS. LIVESAY: Judge, the Defendant did have a  
14 prior record just for PWID marijuana which was a  
15 felony. They had found some guns, an AR and couple  
16 handguns, in the apartment, so he was charged with  
17 felony possession and some other charges. We are  
18 dismissing those charges for exchange of the guilty  
19 plea today.

20           THE COURT: All right. And his prior record is a  
21 PWID marijuana, possession with intent to distribute  
22 marijuana?

23           MS. LIVESAY: I'm sorry, Your Honor?

24           THE COURT: His prior is a possession with intent  
25 to distribute?

1 MS. LIVESAY: One more time, judge.

2 THE COURT: His prior is a possession with intent  
3 to distribute marijuana?

4 MS. LIVESAY: Yes, sir, that's the only one.

5 THE COURT: How long ago was that?

6 MS. LIVESAY: Was in, I believe, 2011, judge.

7 THE COURT: Okay, all right.

8 MR. McCOY: 2002, Your Honor.

9 THE COURT: 2002?

10 MR. McCOY: Yes, sir.

11 MS. LIVESAY: It was 2006, judge.

12 THE COURT: Okay. It really doesn't matter.

13 That's his record.

14 MS. LIVESAY: Yes, sir.

15 THE COURT: All right. Mr. McCoy, Mr. Irvin?

16 MR. IRVIN: Your Honor, let me give to you an  
17 affidavit done by his uncle in writing, and he had to  
18 be out of town today. And I would like to read it to  
19 the Court. It basically says that...

20 THE COURT: All right.

21 (WHEREUPON, Court's Exhibit No. 1 was marked for  
22 identification only.)

23 MR. IRVIN: One thing I'd like the Court to know,  
24 he will be 36 years old next week.

25 THE COURT: Okay.

1           MR. IRVIN:  And I have known and spent many hours  
2 with him in the last three years, almost three years,  
3 and that he has his family in the courtroom, his both  
4 brothers are there and his brother's wife.  The man  
5 that taught him how to earn a living being an artist on  
6 the boulevard and was in business with his wife,  
7 Angelina, until they divorced.

8           I personally have not seen in his heart any  
9 madness, any evilness towards me or anyone in my time  
10 of the hours that I spent over three years with him.  I  
11 think Johnnie is going to close our closing, but that's  
12 what I wanted to share with the Court.

13           THE COURT:  All right, Mr. McCoy.

14           MR. McCOY:  Your Honor, briefly can he address  
15 Your Honor and the Court.

16           THE COURT:  Certainly.

17           MR. McCOY:  And then I will close it.

18           THE COURT:  All right.

19           THE DEFENDANT:  I'm guilty for what I'm charged  
20 with.  There's nothing that I can say or do to replace  
21 Charles Royal.  There's nothing that I can say or do to  
22 please his family.  For three years I've had this on my  
23 conscience.  And I've wanted to come forward, but I had  
24 to find God, like Mr. Royal said.  And I have, but it's  
25 been hard for me to forgive myself for what happened.

1 I can never go back to that split second that I saw him  
2 with my wife, I had a break. In that split second I  
3 did something terrible and I've --

4 THE COURT: Did you know him? I mean, there seems  
5 to be some people who know you and knew him. I just  
6 wonder if you knew him.

7 THE DEFENDANT: I knew him on the boulevard.

8 THE COURT: Okay.

9 THE DEFENDANT: And he had come to work, my wife  
10 had hired him at the air brush store, and we began to  
11 work together. And then things started arising between  
12 us three, and then he left our -- he stopped working.  
13 And then he began working across the street at our  
14 other air brush store.

15 But there's not a day that goes by that I'm not  
16 sorry for this. I feel so much remorse because I  
17 can -- they can never see their son again, and I feel  
18 the worst for his daughter because I know what it's  
19 like to grow up without a father, it hurts. And  
20 there's nothing that I can do to replace him. There's  
21 nothing that I can say. And I'm sorry for what I did,  
22 and I'm guilty of it. And I'm sorry.

23 THE COURT: All right.

24 THE DEFENDANT: There's nothing I can do, just go  
25 back and stop what I did. I wish I could, but I can't.

1 That's all I got to say.

2 THE COURT: All right, Mr. McCoy.

3 MR. McCOY: Your Honor, I just briefly in further  
4 mitigation, I just want the Court to know that an  
5 Alford plea was offered in this case where he did not  
6 have to take responsibility. It was Mr. Powell who  
7 wanted to address Your Honor in this court and say, I  
8 did this. Under North Carolina versus Alford, you can  
9 say it's only enough evidence to convict me. But he  
10 said that the family deserves closure.

11 And it took three years, Your Honor. And we have  
12 some outstanding -- he has some outstanding random  
13 violations. I mean, not random. Brady violations  
14 because we got evidence on Friday during our  
15 negotiations with him. I'm not saying that for any  
16 other reason than when I took that out to him, we had  
17 completed our -- we finally completed our quest to  
18 figure out whether or not there was a constitutional  
19 violation or otherwise.

20 But this man, every time I've encountered him or  
21 Mr. Irvin has, has been repentant, he has been someone  
22 who's been reluctant to even feel as though he deserves  
23 a shot in court. His day in court today is here for  
24 nothing of sentencing or anything else other than to  
25 give the family closure. And he did so on his own

1 accord, not asking for an Alford plea.

2           And when we had the discussion with him regarding  
3 the amount of time and how and why, I went over the  
4 difference between murder and manslaughter with him.  
5 Because I have had murder trials and I have had  
6 manslaughter cases and manslaughter pleas. And this  
7 man has never been violent but for ten seconds his  
8 entire life. I know I say it to you every time I'm in  
9 front of you, judge. We graduated together in Myrtle  
10 Beach High School. I knew him then, and he was a nice  
11 kid. I mean, he probably was more afraid of me than I  
12 was of him in high school.

13           But to say that this man committed a split second  
14 decision when he saw his wife with another -- his soon  
15 to be ex-wife with another man, it forever changed the  
16 course of Mr. Royal's entire family and their life.  
17 And only those ten seconds in a mirror, that is exactly  
18 what the definition of manslaughter is.

19           And also, if you take into account the fact that  
20 this is a manslaughter case and he does not have a  
21 record and he is not a violent man, we would ask for  
22 mercy, Your Honor, as he is trying to give the family a  
23 little bit of closure today. I know that there's  
24 nothing that can bring them complete closure or any  
25 absolution.

1           But this was his idea not to plead under Alford,  
2 it was his idea to say, I'm sorry, it was his idea to  
3 stand here with us today regardless of what we wanted  
4 to go forward with on the trial.

5           And we just ask Your Honor for mercy for the ten  
6 seconds that he made a ridiculously horrific decision  
7 less than a mile away from the school I graduated from  
8 and two miles away from my house. He knows the gravity  
9 of the situation. But it was ten seconds, Your Honor,  
10 that he'll never get to take back. And we just  
11 respectfully request that leniency be granted under the  
12 law and this Court be merciful. Thank you, Your Honor.

13           THE COURT: All right, Mr. McCoy, do you have  
14 anything else you would like to offer?

15           MR. McCOY: Your Honor, we would ask for credit  
16 for the three years time served.

17           THE COURT: Well, he's entitled to that.

18           MR. McCOY: Thank you, Your Honor.

19           THE COURT: All right. I'm going to follow the  
20 recommendation of the State, 25 years.

21           MR. McCOY: Thank you, judge.

22           (The hearing concluded at approximately  
23 11:15 a.m.)

24           (End of Transcript of Record)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

I, TERESA J.F. BAUTZ, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 12th day of February, 2018.

I FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

*S/Teresa J. F. Bautz*

---

TERESA J.F. BAUTZ, RPR  
Official Court Reporter

FORM 5

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
CLIFFORD WAYNE POWELL JR #372293 )  
 Full name and prison number (if any) of Applicant. )  
 )  
 v. )  
 )  
 State of South Carolina )  
 )

IN THE COURT OF COMMON PLEAS

20 17 CP26 7756

APPLICATION FOR  
POST-CONVICTION RELIEF

FILED  
 CLERK OF COURT  
 HORRY COUNTY  
 NOV 28 2017

**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention KIRKLAND CORRECTIONAL INSTITUTION 4344 BRAND RIVER RD. COLUMBIA, SC 29210
2. Name and location of Court which imposed sentence HORRY COUNTY COURT OF GENERAL SESSIONS
3. Name(s) of co-defendant(s) (if any) NOT APPLICABLE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2014-GS-26-03666
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) SENTENCE IMPOSED ON APRIL 26TH, 2017
  - (b) VOLUNTARY MANSLAUGHTER: 25 YEARS

- (c) \_\_\_\_\_
- 6. Check whether a finding of guilty was made:
  - (a) after a plea of guilty ✓
  - (b) after a plea of not guilty \_\_\_\_\_
  - (c) after a plea of nolo contendere \_\_\_\_\_
- 7. Did you appeal from the judgment of conviction or the imposition of sentence?  
NO APPEAL WAS FILED BY APPLICANT'S COUNSEL
- 8. If you answered "yes" to (7), list:
  - (a) the name of each Court to which you appealed:
    - i. NOT APPLICABLE
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. NOT APPLICABLE
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. NOT APPLICABLE
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. NOT APPLICABLE
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
- 9. If you answered "no" to (7), state your reasons for not so appealing:
  - (a) SEE QUESTION 7
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
- 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) PLEASE SEE ATTACHMENT
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

- (a) PLEASE SEE ATTACHMENT
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

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

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

- (a) the specific nature thereof:
  - i. NOT APPLICABLE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. NOT APPLICABLE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. NOT APPLICABLE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

## ATTACHMENT

10.

STATE CONCISELY THE GROUNDS ON WHICH YOU BASE ALLEGATION THAT YOU ARE BEING HELD IN CUSTODY UNLAWFULLY:

- A - INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO FILE NOTICE OF APPEAL
- B - INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESENT A COMPETENCY AND INSANITY DEFENSE
- C - INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ADVISE AND ASSERT DEFENSES TO APPLICANT
- D - INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ADEQUATELY INVESTIGATE AND PREPARE FOR TRIAL
- E - INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE STATEMENTS PRESENTED BY STATE'S WITNESS AT SENTENCING AND FAILURE TO NOTIFY COURT OF APPLICANT'S MENTAL ILLNESSES
- F - INEFFECTIVE ASSISTANCE OF COUNSEL BY DUAL REPRESENTATION
- G - INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO MOVE FOR SUPPRESSION OF EVIDENCE
- H - INEFFECTIVE ASSISTANCE OF COUNSEL FOR ADVICE CONCERNING PLEA, GOING TO TRIAL AND PRESERVING THE APPLICANT'S RIGHTS
- I - MISCELLANEOUS INEFFECTIVENESS OF COUNSEL
- J - INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE WITNESSES
- K - VOLUNTARINESS OF PLEA UNRELATED TO ATTORNEY ERROR

ATTACHMENT

11.

STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (10):

- A- APPLICANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHTS TO A DIRECT APPEAL.
- B- COUNSEL FAILED TO PRESENT A COMPETENCY AND INSANITY DEFENSE.
- C- COUNSEL FAILED TO INFORM APPLICANT ADEQUATELY OF ALL AVAILABLE DEFENSES INCLUDING FAILURE TO INFORM APPLICANT OF THE M'NAUGHTEN INSANITY DEFENSE, CODIFIED AS S.C. CODE 17-24-16
- D- COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE FOR TRIAL BY NOT INVESTIGATING MENTAL ILLNESS CLAIMS OF APPLICANT BY STATE'S WITNESSES, STATE'S VICTIM/WITNESS, APPLICANT'S FAMILY APPLICANT HIMSELF, AND A PSYCHIATRIST'S DIAGNOSIS INFORMING APPLICANT'S COUNSEL OF FINDINGS OF MENTAL ILLNESSES.
- E- COUNSEL FAILED TO CHALLENGE STATEMENTS PRESENTED BY STATE'S WITNESS AT SENTENCING TO THE COURT, TOWARDS APPLICANT WHICH WAS BIAS, HELD NO VALUE, WAS NO EVIDENCE TO SUPPORT WITNESS' CLAIM ACCUSING THE APPLICANT OF A HATE CRIME USING RACIAL TERMINOLOGY. COUNSEL'S FAILURE TO RAISE CHALLENGE TO THIS STATEMENT AS WELL AS NOTIFY THE COURT OF APPLICANT'S MENTAL ILLNESSES WAS ERRONEOUS AND POSSIBLY AFFECTED THE COURT'S CONSIDERATION FOR LENIENCY AND A CONSIDERABLY LOWER SENTENCE.

F- APPLICANT'S COUNSEL BEGAN REPRESENTING APPLICANT ON JUNE 10TH, 2014 AND DUAL REPRESENTED A STATE'S WITNESS IN NOVEMBER 2014. THIS STATE WITNESS HAD COLLECTED EVIDENCE AND TURNED SAID EVIDENCE OVER TO POLICE, GAVE STATEMENTS TO STATE PROSECUTOR AND A DETECTIVE INTERVIEW WHICH WAS USED IN HAVING THE APPLICANT PLEAD GUILTY. COUNSEL REPRESENTED SAID STATE'S WITNESS, IN THE COMPANY OF THE STATE'S "STAR" WITNESS/VICTIM IN A SEPERATE HEARING/CASE. THE APPLICANT'S COUNSEL MAINTAINED A CLOSE RELATIONSHIP WITH THIS STATE WITNESS THROUGHOUT PRE-TRIAL. THIS BELIEVABLY AFFECTED APPLICANT'S CASE AND IN TURN PRESUDICED COUNSEL TOWARDS APPLICANT'S DEFENSE AND DECISIONS CONCERNING TRIAL.

G- COUNSEL FAILED TO MOVE TO SUPPRESS EVIDENCE USED IN HAVING THE APPLICANT PLEAD GUILTY, SUCH AS:

i- WRITTEN STATEMENT, (2) DETECTIVE INTERVIEWS OF STATE'S "STAR" WITNESS/VICTIM/WIFE  
ii- WRITTEN STATEMENT, (2) DETECTIVE INTERVIEWS OF STATE'S WITNESS/ROOMMATE OF APPLICANT.

iii- INVESTIGATIVE REPORT OF STATE'S 2ND EYE WITNESS PROVIDED BY GINGER POP IN APRIL 2017.

THE ITEMS LISTED IN (G) WERE USED TO GET THE APPLICANT TO PLEAD GUILTY. THESE WITNESSES GAVE INCONSISTENT STATEMENTS IN AUDIO RECORDINGS ON 911 CALLS, DETECTIVE INTERVIEWS AND WRITTEN; INVESTIGATOR POP'S INVESTIGATION REPORT OF EYE WITNESS IN APRIL 2017 COMPLETELY CONTRADICTS AND IS VERY INCONSISTENT WITH HIS (2) 911 CALLS AND DETECTIVE INTERVIEW ON JUNE 1ST, 2014.

IV- INCORRECT/MISDATED RESIDENTIAL SEARCH WARRANT USED TO COLLECT ITEMS FROM APPLICANT'S HOME USED IN HAVING THE APPLICANT PLEAD GUILTY.

- H- COUNSEL ADVISED APPLICANT TO PLEAD GUILTY DESPITE THE REPEATED OBJECTIONS TO DOING SO BY THE APPLICANT ON APRIL 24<sup>TH</sup> 2017 AT THE HARRY COUNTY COURTHOUSE AND REPEATEDLY ON APRIL 26<sup>TH</sup> 2017 AT THE HARRY COUNTY COURTHOUSE IMMEDIATELY BEFORE THE HEARING FOR SENTENCING, AT WHICH TIME APPLICANT WAS COERCED AND FRIGHTENED INTO PLEADING GUILTY.
- I- APPLICANT'S COUNSEL WAS UNDERGOING TREATMENT FOR LUNG CANCER WHILE REPRESENTING APPLICANT AT THE JANUARY 2017 BOND HEARING AND AT THE APRIL 26<sup>TH</sup> 2017 SENTENCING HEARING. COUNSEL NEVER INFORMED COURT OF LIFE THREATENING ILLNESS, TREATMENT OF DISEASE INCLUDING MEDICATION, OR THE APPLICANT. IT IS POSSIBLE APPLICANT'S COUNSEL'S JUDGEMENT AND PERFORMANCE WAS EFFECTED BY HIS ILLNESS, TREATMENT AND MEDICATION.
- J- COUNSEL FAILED TO INVESTIGATE ALL WITNESSES WHO HAD INFORMATION CONCERNING THE APPLICANT'S GUILT AND INNOCENCE. COUNSEL HAD A DUTY AND OBLIGATION TO INVESTIGATE ALL WITNESSES WHO MAY HAVE HAD INFORMATION CONCERNING THE APPLICANT. COUNSEL FAILED TO CONTACT AND INVESTIGATE ALL ALIBI WITNESSES, COMPLETE FAILURE TO INVESTIGATE THESE WITNESSES CAN HARDLY BE CONSIDERED A TACTICAL DECISION.
- K- THE COURT FAILED TO ADVISE THE APPLICANT ABOUT SUPERVISED RELEASE UPON COMPLETION OF PRISON SENTENCE TERM AT THE SENTENCING HEARING.
- L- APPLICANT RESERVES THE RIGHT TO AMEND THIS APPLICATION WITH THE SPECIFIC FACTS UNDERLYING EACH ALLEGATION FOR POST CONVICTION RELIEF.

- iv. \_\_\_\_\_
- (d) the date of each such disposition:
  - i. NOT APPLICABLE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. NOT APPLICABLE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

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

NO

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

- (a) which grounds have been presented:
  - i. NOT APPLICABLE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings in which each ground was raised:
  - i. NOT APPLICABLE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

- (a) NOT APPLICABLE
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

- (a) your arraignment and plea? YES
- (b) your trial, if any? NOT APPLICABLE
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NOT APPLICABLE
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NOT APPLICABLE

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

- (a) the name and address of each attorney who represented you:
  - i. JAMES T. IRVIN SR. ESQ, 1240 21ST AVE, SUITE 101, P.O. BOX 26077, MYRTLE BEACH, SC 29578 (LEAD COUNSEL)
  - ii. JONATHAN D. MCCOY, 1240 21ST AVE NORTH, SUITE 103, MYRTLE BEACH, SC 29577 (CO-COUNSEL)
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. PLEASE SEE ATTACHMENT
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

DIRECT APPEAL TO BE REINSTATED, GUILTY PLEA AND SENTENCE TO BE VACATED, AND A NEW TRIAL ORDERED.

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

NO

## ATTACHMENT

18.

(b) THE PROCEEDINGS AT WHICH EACH SUCH ATTORNEY REPRESENTED YOU:

i. JAMES T. IRVIN JR., ESQ (JIM), REPRESENTED THE APPLICANT AS "LEAD COUNSEL" ON:

A- JULY 16TH, 2014, - BOND HEARING (DENIED)

B- SEPTEMBER 10TH, 2014, - BOND HEARING (CONTINUED)

C- SEPTEMBER 11TH, 2014, - PRELIMINARY HEARING (NOLLE PROSEQUI - <sup>ATTN:</sup> MURDER)

D- NOVEMBER 10TH, 2014, - BOND HEARING (DENIED)

E- SEPTEMBER 4TH, 2015, - FAMILY COURT (DIVORCE)

F- OCTOBER 2015 - BOND HEARING (DENIED)

G- SEPTEMBER 2016 - BOND HEARING (DENIED)

H- JANUARY 4TH, 2017, - HEARING APPOINTING CONFLICT ATTORNEY AS CO-COUNSEL

I- JANUARY 2017 - BOND HEARING (DENIED)

J- APRIL 24TH, 2017, - HEARING WITH PROSECUTOR FOR <sup>(APPLICANT)</sup> DEFENDANT TO SIGN GUILTY PLEA (APPLICANT REFUSED)

K- APRIL 26TH, 2017, - HEARING FOR PLEA AND SENTENCING - (APPLICANT REFUSED TWICE BEFORE SIGNING PLEA AGREEMENT)

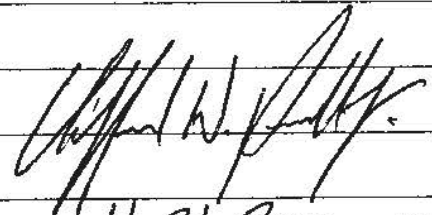
ii. JONATHAN D. MCCOY (JONNY), REPRESENTED THE APPLICANT AS "CO-COUNSEL" ON:

A- JANUARY 2017, - BOND HEARING (DENIED)

B- APRIL 26TH, 2017, - HEARING FOR PLEA AND SENTENCING - (APPLICANT REFUSED TWICE BEFORE SIGNING PLEA AGREEMENT)

ATTACHMENT

I CLIFFORD WAYNE POWELL JR. DO NOT HAVE POST CONVICTION COUNSEL AT THE TIME OF FILING THIS APPLICATION. FURTHER I DO NOT YET HAVE A COPY OF PLEA COUNSEL'S FILE, ACCESS TO DISCOVERY ACCESS TO FUNDS FOR EXPERT AND INVESTIGATIVE SERVICES, OR ANY ABILITY TO CONDUCT AN INVESTIGATION. GIVEN THOSE LIMITATIONS, I CAN NOT PROVIDE FURTHER INFORMATION REGARDING ADDITIONAL CLAIMS FOR POST CONVICTION RELIEF, ALTHOUGH I CLIFFORD WAYNE POWELL JR. BELIEVE THERE ARE OTHER VIABLE POST CONVICTION CLAIMS AVAILABLE TO ME. WITH THE EXCEPTION OF THE SPECIFIC ISSUES INCLUDED IN THIS APPLICATION AT THIS TIME, I CLIFFORD WAYNE POWELL JR. DO NOT WAIVE THE ATTORNEY-CLIENT PRIVILEGE TO ANY EXTENT, AND I REQUEST THAT MY PLEA COUNSEL NOT PROVIDE ANY PORTION OF MY FILES TO ANY REPRESENTATIVE OF THE ATTORNEY GENERAL'S OFFICE, OUTSIDE THE SCOPE OF THE SPECIFIC CLAIMS ADDRESSED IN THIS APPLICATION AND ANY AMENDMENT TO THIS APPLICATION.



11-21-2017 10:45AM

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

2017 CP26 ~~7156~~

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

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

  
 Applicant

SWORN or affirmed to and subscribed before me this

21 day of November, 2017.

  
 Notary Public

My Commission Expires: Dec. 1, 2025

FILED  
 CLERK OF COURT  
 HORRY COUNTY, SC  
 2017 NOV 28 PM 1:07

STATE OF SOUTH CAROLINA )  
 )  
County of HORRY )

VERIFICATION

20 17 CP26 7756

I, CLIFFORD W. POWELL SR., 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.

[Signature]

SWORN to and subscribed before me this 21  
day of November, 2017.

[Signature] (L.S.)  
Notary Public

My Commission Expires: Dec. 1, 2025

FILED  
IN PROBATE  
2017 NOV 28 PM 1:01  
KIMBERLY ELLIS  
CLERK OF COURT  
HORRY COUNTY, SC

CLERK OF COURT, 2017 CP26 1756 ~~TUESDAY~~, NOVEMBER 21ST, 2017 10:48

PLEASE MAIL ME A TIME-STAMPED COPY OF THIS APPLICATION AFTER YOU HAVE RECEIVED IT. I'M REQUESTING THIS COPY FOR MY RECORDS AS PROOF OF FILING THE POST CONVICTION RELIEF APPLICATION - FORM 5, VERIFICATION, AND APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF. THANK YOU AND HAPPY HOLIDAYS.

Sincerely,  
Cliff W. R. [Signature]

FILED  
HARRIS COUNTY  
2017 NOV 28 PM 1:07  
MARLENE ELVIS  
CLERK OF COURT  
HARRIS COUNTY, SC

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FIFTEENTH JUDICIAL CIRCUIT  
 COUNTY OF HORRY )

Clifford Wayne Powell, Jr., ) Case No.: 2017-CP-26-07756  
 S.C.D.C. No. 372293, )  
 )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

**RETURN AND  
 PARTIAL MOTION TO DISMISS**

2018 MAR -5 PM 1:19  
 REBECCAH ELVIS  
 CLERK OF COURT  
 HORRY COUNTY

In response to the application for post-conviction relief filed by Clifford Wayne Powell, Jr. (Applicant) on November 28, 2017, Respondent would show this Court:

**I.**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the September 2014 term of the Horry County Grand Jury for murder (2014-GS-26-03666).<sup>1</sup> The underlying facts of the matter, affirmed by Applicant, are as follows:

On June the 1<sup>st</sup> of 2014, in the early morning hours of around 1:30 a.m., 2 a.m., Angela Powell, the victim of the attempted murder that's been dropped, was out celebrating her birthday with three other friends, including the victim Charles Royal.

When they were out that night, they saw Clifford Powell. There was no altercation at that time, no issues. She saw him, he saw her, there was a brief speaking, that was the end of it. They then make arrangements all to come back to Angelina Powell's apartment to continue hanging out for her birthday. Her and Mr. Royal, the victim, get there first. They get out of the vehicle.

<sup>1</sup> Applicant was additionally indicted at the September 2014 term for attempted murder (2014-GS-26-03665), and unlawful possession of a firearm by a person convicted of a violent offense (2014-GS-26-03667). Applicant was additionally indicted at the October 2014 term for an additional count of attempted murder (2014-GS-26-04029), and at the January 2015 term for possession of a weapon during the commission of a violent crime (2015-GS-26-00423). These indictments were dismissed *nolle prosequi* as part of Applicant's plea.

Charles Royal is walking up first. Clifford Powell is there waiting. They both approach, there's some words exchanged. The Defendant then shoots the victim six times with a 9 millimeter. He then holds the gun up to Angelina Powell's head, makes some statements to the gist of, you would be dead too, but I still love you. He then takes off running.

The six gunshot wounds to the victim were all to the right side, the right back of the head, the right elbow, the right abdomen, the right thigh and below the kneecap. I just bring that up because the State believes it's indicative of some sort of defensive position where he's leaning to the right. And the shots are fired.

He then takes off running. There is a fence that separates where the victim's apartment is to where the Defendant lives. A witness sees him run to that fence, climb over the fence. He then is seen minutes later at a trash can or a dumpster a few blocks down, a witness sees him dumping things into the dumpster. He gets back in the vehicle, takes off to his apartment.

Later on what's found in that dumpster is a 9 millimeter, two holsters and 9 millimeter bullets. The State through investigator [Pop] and the ATF was ultimately able to trace that gun back to Clifford Powell. He goes back to the apartment, the roommate testifies he then sees the Defendant in a towel, indicating that he had showered. He says he then tells him that he is going to the gold club.

Later on that night he's at the gold club, the police of course come to the scene. Angelina Powell immediately identifies Clifford Powell, she recognizes his voice and she recognizes all the clothes he's wearing. The police immediately go pick up Mr. Powell and interview him. At that time, of course, he denies any sort of involvement with the murder.

(Tr. 15-17.) James Irvin, Esq.,<sup>2</sup> and Jonny D. McCoy, Esq. represented Applicant. Nancy Livesay and Chris Helms, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 26, 2017, Applicant pled guilty to the lesser-included offense of voluntary manslaughter. Upon recommendation by the State of a sentence of no more than 25 years, the Honorable Larry B. Hyman, Jr. sentenced Applicant to imprisonment for a term of 25 years. Applicant did not appeal his plea or sentence.

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<sup>2</sup> Deceased as of October 22, 2017.

## II.

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

1. "Ineffective Assistance of Counsel"
  - a. "For Failure to File Notice of Appeal"
    - i. "Applicant did not knowingly, intelligently, and voluntarily waive his rights to a direct appeal."
  - b. "For Failure to Present a Competency and Insanity Defense"
    - i. "Counsel failed to present a competency and insanity defense."
  - c. "For Failure to Advise and Assert Defenses to Applicant"
    - i. "Counsel failed to inform Applicant adequately of all available defenses including failure to inform Applicant of the M'Naughten insanity defense, codified as S.C. Code 17-24-10"
  - d. "For Failure to Adequately Investigate and Prepare for Trial"
    - i. "Counsel failed to adequately investigate and prepare for trial by not investigating mental illness claims of Applicant by State's witnesses, State's victim/witness, Applicant's family, Applicant himself, and a psychiatrist's diagnosis informing Applicant's counsel of findings of mental illnesses."
  - e. "For Failure to Challenge Statements Presented By State's Witness At Sentencing"
    - i. "Counsel failed to challenge statement's presented by State's witness at sentencing to the Court, towards Applicant which was blast, held no value, was no evidence to support witness' claim accusing the Applicant of a hate crime using racial terminology. Counsel's failure to raise challenge to this statement as well as notify the Court of Applicant's mental illnesses was erroneous and possibly affected the Court's consideration for leniency and a considerably lower sentence."
  - f. "By Dual Representation"
    - i. "Applicant's counsel began representing Applicant on June 10, 2014 and dual represented a State's witness in November 2014. This State witness had collected evidence and turned said evidence over to police, gave statements to State prosecutor and a detective interview which was used in having Applicant plead guilty. Counsel represented said State's witness, in the company of the State's "star" witness/victim in a separate hearing/case. The Applicant's counsel maintained a close relationship with this State

witness throughout pre-trial. This believability affected Applicant's case and in turn prejudiced counsel towards Applicant's defense and decisions concerning trial."

- g. "For Failure to Move For Suppression of Evidence"
  - i. "Counsel failed to move to suppress evidence used in having the Applicant plead guilty, such as:"
    - 1. "Written statement, (2) detective interviews of State's "star" witness/victim/[illegible]"
    - 2. "Written statement, (2) detective interviews of State's witness/roommate of Applicant."
    - 3. "Investigative report of State's 2<sup>nd</sup> Eyewitness provided by Ginger Pop in April 2017."
  - ii. "Incorrect/misdated residential search warrant used to collect items from Applicant's home used in having the Applicant plead guilty."
  - iii. "The items listed [above] were used to get the Applicant to plead guilty. These witnesses gave inconsistent statements and in audio recordings on 911 calls, detective interviews and written; Investigator Pop's investigation report of eyewitnesses in April 2017 completely contradicts and is very inconsistent with his (2) 911 calls and detective interview on June 1<sup>st</sup> 2014."
- h. "For Advice Concerning Plea, Going to Trial And Preserving the Applicant's Rights"
  - i. "Counsel advised Applicant to plead guilty despite the repeated objections to doing so by the Applicant on April 24<sup>th</sup>, 2017 at the Horry County Courthouse and repeatedly on April 26<sup>th</sup> 2017 at the Horry County Courthouse immediately before the hearing for sentencing, at which time Applicant was coerced and frightened into pleading guilty."
- i. "Miscellaneous Ineffectiveness of Counsel"
  - i. "Applicant's counsel was undergoing treatment for lung cancer while representing Applicant at the January 2017 bond hearing and at the April 26<sup>th</sup> 2017 sentencing hearing. Counsel never informed Court of life threatening illness, treatment of disease including medication, or the Applicant. It is possible Applicant's Counsel's judgment and performance was effected by his illness, treatment and medication."
- j. "For Failure to Investigate Witnesses"
  - i. "Counsel failed to investigate all witnesses who had information concerning the Applicant's guilt and innocence. Counsel had a duty and obligation to investigate all witnesses who may have had

information concerning the Applicant. Counsel failed to contact and investigate all alibi witnesses. Complete failure to investigate these witnesses can hardly be considered a tactical decision.”

2. “Voluntariness of Plea Unrelated to Attorney Error”

- a. “The court failed to advise the Applicant about supervised release upon completion of prison sentence term at the sentencing hearing.”

Applicant thereafter reserved the right to further amend the application.

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

### III.

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases.

Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

#### A. Right to Appeal

Applicant alleges that he was denied the right to a direct appeal of his plea and sentence. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

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

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted). Therefore, in a collateral action attacking a guilty plea, the “bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief.” Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

Applicant narrowly alleges that he did not knowingly, intelligently, and voluntarily waive his right to a direct appeal. The application does not indicate whether or not Applicant asked for

an appeal, nor does it indicate any obvious, non-frivolous grounds for appeal. The plea transcript shows the Court explicitly informed Applicant of his right to file an appeal, and that Applicant confirmed his understanding of that right and how to act upon it. (Tr. 19, ll. 6-23.) As such, Respondent lacks sufficient information to admit or deny this allegation at this time. Respondent requests an evidentiary hearing on this ground for relief. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

### **B. Mental Health / Insanity / Competence**

One of Applicant's ineffective assistance allegations raises a question of mental competence. Due process prohibits the conviction of a person who is mentally incompetent, and that right cannot be waived by a guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992) (citing Bishop v. U.S., 350 U.S. 961 (1956); Pate v. Robinson, 383 U.S. 375 (1966)). The test of competency to enter a plea is the same as required to stand trial: the accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Id., 417 S.E.2d at 596 (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980)). An applicant alleging incompetence in fact must show by a preponderance of the evidence he was incompetent at the time of his plea. Id.

An applicant alleging ineffective assistance of counsel for failure to seek a mental health evaluation, however, must still satisfy the two prongs of Strickland, though considered in reverse as a practical necessity: applicant must demonstrate (1) a 'reasonable probability' that he was not competent at the time of the crime or at the time of the plea, and (2) that counsel's failure to

seek an evaluation was unreasonable. Id. at 233, 417 S.E.2d at 596. Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id.

### **C. Investigation & Preparation**

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

### **D. Conflict of Interest**

“An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s.” Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). The South Carolina Supreme Court has further stated that a conflict of interest occurs when “a defense attorney places himself in a situation inherently conducive to divided loyalties.” Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993)

(citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); see also Burger v. Kemp, 483 U.S. 776, 783 (1987). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005).

Notably, Applicant fails to identify by name the person who allegedly forms the basis of his conflict of interest allegation.

#### **E. Generally**

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

#### **IV.**

Applicant proposes as an independent ground that Counsel Irvin was potentially ineffective because he was battling cancer throughout the course of his representation and did not inform the Court of as much on the record. Whether Applicant wishes to argue Counsel Irvin’s illness as the underlying cause of the deficiencies alleged is within his prerogative, but the fact that his attorney was deathly ill does not, in and of itself, constitute an independent ground for relief cognizable under the Uniform Post-Conviction Procedure Act. Accordingly, Applicant’s allegation that Counsel Irvin was ineffective due to cancer should be summarily dismissed.

#### **V.**

Applicant’s last allegation, that his plea was rendered involuntary by the Court’s failure to advise him regarding supervised release, is without merit. “The imposition of a sentence may

have a number of collateral consequences, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences.” Williams v. State, 378 S.C. 511, 514-15, 662 S.E.2d 615, 617 (Ct. App. 2008); see also Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991). Thus, a defendant need not be advised of all collateral consequences of his or her plea in order for the plea to withstand constitutional scrutiny. Id.

A consequence that the defendant must be informed of is one which impacts the sentence imposed on the defendant, and as such, is a direct consequence. See State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (stating the defendant must be apprised of the direct consequences, which are the direct and immediate results, of his guilty plea). “The distinction between ‘direct’ and ‘collateral’ consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate, and largely automatic effect on the range of the defendant’s punishment.” Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1365-66 (4th Cir. 1973).

Parole eligibility is a collateral consequence, and a defendant need not be specifically advised of it before entering a guilty plea. Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997). As such, Applicant’s claim that his guilty plea was rendered involuntary by the Court’s failure to discuss parole eligibility with him is without merit as a matter of law and should be summarily dismissed.

## VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code

of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC; Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

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

## VII.

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

*[Conclusion and signature on following page]*

## VIII.

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

Respectfully submitted,

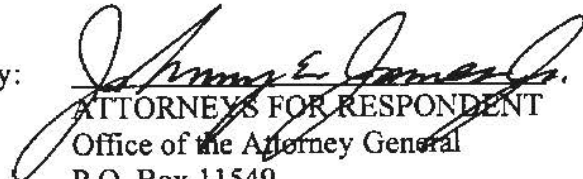
ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.  
Assistant Attorney General

By:

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

3/1, 2018

STATE OF SOUTH CAROLINA )  
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 COUNTY OF HORRY )  
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 CLIFFORD W. POWELL, JR., #372293, )  
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 ) Applicant, )  
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 ) vs )  
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 STATE OF SOUTH CAROLINA, )  
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 ) Respondent. )  
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IN THE COURT OF COMMON PLEAS

2017-CP-26-7756

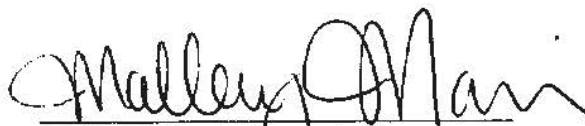
AFFIDAVIT OF SERVICE BY MAIL

HORRY COUNTY  
 2018 MAR -5 PM 1:18  
 RENEE M. LEVINS  
 CLERK OF COURT  
 HORRY COUNTY, SC

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

**Steven W. Fowler, Esquire**  
**Fowler Law Firm**  
**730 Main Street, Unit 237**  
**North Myrtle Beach, SC 29582**

DATED this 1<sup>st</sup> day of March, 2018.

  
 Mallory Morris, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY ) 2017-CP-26-7756

CLIFFORD W. POWELL, Jr., )

Applicant, )

vs. )

STATE OF SOUTH CAROLINA, )

Respondent. )

**Transcript of Record**

OCTOBER 9, 2019

**B E F O R E:**

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

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

Steven W. Fowler, Esquire  
**Attorney for Applicant**

Johnny James, Jr., Esquire  
**Attorney for State**

Sallie Beth Todd  
**Circuit Court Reporter**

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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**CLIFFORD W. POWELL, JR.**

By Mr. Fowler	4		79	
By Mr. James		54		

**DR. HAROLD C. MORGAN**

By Mr. Fowler	85			
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**JOHNNY MCCOY**

By Mr. James	97			
By Mr. Fowler		118		

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Certificate of Court Reporter ..... 128

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>
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PL 1	E-mail dated 3/28/2015		X	23
PL 2	Order dated 3/31/2017		X	43
PL 3	Order dated 1/4/2017		X	44
PL 4	Letter dated 3/21/2017		X	50
PL 5	USB with discovery		X	52
PL 6	Dr. Morgan's Bill		X	87

1           **THE COURT:** All right. I'm ready when you are.

2           **MR. JAMES:** If it may please the Court. Your Honor, this  
3 is the matter of Clifford Wayne Powell versus the State of  
4 South Carolina, docket number 2017-CP-26-07756. Mr. Powell  
5 is present here in the courtroom today and is represented by  
6 Mr. Steven Fowler, Esquire. Mr. Powell was indicted at the  
7 September 2014 term of the Horry County Grand Jury for murder.  
8 He was additionally indicted at that term for attempted  
9 murder, unlawful possession of a firearm by a person convicted  
10 of a violent offense. He was additionally indicted at the  
11 October 2014 term of an additional count of attempted murder,  
12 and at the January 2015 term for possession of a weapon during  
13 the commission of a violent crime. All of those indictments,  
14 not withstanding the first murder indictment, were dismissed  
15 nolle prosequi as part of his plea. He was represented on  
16 those charges by James Irvin, Esquire and Jonny D. McCoy,  
17 Esquire. Mr. McCoy is present here in the courtroom today,  
18 and unfortunately Mr. James Irvin passed away on October 22nd,  
19 2017. That case was prosecuted by Nancy Livesay and Chris  
20 Helms of the 15th Circuit Solicitor's Office. On April 2016,  
21 I'm sorry, April 26th, 2017, applicant plead guilty of the  
22 lesser included offense of voluntary manslaughter. On the  
23 recommendation by the state of no more than 25 years, the  
24 Honorable Larry B. Hyman, Junior sentenced him to imprisonment  
25 for a term of 25 years. The applicant did not appeal his plea

1 or his sentence. Your Honor, the state's understanding of the  
2 allegations that we are going forward on today are as they are  
3 set forth in the original application and restated in the  
4 state's return to that application. I believe there is  
5 roughly ten, give or take, allegations that we'll be  
6 proceeding on today. With that set forth, I will give the  
7 floor over to Mr. Fowler to proceed with his case.

8 **THE COURT:** All right. Yes, sir.

9 **MR. FOWLER:** Your Honor, I'd like to call Clifford Wayne  
10 Powell, Junior to the stand, please.

11 **THE COURT:** All right.

12 **CLIFFORD WAYNE POWELL, JUNIOR, HAVING BEEN**  
13 **FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

14 **THE CLERK:** Please have a seat and state your name for  
15 the Court.

16 **MR. POWELL:** Yes, ma'am. My name is Clifford Wayne  
17 Powell, Junior.

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

19 **MR. FOWLER:** Thank you, Your Honor.

20 **DIRECT EXAMINATION OF MR. POWELL BY MR. FOWLER:**

21 Q: Mr. Powell, you have filed an application for post-  
22 conviction relief in this matter; is that correct?

23 A: Yes, sir.

24 Q: And I was looking at the date, apparently you signed it  
25 on November 21st, 2017; is that correct?

1 A: Yes, sir.

2 Q: And you plead in April of 2017; is that correct?

3 A: Yes, sir.

4 Q: All right. So, that's approximately six months after you  
5 plead, you filed this PCR; is that correct?

6 A: Yes, sir.

7 Q: Now, we'll get to some specifics with the pleasure of the  
8 Court in a minute. But tell me, why did you -- to me that's a  
9 relatively short period of time from April to November. Why  
10 did you file a PCR application so quickly after your April  
11 17th plea?

12 A: I had been reviewing some of the evidence that I had  
13 carried with me from county jail after I plead guilty. I  
14 noticed things in the discovery that were very important and  
15 had never been basically investigated. And ---

16 Q: Okay. Let me stop you right there.

17 A: Yes, sir.

18 Q: And I might piece mill your testimony from time to time.

19 A: Yes, sir.

20 Q: What things specifically did you notice that caused you  
21 concern?

22 A: Things concerning my mental health, basically, mainly my  
23 mental health things. And not only that, I began responding  
24 to a Doctor Harold C. Morgan, Medical Doctor. He's a  
25 psychiatrist. Jim Irvin had had Doctor Irvin come interview

1 me on January 10th, 2015 while I was still in pretrial  
2 detention here in Conway. Doctor Morgan and I met for two  
3 hours in a private room. He left me a Multiphasic Minnesota  
4 Test with about 500 personality questions that I filled out  
5 and mailed to him.

6 Q: And when was that specifically?

7 A: That was January 10th, 2015, pretrial.

8 Q: So that could have easily been provided. Did you provide  
9 that to Mr. Irvin or how did Mr. Irvin get that document?

10 A: Mr. Irvin -- I made payments to Mr. Irvin to personally  
11 hire a psychiatrist to basically check my mental health status  
12 and if I had any mental health issues to help build a defense.  
13 Mr. Irvin then contacted Harold C. Morgan, who he had worked  
14 with in previous cases or worked with before. Harold Morgan  
15 then came from Atlanta, Georgia and visited me. He basically  
16 interviewed me for two hours and then after that him and  
17 Counsel Irvin both went to lunch and from that point, I didn't  
18 know anything else. All throughout Irvin's representation of  
19 me I requested numerous times results from Doctor Morgan, what  
20 did Doctor Morgan say? Do I have issues? Why am I feeling  
21 this way a lot of times or that way? I was told consistently  
22 you're fine, nothing's wrong with you. Doctor Morgan said  
23 you're fine, there's no mental health issues with you  
24 whatsoever. So, once I had plead guilty on April 26th, 2017 I  
25 had an officer at SCDC, South Carolina Department of

1 Corrections, who basically got the information for Doctor  
2 Morgan in Atlanta. I began corresponding with Doctor Morgan.

3 Q: And what year and month was this again?

4 A: This was October 2017.

5 Q: Okay. So that was after your plea in April of '17.

6 A: Yes, sir.

7 Q: Okay. Go ahead.

8 A: Okay. So I began writing him and I mentioned who I was  
9 and if he had any information, and I basically expressed what  
10 Counsel Irvin had been telling me for two years plus that I  
11 had no mental health issues. So, I received a letter back  
12 from Doctor Morgan around, I think it was October 17th, 2017.  
13 And he stated in his letter that he did remember who I was and  
14 that he had told Jim Irvin, Counsel Irvin, that I did have  
15 significant mental health issues that would be helpful in a  
16 defense. He stated to me that Jim Irvin ---

17 Q: When did he tell him that?

18 A: He had told him ---

19 **MR. JAMES:** Objection: hearsay.

20 **THE COURT:** Sustained.

21 **BY MR. FOWLER:**

22 Q: Go ahead.

23 A: Okay.

24 Q: Without the hearsay element of it. I mean, your  
25 discussion -- Doctor Morgan is in the courtroom today,

1 correct?

2 A: Yes, sir.

3 Q: Okay. What did you and Doctor Morgan talk about?

4 A: We talked about -- sir?

5 Q: Your conversation between you and Mr. Morgan, who is here  
6 today. Tell us a little bit about what your conversations  
7 were with him only.

8 A: Okay. With him only, which I have exhibits for the  
9 Court. We basically discussed my mental health issues that he  
10 did notify her (sic) from the day of us meeting that I had  
11 significant mental health issues. He said in the letters,  
12 through the corresponding letters over two years, that Counsel  
13 Irvin never paid him the fees, which I had given Counsel Irvin  
14 to pay Doctor Morgan. And ---

15 **MR. JAMES:** I -- strike that, Your Honor.

16 **THE COURT:** Go ahead.

17 **BY MR. FOWLER:**

18 A: Yes, sir. And that Counsel Irvin never contacted him in  
19 any way regarding me.

20 Q: All right. So, basically, based on your testimony here  
21 over the last few minutes, you're saying that after April 17th  
22 you received some information that you feel warrants a PCR; is  
23 that correct?

24 A: Yes, sir. That's correct.

25 Q: Now, you've been in contact with Doctor Morgan fairly

1 regularly over the last several years, correct?

2 A: Yes.

3 Q: And you asked us to have him appear in court?

4 A: Yes, sir.

5 Q: And he's here today, correct?

6 A: Yes, sir.

7 Q: Okay. And you and I've met about this a few -- we've  
8 talked several times, correct?

9 A: Yes, sir.

10 Q: And even this morning at 7:30 at the jail, you and I had  
11 a fairly good conversation, correct?

12 A: Yes, sir.

13 Q: Okay. So, based on your testimony over the last several  
14 minutes, you're saying that probably the main thing is your  
15 mental health issues and how they relate to your PCR appeal,  
16 correct?

17 A: Yes, sir.

18 Q: And also, how you -- the reasoning behind the pleading in  
19 April of 2017.

20 A: Yes, sir.

21 Q: But in your PCR application you list several reasons,  
22 correct?

23 A: Yes, sir. That's correct.

24 Q: All right. Let's take a look at what you filled out and  
25 provided to the Court, and the ones that we need to go more in

1 depth in we will. You indicated on question 10 (a) that you  
2 were provided ineffective assistance of counsel for failure to  
3 file notice of appeal.

4 A: Yes, sir.

5 Q: Tell me a little bit about that.

6 A: Okay. After the sentencing on April 26th, 2017 I was  
7 taken from the Horry County Courthouse to the J. Reuben Long  
8 Detention Center. Approximately four to five hours later  
9 Counsel Irvin came with a Ronald Duncan who worked for him at  
10 his law firm. They came, they called me down to the  
11 attorney/client room. I spoke with Counsel Irvin and he began  
12 to ask me things about my laptops and things that he had at  
13 his office and what he wanted me to do with them. In turn, he  
14 started discussing other things as far as his health wise. He  
15 had notified me at that time that his biopsy was clean and at  
16 first, I wasn't familiar with the scientific terminology. I  
17 said, "Well what is a biopsy?" He said, "Well I've had cancer  
18 and I've been going through successive chemo and radiation  
19 therapy over the past year or so." And immediately I was -- I  
20 was stunned because I thought as a client, I have the right to  
21 know when my counsel has declining representation. He never  
22 told me throughout the entire representation of me of almost  
23 three years. So as soon as he told me that I felt as if he  
24 could have been better at what he was doing if he was not  
25 sick. So I asked him to file an appeal in front of Ronald

1 Duncan. Counsel Irvin said, "There's no need to file an  
2 appeal. You took a guilty plea and there's nothing an appeal  
3 will do for you." And I still insisted on him to file the  
4 appeal and he never carried through with my wishes.

5 **MR. FOWLER:** If I may address the Court briefly. Your  
6 Honor, I was involved in an automobile accident in September  
7 of '17 and I still have some problems with my legs, so I may  
8 rise and sit from time to time if that's okay?

9 **THE COURT:** Sure.

10 **MR. FOWLER:** Thank you, Your Honor. I appreciate that.

11 **BY MR. FOWLER:**

12 Q: So, you did indicate to him that you wanted to file a  
13 notice of appeal, right?

14 A: Yes, sir. That's correct.

15 Q: Now, let's -- based on your own personal knowledge, the  
16 appeal -- the plea was in April of 2017, correct?

17 A: That's correct.

18 Q: When did Mr. Irvin die?

19 A: Mr. Irvin died, I believe it was October 22nd, 2017,  
20 approximately five months after the sentencing plea hearing.

21 Q: So, he died relatively soon after your plea.

22 A: That's correct.

23 Q: And based on your -- now, you're no expert, are you?

24 A: No, sir. I'm not.

25 Q: But he could have had a condition possibly that had a

1 declining health over time?

2 A: Yes, sir. That's correct.

3 Q: Okay. So, you did tell him to file an appeal?

4 A: Yes, sir.

5 Q: And he did not.

6 A: Correct.

7 Q: Okay. And why did you go to him only on that?

8 A: Well, because Mr. McCoy was basically appointed just to -  
9 - as a co-counsel by Judge John in case, from what I read in  
10 the transcripts of the sentencing plea hearing, which I  
11 received after the sentencing, months later. You provided  
12 that to me. And it said -- Counsel McCoy said that he was  
13 only appointed in case Jim Irvin could not be present for the  
14 trial.

15 Q: Well, let's talk about that.

16 **MR. FOWLER:** Your Honor, I'd like for the Court to take  
17 judicial notice of the transcript of record in the underlying  
18 case on April 26th, 2017.

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

20 **MR. FOWLER:** No objection, correct?

21 **MR. JAMES:** No objection from the State, Your Honor.

22 That should be included in the Judge's packet.

23 **BY MR. FOWLER:**

24 Q: So, you're telling me that you -- that most of your, if  
25 not all -- would you say you only communicated with Mr. Irvin

1 on these matters or you mostly spoken contacted, spoke with  
2 him on them?

3 A: One hundred percent Counsel Irvin.

4 Q: Okay.

5 A: Counsel McCoy was appointed late January by Judge John at  
6 a hearing to appoint him as a -- I think it was a Rule 608  
7 appointment of conflict attorney. And at the time I didn't  
8 understand what that was until I started researching law. And  
9 once he was appointed, he officially came on, I think it was  
10 late February. And at the time he had his assistant, Allie  
11 Argoe, assisting Counsel Irvin because he was in Brazil a  
12 couple of times throughout late January, early February, until  
13 March.

14 Q: Okay. And Mr. McCoy's here in the courtroom, correct?

15 A: Yes, sir. He is.

16 Q: So, you're saying that even Mr. McCoy, by his own  
17 admission in court, said that he was not your primary counsel,  
18 correct?

19 A: That's correct. And the order by Judge John clearly  
20 states that he was co-counsel, that Jim Irvin was the lead  
21 counsel in my case.

22 Q: Okay. Well, let's ---

23 **MR. FOWLER:** May I approach liberally, Your Honor, if I  
24 may?

25 **THE COURT:** (Affirmative response.)

1           **MR. FOWLER:** Thank you.

2           **BY MR. FOWLER:**

3           Q:     A moment ago I mentioned judicial notice of transcript of  
4           record. Could you look at page 5 and read lines 5 through 10?

5           A:     Yes, sir. Okay. Page 5, lines 5 through 10. The Court  
6           addresses Mr. McCoy, and Mr. McCoy answers:

7                     MR. MCCOY: Absolutely, Your Honor. And I was appointed  
8           to this case in late February to ensure that if Mr. Irvin had  
9           any difficulties with health issues that we'd have somebody  
10          here just in case. So, as far as plea negotiations are  
11          concerned, everything has been handled with Mr. Irvin.

12          Q:     Okay. So even by his, Mr. McCoy's own admission, Mr.  
13          Irvin was the one responsible for everything, correct?

14          A:     Yes, sir. That's correct.

15          Q:     Is that your understanding from this transcript?

16          A:     Yes, sir.

17          Q:     Okay. Alright so we mentioned that you -- under 10 (a)  
18          you mentioned that you wanted to file a notice of appeal. In  
19          (b) you state ineffective assistance of counsel for failure to  
20          present a competency and insanity defense. Tell me a little  
21          about that.

22          A:     Okay. Basically, after I began researching -- once I was  
23          incarcerated at South Carolina Department of Corrections I  
24          began researching law to try to understand things about my  
25          case that I was never explained. So, I noticed once thing in

1 the PCR Handbook from Charleston Law that there's something  
2 titles as the M'Naghten Insanity Defense. And it went through  
3 to, you know -- basically all of the counsel and officers of  
4 the law would know what that is as far as mental health issues  
5 concerning a defense strategy at trial or concerning a plea or  
6 anything of that nature. So, when I started reviewing that, I  
7 was never informed by Counsel Irvin of what a M'Naghten  
8 defense was or what an insanity plea was, and it continued on  
9 from there. From that research I continued on to discover  
10 more things, especially with Doctor Morgan, that had never  
11 been addressed to me and was never investigated.

12 Q: Now, has this been a problem all of your life?

13 A: Yes, sir, from early childhood.

14 Q: Okay.

15 **MR. FOWLER:** If I may approach, Your Honor.

16 **BY MR. FOWLER:**

17 Q: You stated earlier that this has been a problem. Now,  
18 I'm not entering this into evidence necessarily at this point,  
19 but can you identify this document?

20 A: Yes. This is a Denver Developmental Screening Test and  
21 results from the United Cerebral Palsy of Crawford, Venango,  
22 and Clarion Counties in Meadville, Pennsylvania and it's dated  
23 May 26th, 1985.

24 Q: Okay. So, this is a document that you say is relevant to  
25 this case?

1 A: Yes, sir. It would be of some significance.

2 Q: Is this something that was provided to counsel?

3 A: No, sir.

4 Q: Okay. Why was it not provided to -- well, let me -- when  
5 did this document come into your possession?

6 A: This document came into my possession about one month ago  
7 at the beginning of September.

8 Q: Okay. All right. And how did you get it?

9 A: I contacted my youngest brother, Jarred Knowdon, his  
10 father Reverend Malcolm P. Knowdon (ph), III in Rock Hill,  
11 South Carolina, who had been investigating some things of my  
12 mother from the past. And he had done some research through a  
13 clerk of court in that township in Pennsylvania and had  
14 discovered that a specialist or somebody had testified in  
15 court to mental health issues that I had at the age of four  
16 years old. So ---

17 **MR. JAMES:** Your Honor, I must respectfully objection at  
18 this time to any further testimony on the United Cerebral  
19 Palsy document. I had a private conversation with Mr. Fowler  
20 off the record indicating that the State would not necessarily  
21 object to this testimony if the foundation for it could be  
22 brought back around through the expert witness. My impression  
23 was that the expert witness was going to rely upon it as part  
24 of his testimony today. Upon consultation with that witness,  
25 my understanding is that he did not see this document until

1 this morning. So, Your Honor, there is nobody present here  
2 today of which I am aware who can establish a foundation for  
3 this document from the United Cerebral Palsy.

4 **THE COURT:** I agree.

5 **MR. FOWLER:** Okay. Thank you, Your Honor.

6 **BY MR. FOWLER:**

7 Q: So, you mentioned the competency and insanity defense.  
8 So, you're saying that there was various things that happened  
9 that you feel like, other than the M'Naghten test, that you  
10 feel like was relevant.

11 A: Yes, sir. That's correct.

12 Q: Such as?

13 A: Such as the investigation or ---

14 Q: As to -- let's stay on target here.

15 A: Okay.

16 Q: The competency and insanity defense. You're saying that  
17 Mr. Irvin -- are you saying that Mr. Irvin's performance in  
18 representing you was deficient as to those topics, competency  
19 and insanity?

20 A: Yes, sir. That's correct.

21 Q: And you were discussing, you were talking about it; just  
22 briefly, why do you feel like he did not do his job?

23 A: He never informed me of any defense whatsoever. There  
24 was never any defense discussed. I didn't even know what this  
25 was until after I was researching it at law in South Carolina

1 Department of Corrections. I didn't even know ---

2 Q: So, and that goes to number (c) on your application. So,  
3 you're saying that he did not give you any information on any  
4 defenses that were available.

5 A: That's correct.

6 Q: Okay. Did you discuss with him any opportunity -- did  
7 you have any opportunity to talk about defenses or your  
8 interest in having a defense in this matter?

9 A: No, sir.

10 Q: Okay. Why not?

11 A: Basically, it was at the very end of everything it was  
12 take a plea, take a plea, take a plea. It was never as if I  
13 had any option of any defense, no defense strategy. Nothing  
14 was ever discussed with me, ever, about any kind of defense to  
15 go to trial or a defense for a plea or anything of that  
16 nature.

17 Q: Okay. So, not only did he not -- just to conclude on  
18 this section, not only did he fail, in your opinion, he failed  
19 to present a competency and insanity defense, correct?

20 A: Yes, sir.

21 Q: And also, he failed to advise and assert any defenses.  
22 He, he, he did not provide you any defenses available,  
23 correct?

24 A: Yes, sir.

25 Q: Okay. Very good. You mentioned here that he failed to

1 adequately investigate and prepare for trial, in section (d)  
2 on your number 10. Tell me a little bit about that. Why do  
3 you feel like he failed to investigate and prepare for trial?  
4 A: Okay. He never investigated the claims, and let me, let  
5 me just say adequately investigated. He was given discovery  
6 documents, my evidence, around August 2014 by Assistant  
7 Solicitor Donna Elder. Immediately after he received those,  
8 he brought those to me at the J. Reuben Long Detention Center  
9 and he told me to review them as well as him and Sharde  
10 Crawford, at the time his assistant attorney, was going to be  
11 reviewing the documents together. I received those documents;  
12 I went through it and it was basically, you know, what a basic  
13 discovery consists of: detective notes, different things of  
14 that nature. One thing that it did not have and I did not get  
15 until the -- almost the second or third year of my pretrial  
16 detention was the detective interviews, which were on an audio  
17 file that the solicitor's office was having a problem  
18 transferring over. In one of the documents that clearly  
19 states, by who was my wife at the time, she is in the  
20 courtroom, my ex-wife. She states to the detective in her  
21 Horry County Police Department detective interview, her first  
22 statement was, "My ex-husband is bi-polar and has mental  
23 issues." She goes on from there to give ---  
24 Q: And this is documentation that was provided to Mr. Irvin?  
25 A: Yes, sir, numerous times through numerous requests for

1 discovery evidence through the solicitor's office here in  
2 Horry County.

3 Q: Okay. Now, Mr. Irvin after -- and I don't want to get  
4 too far off target here. But Mr. Irvin, did he ever provide  
5 you the full discovery on this case?

6 A: I was, I was provided full discovery a few days before, I  
7 think it was maybe two or three days before we went to the  
8 sentencing plea hearing. Counsel McCoy had even addressed  
9 that to the Court of the outstanding numerous *Brady* violations  
10 that was, was into the case concerning that evidence.

11 Q: Okay. Now, did he provide you additional evidence after  
12 you plead in April?

13 A: No. Nothing was given to me except Counsel McCoy his  
14 office had sent my brother, who is in the courtroom, had sent  
15 him a external flash drive with the entire discovery documents  
16 on it that was given to him by either Counsel Irvin or the  
17 solicitor's office.

18 Q: Okay. And that was, that was after your plea, right?

19 A: Yes, sir. That was around mid-July 2017. It was  
20 provided to my brother. I had directed Counsel McCoy's office  
21 to relinquish whatever documents he was allowed to to my  
22 family member.

23 Q: Okay. Now, we have kind of a mix here. Your application  
24 goes over several, but there's an underlying theme of your  
25 mental health; is that correct?

1 A: That's correct. Yes, sir.

2 Q: Okay. Now, Mr. Morgan is still here in the courtroom,  
3 correct?

4 A: Yes, sir.

5 Q: All right. And you corresponded with him fairly  
6 frequently, right?

7 A: Yes, sir. Numerous times.

8 Q: Okay. Can you -- this is a document that you provided to  
9 me, correct?

10 A: Yes, sir. This document ---

11 Q: And let me, let me just --

12 A: I'm sorry.

13 Q: That's fine. That's fine. What is it?

14 A: This is an e-mail from Doctor Morgan to Counsel James T.  
15 Irvin, Junior also known as Jim Irvin.

16 Q: Okay. Did you receive this in your e-mail?

17 A: No. I received this, Doctor Morgan had printed this up  
18 and mailed this to me while I was at Kirkland Correctional  
19 Facility.

20 Q: But it's in the form of an e-mail, correct?

21 A: That's correct. Yes, sir.

22 Q: Who is the e-mail -- it says at the top Harold, Clifford  
23 Powell and then it says Harold Morgan. So, how is that  
24 document transported or transmitted?

25 A: Okay. Doctor Morgan had sent this to Jim Irvin with my

1 name, Clifford Powell, as the subject and it basically goes --  
2 would you like me ---

3 Q: Well, let's just hold on a second. Generally, what does  
4 it say?

5 A: It tells me from what Doctor Morgan did was he notified  
6 Jim Irvin again on March 28th, 2015 of my mental health  
7 issues. And not only does he notify Jim Irvin of my mental  
8 health issues, he also suggests to him about a guilty but  
9 mentally ill plea ---

10 Q: Okay.

11 A: --- would be appropriate.

12 Q: All right. So that is correspondence addressed to you,  
13 correct?

14 A: Yes, sir. And one other thing ---

15 Q: Hold on a second.

16 A: I'm sorry.

17 Q: That's kept in the ordinary course of business at your  
18 files, right?

19 A: Yes, sir.

20 **MR. FOWLER:** Your Honor, at this time ---

21 **BY MR. FOWLER:**

22 Q: And Mr. Morgan is still here in the courtroom, right? Is  
23 that correct?

24 A: Yes, sir.

25 Q: Okay.

1           **MR. FOWLER:** So, at this time I'd like to enter this into  
2 evidence as Exhibit 1 or A, Your Honor.

3           **THE COURT:** Any objections from the state?

4           **MR. JAMES:** No objection from the state, but I would like  
5 to hear just a little bit more foundation from Doctor Morgan  
6 when he takes the stand to establish that he did in fact send  
7 that e-mail

8           **MR. FOWLER:** Okay. All right. I'll approach the clerk  
9 and enter this or have the Court enter it as A or 1.

10   **(PLAINTIFF'S EXHIBIT 1 IS**  
11   **ADMITTED INTO EVIDENCE.)**

12           **BY MR. FOWLER:**

13           Q: All right. This has now been identified as Exhibit 1 and  
14 Doctor Morgan is here, and he can talk about it as well. Can  
15 you read this to the Court starting -- and we've identified it  
16 as -- who's it from again?

17           A: It's from Doctor Harold C. Morgan.

18           Q: To you, correct?

19           A: This is to Jim Irvin.

20           Q: Oh.

21           A: This was an e-mail to Jim Irvin.

22           Q: Okay. Can you read from Jim to best regards at the end,  
23 please?

24           A: Yes, sir. "Jim, it will come as no surprise to you that  
25 your client has lots of problems. He is sensitive and tends

1 to be volatile and acts impulsively. His excessive drinking  
2 makes all of these qualities more extreme. I have not seen  
3 any of the investigative material yet, so don't know what the  
4 police and prosecution are saying about his behavior. If it  
5 comes to a plea, guilty but mentally ill may be appropriate.  
6 Please send me the investigative material when it is  
7 available. Best regards, Harold Morgan, 3/28/15."

8 Q: Okay. So, that basically, in March of 2015, shows that  
9 Doctor Morgan raised some concerns, right?

10 A: Yes, sir.

11 Q: And he also stated that if there was a plea, that there  
12 needed to be some kind of caveat to it or a qualifier; is that  
13 correct?

14 A: Yes, sir.

15 Q: Okay. And that did not happen?

16 A: No, sir. It didn't.

17 Q: Okay.

18 **MR. FOWLER:** I'd like to submit this to the Court. If I  
19 might have just a moment, Your Honor.

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

21 **MR. FOWLER:** If I may approach, Your Honor.

22 **THE COURT:** Yes.

23 **BY MR. FOWLER:**

24 Q: Now, Doctor Morgan and you -- you and Doctor Morgan  
25 continued to correspond after your plea; is that correct?

1 A: That is correct.

2 Q: How did you correspond with him?

3 A: I corresponded by letters.

4 Q: Okay. Did he write you back?

5 A: Yes, sir. He did.

6 Q: Okay. Can you identify without reading it, just identify  
7 what this is, this document?

8 A: Okay. This is a letter from Doctor Harold C. Morgan  
9 dated October 16, 2017 to me, Clifford Powell.

10 Q: So, it was addressed to you, correct?

11 A: That's correct.

12 Q: From Doctor Morgan.

13 A: Yes, sir.

14 Q: Okay. And you'd had a long-standing professional  
15 relationship with Doctor Morgan, correct?

16 A: Well, we had a brief relationship for the day while he  
17 met with me and then I lost contact with him over my pre-trial  
18 detention. Then once I was incarcerated I researched to find  
19 his address through numerous times different addresses and I  
20 finally was able to reach him at a Folly Beach address, I  
21 believe it was, and we began communicating there. And I sent  
22 him a letter, I think it was early October and this was the  
23 first response back including that e-mail which you just  
24 turned over to the Court as Exhibit 1 was in this.

25 Q: But you, you --- what I mean long-standing is you spoke

1 with him several years ago and then followed up after your  
2 plea, correct?

3 A: Yes, sir. That's correct. I'm sorry.

4 Q: And what is this document, without reading it  
5 specifically. What does this go over?

6 A: This is a letter from Doctor Morgan. Basically, this is  
7 the letter that opened me up to research for my post-  
8 conviction relief and had me start researching issues. This  
9 is the letter that opened the can of worms, basically.

10 **MR. FOWLER:** Your Honor, at this time I'd like to enter  
11 into evidence this October 16th, 2017 letter form Doctor  
12 Morgan to Mr. Powell and Doctor Morgan remains in the  
13 courtroom.

14 **THE COURT:** Any objections?

15 **MR. JAMES:** I apologize. Mr. Fowler, may I see that  
16 letter one more time?

17 **MR. FOWLER:** Sure.

18 **MR. POWELL:** Your Honor ---

19 **MR. FOWLER:** No, no.

20 **MR. POWELL:** Oh, I'm sorry.

21 **MR. FOWLER:** Your Honor, I'd like to withdraw that, Your  
22 Honor.

23 **BY MR. FOWLER:**

24 Q: But just one more time for clarification, what was this  
25 letter about?

1 A: This letter was basically to notify me of Doctor Harold  
2 Morgan contacting Jim Irvin and letting him know that my  
3 mental health issues -- and that Doctor Morgan wanted to be in  
4 the loop for my defense. And from what Doctor Morgan had told  
5 me in this letter ---

6 **MR. JAMES:** Objection: hearsay.

7 **THE COURT:** Sustained.

8 **MR. FOWLER:** All right.

9 **BY MR. FOWLER:**

10 Q: But I guess my question was by October of 2017 Mr. Irvin  
11 had died; is that correct?

12 A: No. He died five days after I received this letter.

13 Q: Really? Okay.

14 A: Yes, sir.

15 Q: All right. You mentioned in your application in section  
16 (e) ineffective assistance of counsel for your failure to  
17 challenge statements presented by the state's witness at  
18 sentencing. Tell me a little bit about that.

19 A: Can you repeat that one more time. I'm sorry.

20 Q: Yes. On (e), just to show you this to refresh your  
21 memory.

22 A: Okay. Okay. Okay. As far as that, it's in the  
23 transcripts which have been provided to the Court. There was  
24 a witness, her name was Earline E. Gee. She began to  
25 basically provide I guess her testimony in the sentencing

1 phase of the guilty plea. She began to tell how she knew me,  
2 how she knew Charles Royal, the victim, and she stated things  
3 that were not in any of the discovery that had been provided  
4 to us up to that point of my ex-employee, room ---

5 Q: When you say up that point, what month?

6 A: That was April 26th, 2017.

7 Q: Okay.

8 A: And the terminology she used was very racist, trying to  
9 insinuate that I committed a hate crime. Which there was  
10 nowhere in any of the evidence that any detective, solicitor,  
11 or anybody had stated throughout the discovery evidence that  
12 had any information whatsoever that pointed me to be a racist  
13 person or commit any type of hate crime whatsoever.

14 Q: Okay.

15 A: And she used very racist terminology.

16 Q: Was it just -- was that written, or in a statement, or  
17 how was it?

18 A: What she had stated is that she was at her business on  
19 Ocean Boulevard ---

20 Q: Let me, let me rephrase the question.

21 A: Okay.

22 Q: Was it a statement that she gave to the police or to law  
23 enforcement?

24 A: She gave it to the Court.

25 Q: Okay. When?

1 A: At the sentencing hearing.

2 Q: Okay. All right. So, you had an issue with that,  
3 correct?

4 A: Correct.

5 Q: Okay. And just explain that one more time briefly or  
6 continue on.

7 A: Okay. She had stated that my roommate had come down to  
8 get food from her restaurant and was bragging that I had, I  
9 had killed somebody. It's all in the transcripts there. She  
10 states that my roommate told her that I ---

11 Q: So, whatever she said in the transcript is ---

12 A: Yes, sir. Which if you would allow me, I could read it  
13 to the Court for the record if that's feasible.

14 Q: Sure. Do you know which page it's on?

15 A: Yes, sir. It's highlighted if you grab my packet right  
16 there. It's under the -- it's in the manilla envelope, the  
17 one that you sent me a few months back.

18 Q: Okay.

19 A: That's correct. Yes, sir.

20 **MR. JAMES:** To guide everybody along efficiently my  
21 understanding is Ms. Gee addresses the Court on pages 22  
22 through 24 of the transcript.

23 **MR. FOWLER:** If I may have a moment, Your Honor.

24 **THE COURT:** Sure.

25 **BY MR. FOWLER:**

1 Q: The Court took judicial notice of this transcript  
2 earlier.

3 A: Yes, sir.

4 Q: I'm not asking you read everything but -- this is my  
5 copy, although you stated you had a copy in your notes. Was  
6 there a particular area or line?

7 A: Yes. It starts on page 23, verses 3 and am I allowed to  
8 ---

9 Q: Where would you read to?

10 A: I would read down to 8 and then I'd like to just read a  
11 few sentences of this.

12 Q: Okay.

13 A: What would you suggest?

14 Q: Read from 12 to 24.

15 A: Okay. Okay. You said 12 to 24?

16 Q: Yes.

17 A: The Court addresses Ms. Gee. She says, "I'm sorry. His  
18 roommate Robert", which is Robert Orr (ph), "said that CJ left  
19 the room and he said that he was going to kill him a nigger.  
20 And CJ -- and said he came back later, and he was covered in  
21 blood. He went and took a shower, he changed clothes, and  
22 then he went out." So, that's, that's what she said and  
23 there's nowhere in any evidence through the two detective  
24 interviews of Robert Orr (ph), who was my roommate, or in his  
25 written statement to the Horry County Police Department he

1 never states that at all.

2 Q: And so the racial epitaph was her words not yours.

3 A: Her words, not mine.

4 Q: And you're saying that that was entered in at your plea  
5 on April 2017; and are you saying that that is incorrect?

6 A: That is incorrect.

7 Q: Did Mr. Irvin ever bring that to your attention?

8 A: No, sir.

9 Q: Did you ever go over that with Mr. Irvin before April of  
10 -- your plea date in April of 2017?

11 A: No, sir. It was never in any of the discovery evidence  
12 what she had stated at that time.

13 Q: Do you think that might have had some kind of impact on  
14 your sentencing?

15 A: It quite possibly could have with all of the things that  
16 are happening in society for the past five years. I do  
17 believe so.

18 Q: Now, you mention in 10 (f) ineffective assistance of  
19 counsel by dual representation. What did you mean by that?

20 A: Okay. And I don't have the exact date, November of 2014,  
21 Counsel Irvin represented Tom Davis, my landlord, at a  
22 magistrate's hearing in front of Judge Chris Arakas at the  
23 magistrate courthouse in Myrtle Beach, South Carolina on ---

24 Q: And how do, how do you know that?

25 A: I found out from my mother and then I found out from Tom

1 Davis himself.

2 Q: And that would be public record, correct?

3 A: That's correct.

4 Q: Also, I wanted to let you know that Tom Davis was a  
5 witness for the prosecutor. He had collected evidence and  
6 turned said evidence over to the detectives and the Myrtle  
7 Beach Police Department.

8 Q: So, you're referring to Tom Davis when you're talking  
9 about dual representation?

10 A: That's correct.

11 Q: And just to refresh my memory, Tom Davis was a co-  
12 defendant of yours?

13 A: No. He was my grandmother's sister's husband.

14 Q: Okay. So, grandmother's sister's husband. So, how does  
15 that relate to your case that you plead to in April of 2017?

16 A: Okay. Mr. Davis gave a detective interview, he gave  
17 evidence to Horry County Police, and he turned over evidence  
18 to the Myrtle Beach Police Department that was used in my  
19 case. He was going to be called and listed as a witness for  
20 the prosecution. At that time, Mr. Irvin represented, without  
21 my permission, represented Tom Davis in a magistrate's hearing  
22 with -- it was my ex-wife, who is in the courtroom,  
23 represented with her at that hearing for Mr. Davis in an  
24 eviction notice towards me and my mother. And that was  
25 clearly ---

1 Q: Did he ever -- did Mr. Irvin ever provide you any kind of  
2 e-mails stating that he represented Tom Davis?

3 A: No, sir. No letter, no e-mail, nothing.

4 Q: Okay. So, why do you -- do you feel like that's a  
5 conflict?

6 A: I do feel that that is a conflict.

7 Q: Do you think -- why do you think that is a conflict?

8 A: Because he has a right to me as his paying client to  
9 represent me in all aspect. No matter who it is, he doesn't  
10 have the right to represent them in another fashion,  
11 especially when they're going to be used to testify against me  
12 if we were to go to trial for the prosecution.

13 Q: Now, was the -- what type of matter did he represent Tom  
14 Davis in again?

15 A: It was a magistrate's eviction hearing.

16 Q: Okay. So, it was, so it was a business matter, correct?

17 A: That is correct.

18 Q: So, but still, you still feel like there was a conflict,  
19 correct?

20 A: Yes, sir.

21 Q: Did you ever think about taking it to the State Bar or  
22 discussing it that way?

23 A: Not at the time. I didn't even know what the State Bar  
24 was until I started researching. I knew little of anything of  
25 law until I was incarcerated.

1 Q: You mention in 10 (g) -- okay. Anything else about the  
2 dual representation that concerning?

3 A: No. Just the fact that he was there with the state's  
4 star witness and another state's prosecutor's witness  
5 testifying or representing him against me and then that's  
6 pretty much after that it goes from there. Nothing else.  
7 Yes, sir.

8 Q: In 10 (g) you mention ineffective assistance of counsel  
9 for failure to move for suppression of evidence. What  
10 evidence are you referring to in terms of suppression?

11 A: Okay. And this one is kind of extenuating.

12 Q: And I would just ask that you be as precise as ---

13 A: Okay. I understand. Okay. Robert David Orr (ph) made  
14 two detective interviews and he made one Horry County Police  
15 Department voluntary statement. If the notes were compared  
16 from the two detective interviews in the Horry County Police  
17 Department voluntary statement, all three of those are  
18 inconsistent with each other. There times are off, there's  
19 things that he stated and then he goes back and states other  
20 things, there's a lot of things in there that could easily be  
21 reviewed and looked at as though there could have been a  
22 motion to suppress the evidence. And it's possible that it  
23 could have been suppressed. There's other evidence as far as  
24 the Horry County Police Department going to the residence with  
25 a false dated search warrant to gain access through Robert

1 David Orr (ph) and begin investigating with an incorrect dated  
2 or false dated search warrant that was a month ahead of time  
3 before the incident or before it was even issued.

4 **MR. FOWLER:** If I might have a moment, Your Honor. Your  
5 Honor, may I approach?

6 **THE COURT:** You may.

7 **BY MR. FOWLER:**

8 Q: So, you talked about three different interviews and you  
9 provided me with some information here ---

10 A: Yes, sir.

11 Q: --- about this. Could you tell me a little bit about  
12 this?

13 A: Okay. This is the detective interview on June 1st, 2014.  
14 The detective was Jeffrey Cauble; he's an Horry County Police  
15 Department Detective. The witness giving the statement was  
16 Ms. Angelina Gee (inaudible) Powell, at the time she was the  
17 wife of me. We're now we're not married anymore obviously.  
18 And basically, she gives her entire testimony to Detective  
19 Cauble concerning me. And this was her first interview on  
20 June 1st.

21 Q: So, this is a -- how did you come into possession of this  
22 document?

23 A: This document was transcribed word for word in times  
24 aligning with external hard drive that Mr. McCoy provided to  
25 my brother.

1 Q: All right.

2 A: And they're also on the disk drive that were copied from  
3 that external hard drive that were given to you by my brother.

4 Q: So, this was something that was provided by Mr. McCoy to  
5 you; is that correct?

6 A: This was provided by Mr. McCoy to me after sentencing,  
7 post-sentencing. This -- I never had a chance to review her  
8 second detective interview by McCoy, I mean by Counsel Irvin.  
9 But Jonny McCoy did come out with Allie Argoe two days before  
10 the sentencing hearing and she had brought everything, but at  
11 that time we had went over a lot of details in the case.

12 Q: And how is this relevant to today's action for PCR?

13 A: This is relevant due to the fact that Ms. (inaudible)  
14 Powell basically states to the detective numerous times  
15 throughout our marriage mental health issues that I had had --  
16 -

17 Q: Wait. Okay.

18 A: I'm sorry.

19 **MR. JAMES:** I must respectfully object to hearsay at this  
20 point and lack of foundation.

21 **THE COURT:** Sustained.

22 **MR. JAMES:** If he wants to bring in the original  
23 statements, the recorded statements, I don't think I can  
24 object to that. That would be something his attorneys relied  
25 upon, but the transcription I, I don't have the statements

1 here to compare them against to judge their accuracy.

2 **MR. FOWLER:** Okay. All right.

3 **BY MR. FOWLER:**

4 Q: Well, we'll just discuss these briefly without entering  
5 them into evidence.

6 A: I do have -- listen to me, okay. Because that's  
7 important that I get that into evidence.

8 Q: Okay. But we've discussed interview one, correct? Now,  
9 just briefly without reading it verbatim, you said there was a  
10 second interview. Is that the June 5th, 2014 interview?

11 A: Yes, sir.

12 Q: And who was that with?

13 A: That's Thomas W. Davis, Senior.

14 Q: Okay. And who is it with?

15 A: It's with Detective Jeffrey Cauble.

16 Q: Okay. And you're saying that there's an issue with this  
17 as well?

18 A: That's correct.

19 Q: What is the issue with that in your recollection?

20 A: He states throughout on the recorded detective interview  
21 that I have numerous mental health issues from childhood up to  
22 my adult until the crime. And he states that, you know, in  
23 his opinion ---

24 Q: And don't get into hearsay here.

25 A: Okay. Okay.

1 Q: But you're just saying that he provides, generally, he  
2 provides ---

3 A: A background detail of my mental health issues that he's  
4 seen raising me.

5 Q: Okay. Very good. And then there was this third one and  
6 I'm not asking to enter it into evidence, but who was it with?

7 A: It was with Angelina Gee (inaudible) Powell, my wife at  
8 the time.

9 Q: Okay.

10 A: To Detective Jeffrey Cauble.

11 Q: All right. And how is that relevant?

12 A: She states again four days after ---

13 Q: Just generally, I mean, you know, it's an interview with  
14 her, correct?

15 A: Again, addressing my mental health issues.

16 Q: Okay. So, and these three documents that you discussed  
17 in general to the Court, how, how do they relate to this  
18 matter? You're saying that Irvin did not suppress these or --  
19 -

20 A: No. Those were never, they were never investigated by  
21 Counsel Irvin.

22 Q: Okay. How do you know that?

23 A: He never brought the issue to me about addressing the  
24 mental health issues that I had.

25 Q: Okay. Did he ever provide anything -- what do you mean?

1 Just briefly, what do you mean by that? That he never showed  
2 you that he was objecting to these or had a problem with them  
3 or how did that go?

4 A: I think those are mixed up with the suppression of  
5 evidence. The main thing that I was bringing up that Counsel  
6 Irvin should have filed a motion to suppress was that the  
7 detective interviews of Robert Orr (ph), Robert Orr's (ph)  
8 voluntary -- Horry County Police Department voluntary  
9 statement. The, the search warrant, which was noted by his at  
10 the time co-counsel Sharde Crawford, that was misdated and was  
11 incorrect. And there's a little other minor things, but it's  
12 all included there. But there was never a motion filed to  
13 suppress any kind of evidence whatsoever because there was no  
14 defense ever put up.

15 Q: And you feel like he should have done that before your  
16 plea?

17 A: That's correct. Yes, sir.

18 Q: Okay. In 10 (h) you mention ineffective assistance of  
19 counsel for advice concerning plea going to trial and  
20 preserving the applicant's rights. What did you mean by that?

21 A: Well, basically, he -- okay. Will you read that one more  
22 time?

23 Q: Sure. And I'll approach to refresh your memory. There's  
24 a lot here so I can understand. Number (h) ineffective  
25 assistance of counsel for advice concerning plea going to

1 trial and preserving the applicant's rights.

2 A: Okay. There was never any -- as far as in finding out if  
3 Counsel Irvin would have done his due diligence in  
4 investigating Doctor Morgan's claims and investigating  
5 witnesses, he would have had due diligence to basically  
6 discover that I had significant mental health issues that  
7 would have been helpful in a defense or with concerning a  
8 plea. There was never any defense built around all of these  
9 claims mainly concerning the mental health.

10 Q: Anything else about that that you feel in (h) that you  
11 feel is relevant?

12 A: I feel that, you know, preserving my rights, my rights  
13 weren't preserved as far as it goes for my mental health with  
14 anything. As far as the advice, I do feel if Counsel Irvin  
15 would have given some kind of due diligence in investigating  
16 the witnesses, the detective, Doctor Morgan, that he would  
17 have been able to build a defense around a mentally ill but  
18 guilty or going to trial. It was never, it was never  
19 suggested to me and I never found out until after a post-  
20 conviction.

21 Q: Okay. Anything else about that that you feel is  
22 relevant?

23 A: No, sir. That's pretty much all I can really touch on on  
24 that.

25 Q: In 10 (i) you mentioned miscellaneous ineffective

1 assistance of counsel and in your facts you mention -- in  
2 number 10 (i) you mention miscellaneous ineffective assistance  
3 of counsel and then in your factual background you talk about  
4 Mr. Irvin's lung cancer and, you know, life threatening  
5 illness and, you know, perhaps his performance was affected by  
6 his illness. In your words, how do you feel like someone in a  
7 court of law in April and who died from a lingering illness  
8 apparently, how do you think that his health impacted your  
9 plea?

10 A: I feel that it impacted it severely.

11 Q: How so?

12 A: Failure to investigate, let me just be specific, when  
13 Counsel Irvin told me that his biopsy was clean and he was  
14 going through successive radiation and chemotherapy, radiation  
15 and chemotherapy very much affects the body and the brain.  
16 It's factual evidence that you tend to decline from these  
17 things and can't function properly.

18 Q: Did you -- okay, when did he begin -- this is a 2014 case  
19 that you plead to in April of 2017. In your eyes, did his  
20 health deteriorate over that time since his initial  
21 discussions, and I'm talking your own personal observations.  
22 What happened to him health wise over that period of his  
23 representation of you?

24 A: When I first met him, he was a healthy individual. He  
25 was strong; he was, he was very adamant about everything. And

1 over time his, his visits stopped, phone calls stopped, the  
2 letters stopped, things started slowing down towards the end  
3 of my pre-trial detention. And I saw him from a healthy 74-  
4 year-old man into his 77 and he looked very sick. I mean, it  
5 was bad.

6 Q: Well, now, did that -- I guess my question to you is this  
7 -- and also, Jonny McCoy was appointed as counsel in this,  
8 correct?

9 A: Co-counsel. Yes, sir.

10 Q: Why was he appointed counsel in this matter?

11 A: Well, according to what I've researched, Rule 608 states  
12 conflict of attorney has to do with indigent defendants. At  
13 that time, I was not indigent. I still had three successful  
14 businesses on Ocean Boulevard. But according to what I've  
15 researched, besides that amended order by Judge John, is that  
16 Mr. McCoy states for the record at the sentencing hearing on  
17 April 26th, 2017 is that he was only appointed if Counsel  
18 Irvin's health issues became a part at the trial and he was  
19 going to be there for Counsel Irvin.

20 Q: Okay.

21 **MR. FOWLER:** Now, Your Honor, I'd like the Court to take  
22 judicial notice of the -- signed by Judge John on 3/31/17, the  
23 amended order appointing conflict attorney pursuant to the  
24 608. I'd like you to take judicial notice of that.

25 **THE COURT:** Yes.

1           **MR. FOWLER:** Do I need to hand this to the clerk or ---

2           **THE COURT:** If it's in the packet ---

3           **MR. JAMES:** No objection from the state, but it's not in  
4 the packet, so I would respectfully request that it go ahead  
5 and be entered in as an exhibit and the state has no objection  
6 to that.

7           **THE COURT:** All right.

8                                   **(PLAINTIFF'S EXHIBIT NUMBER 2**  
9                                   **IS ADMITTED INTO EVIDENCE.)**

10          **MR. FOWLER:** Under judicial notice. Thank you.

11           And the transcript, if I may address Mr. James. The  
12 transcript is in the packet?

13          **MR. JAMES:** Absolutely. Yes.

14          **MR. FOWLER:** Okay. Very good. Thank you.

15          **BY MR. FOWLER:**

16 Q: All right. So, what we've got here is plaintiff's  
17 exhibit number 2. Tell me what this is?

18 A: Okay. This is an amended order appointing conflict  
19 attorney pursuant to Rule 608 by the Honorable Stephen H.  
20 John, Chief Administrative Judge for the General Sessions 15th  
21 Judicial Circuit.

22 Q: Okay. So, let's talk about your understanding of 608.  
23 You had paid Irvin's law firm quite a bit, hadn't you?

24 A: Yes, sir. That is correct.

25 Q: How much did you pay him?

1 A: We paid him \$19,000 in cash. I signed over my 2012 Jeep  
2 Patriot which he sold for \$7,500 cash, so \$26,500.

3 Q: And you can verify that through ---

4 A: Through my brother who is in here, who was basically  
5 helping maintain my stores. Counsel Irvin had also collected  
6 from my brother, who is in the courtroom, at his business  
7 location in Myrtle Beach, collected numerous payments form my  
8 business.

9 Q: Okay.

10 **MR. FOWLER:** Your Honor, at this time I'd like to enter -  
11 - I'd like to ask the Court to approve a judicial notice -- I  
12 apologize, Your Honor, to take judicial notice of an order  
13 signed by Judge Steven John on 1/4/17 appointing conflict  
14 attorney.

15 **THE COURT:** I think I've already done that, I'm not sure,  
16 but ---

17 **MR. FOWLER:** Well, we have two order from Judge John. In  
18 talking with Attorney James, I don't know if this has been  
19 entered into the packet or not.

20 **MR. JAMES:** It has not, Your Honor, and I informed him as  
21 much. The state has no objection to it coming in.

22 **MR. FOWLER:** All right. It sounds like this is number 3.

23 **(PLAINTIFF'S EXHIBIT NUMBER 3**

24 **IS ADMITTED INTO EVIDENCE.)**

25 **BY MR. FOWLER:**

1 Q: Okay. Mr. Powell, I want you to help me out here a  
2 little bit.

3 A: Yes, sir.

4 Q: By judicial -- and they're backwards from the three to  
5 two to two to three.

6 A: Yes, sir.

7 Q: We've got an order, Exhibit Number 3, signed by Judge  
8 John on 1/4/17, clocked in in January of 2017. And then we've  
9 got this other order signed by Judge John on March 31st, 2017  
10 appointing conflict attorney pursuant to Rule 608. So, let's,  
11 let's ask a simple question and then get to the larger one.  
12 If 608 is the -- what's your understanding of Rule 608?

13 A: Rule 608 is to appoint a conflict attorney when a client  
14 can no longer afford to retain his counsel or has fail beyond  
15 indigent status as far as financial wise.

16 Q: Were you indigent at that time?

17 A: No, sir. I was not.

18 Q: Well, why did the Court appoint an attorney pursuant to  
19 608 if you were not indigent at that time?

20 **MR. JAMES:** Objection: calls for speculation.

21 **THE COURT:** Yeah. I think it's already been asked and  
22 gone over with and answered a half a dozen times. I have an  
23 idea as to what's going on.

24 **MR. FOWLER:** I apologize, Your Honor.

25 **BY MR. FOWLER:**

1 Q: Well, just in general, why was there two orders signed  
2 three months apart by Judge John appointing counsel and  
3 changing it from this to this?

4 A: I had wrote to Ms. Orrie West of the public defender's  
5 office here in Horry County and I was confused because I was  
6 under the impression that Counsel Irvin and Ronald Duncan --  
7 it had been explained to me that they were the lead counsel,  
8 that Jonny McCoy was going to be in the background. He was  
9 the co-counsel. And I was confused because I was being told  
10 one thing, but the order said something else. So, I wrote Ms.  
11 West and she sent me a letter apologizing and then sent that  
12 amended application or motion signed by Judge John.

13 Q: Okay. Anything else about your miscellaneous  
14 ineffectiveness of counsel that you'd like to bring to the  
15 Court's attention?

16 A: No, sir. Not at this time.

17 Q: Okay. Under (j) you mention ineffective assistance of  
18 counsel for failure to investigate witnesses. I think that  
19 might have been gone over earlier, but are there any issues  
20 that you did not go over earlier that you feel is relevant  
21 here that needs to be brought to the Court's attention? I  
22 think in your explanation it -- failed to contact and  
23 investigate all alibi witnesses is one thing you mentioned in  
24 (j). What do you mean by that?

25 A: This was, this was before I began researching my notes

1 and getting better into it. An alibi witness was as far as,  
2 you know, as kind of -- you know I put that together so -- can  
3 you, can you ---

4 Q: Yeah. And I apologize.

5 A: I'm sorry. I could have just brought my packet up here  
6 if I was allowed.

7 Q: It's okay. I'm referring to (j), 10 (j). You mentioned  
8 ineffective assistance of counsel for failure to investigate  
9 witnesses.

10 A: Okay. Mainly that was the -- I'm sorry.

11 Q: Anything that you haven't gone over previously in court.

12 A: Okay.

13 Q: And there's your facts based on -- in number 11 if you  
14 that's different that what you stated earlier.

15 A: Yes. He had failed to investigate at the time, which was  
16 Anthony Schnyder, who was with me at the time that the police  
17 had come up there and began questioning me at the Gold Club  
18 back in 2014. But the main cause of that claim was for  
19 failure to investigate, which I've already told the Court;  
20 Doctor Morgan, Angelina Powell, my now ex-wife, my  
21 grandmother's sister's husband, detectives, police in the case  
22 that had information that was effective in building a defense  
23 for my mental health issues.

24 Q: All right. Anything else on that (j), 10 (j), that you  
25 feel needs to be brought to the Court's attention?

1 A: Just, just, well the main thing was those detective  
2 interviews. It wasn't allowed that we have the original flash  
3 drive from Mr. McCoy.

4 Q: Got you. In 10 (k) the voluntariness of plea unrelated  
5 to attorney error. What did you mean by that?

6 A: Okay. That was, that was on -- I had been doing some  
7 research with Supreme Court cases. And I was not aware that  
8 once I was sentenced, once my sentence was complete that I  
9 would get out and have to do another two years supervised  
10 release with the probation, parole, and pardon service. That  
11 was never addressed to me. And in the transcripts of the  
12 sentencing plea hearing it was never addressed that I would be  
13 doing that, which I should have had a right to know what  
14 immediate and long-lasting affects were going to be from that  
15 guilty plea. Also, there was an error in the Court  
16 administratively ordering my driver's license to be revoked.  
17 They used a South Carolina Code that revoked my driver's  
18 license, but the only -- the South Carolina Code specifically  
19 stated that a driver's license is to be suspended or revoked  
20 if a vehicle was used in the commission of the crime. There  
21 was no vehicle used in that crime.

22 Q: Okay.

23 **MR. FOWLER:** Just a moment.

24 **BY MR. FOWLER:**

25 Q: We've gone over your application for 10 (k). Now, you

1 did ---

2 **MR. FOWLER:** If I may approach.

3 **BY MR. FOWLER:**

4 Q: --- you did write McCoy a letter; is that correct?

5 A: That's correct.

6 Q: Okay. And without getting too specific into it, what did  
7 you discuss with him? You sent him a letter in March before  
8 the plea; is that correct?

9 A: Yes, sir.

10 Q: And why did you reach out to Jonny McCoy?

11 A: Because I was worried about Counsel Irvin. Like you said  
12 earlier, he had seen a decline in his health. And every time  
13 I'd ask him, "my back's hurting me, I've got problems with my  
14 back." He never would come forward and tell me what his real  
15 underlying health issue was. And at the time, I grew up with  
16 Jonny, we went to Myrtle Beach High School together. I knew  
17 Jonny was a standup guy. I knew, you know, he was strong, he  
18 was adamant, he had a very good reputation in the community as  
19 a great attorney and I wanted him to be lead counsel. Once I  
20 had been notified that he was co-counsel that's when I became  
21 worried because Irvin had declined over my representation --  
22 health and making decision concerning my case.

23 Q: Okay. And you stated in a letter that there was a  
24 possible May 8th, 2017 trial upcoming; is that correct?

25 A: That's what I was informed by Counsel Irvin.

1 Q: Okay. So, this is your letter, in your handwriting to  
2 Jonny, correct?

3 A: That's correct.

4 Q: Jonny McCoy.

5 A: Yes, sir.

6 Q: And it's relevant in terms of how?

7 A: Just stating my concerns over Irvin's ineffectiveness  
8 throughout my representation, pretrial representation, and  
9 requesting Mr. McCoy to be my lead counsel.

10 Q: Okay. Did he become your lead counsel?

11 A: No, sir. He never did.

12 Q: Okay.

13 **MR. FOWLER:** Your Honor, at this time I'd like to enter  
14 this into evidence for Exhibit 4.

15 **MR. JAMES:** No objection, Your Honor.

16 **THE COURT:** All right.

17 **(PLAINTIFF'S EXHIBIT NUMBER 4**  
18 **IS ADMITTED INTO EVIDENCE.)**

19 **BY MR. FOWLER:**

20 Q: All right. You had a fairly lengthy list of things that  
21 you mentioned in your application, particularly in number 10.  
22 Is there any other things that you feel like needs to be  
23 brought to this Court's attention from your opinion and your  
24 point of view?

25 A: Well, I, I only know as far as the detective interviews -

1 --

2 Q: But you've gone over those at least on the stand,  
3 correct, and your understanding of them, right?

4 A: On the stand?

5 Q: Right here.

6 A: I've tried the best that I could, but they weren't  
7 allowed to go into detail unless they were heard and entered  
8 into evidence. Which I would request that they do be entered  
9 into evidence because it's important that the Court hears what  
10 my ex-wife, at the time my wife, was stating to the detective  
11 in two detective interviews. Also, her Horry County Police  
12 Department voluntary statement that clearly states that I have  
13 mental issues and her first statement and her last statement  
14 saying that I was crazy ---

15 **MR. FOWLER:** If I may have a moment with Attorney James.  
16 Your Honor, we ---

17 **BY MR. FOWLER:**

18 Q: You provided ---

19 **MR. FOWLER:** If I may approach, Your Honor.

20 **THE COURT:** Yes.

21 **BY MR. FOWLER:**

22 Q: You provided, through your agent, this disk; is that  
23 correct?

24 A: That's correct.

25 Q: Okay. And what -- and earlier you stated that that disk

1 has what on it?

2 A: That has all of my entire discovery on it up until April  
3 26th, 2017.

4 Q: Okay. And you indicated that those witness -- we  
5 discussed in general those three statements up here on the  
6 witness stand.

7 A: Yes, sir. The three detective interviews.

8 Q: Okay. And that's what you provided my office in regards  
9 to this?

10 A: Correct. This was mailed from Counsel McCoy's office to  
11 my brother who is in the courtroom, Christopher Parker. I  
12 have the original letter that it came in, with the letter --  
13 with the tracking number and everything. And this was given  
14 by my brother to make copies of the disk to provide to you and  
15 then it turned over to you.

16 **MR. FOWLER:** Your Honor, I'd like to ask that this be  
17 stipulated into evidence at this time.

18 **THE COURT:** Any objection?

19 **MR. JAMES:** No objection from the state, Your Honor.

20 **THE COURT:** All right.

21 **(PLAINTIFF'S EXHIBIT NUMBER 5**  
22 **IS ADMITTED INTO EVIDENCE.)**

23 **MR. FOWLER:** Now, this is an envelope with a disk in it  
24 so I'm going to hand it to the clerk in the envelope that was  
25 provided to me.

1           **MR. JAMES:** And not to be a stickler, but just to be  
2 clear on the record, it is a flash drive is my understanding.

3           **MR. FOWLER:** Right.

4           **BY MR. FOWLER:**

5 Q: All right. At this time, is there anything else about  
6 your application that you feel like needs to be stated to the  
7 Court?

8 A: As far as?

9 Q: As far as your case. I mean, is your -- we've discussed  
10 everything that you mentioned to my understanding in your  
11 application. Is there anything outside of this that you feel  
12 like is relevant and needs to be brought to the Court's  
13 attention? And as I approach, we went over from number 10  
14 everything that you listed.

15 A: Yes, sir.

16 Q: Okay. So, is there anything outside of this that you  
17 feel like needs to be brought to the Court's attention?

18 A: No, sir. Because Mr. James had identified and told me  
19 that if was not brought up to prior to this it would be  
20 objected to and not allowed.

21           **MR. FOWLER:** Your Honor, no further questions.

22           **THE COURT:** All right. Cross?

23           **MR. JAMES:** Before we proceed with cross, may I  
24 respectfully request a 2-3-minute break to use the restroom?

25           **THE COURT:** All right. Sounds good.

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(COURT IN RECESS)

MR. JAMES: If it may please the Court.

THE COURT: Yes.

CROSS EXAMINATION OF MR. POWELL BY MR. JAMES:

Q: Mr. Powell, do you recall about how many times you met with Mr. Irvin prior to your plea?

A: The entire pretrial detention?

Q: Over the course of his entire representation with you. Prior to that guilty plea, do you recall roughly about how many times you met with him in preparation?

A: Numerous times, it was at least once a month.

Q: Were you incarcerated prior to your plea or were you out on bond?

A: I never, I was incarcerated.

Q: Okay.

A: For three years.

Q: So, at least once a month over the course of three years. We're talking about dozens of meetings, correct?

A: Yes, sir.

Q: All right. And does that, does that count include the number of times you met with Mr. McCoy?

A: I met with -- the first time I met with Mr. McCoy was at my final bond hearing in January for about 7 to 10 minutes before the hearing. Counsel Irvin then entered late from a car accident he had had the night before. The second time

1 that I had met with Counsel McCoy was two days before the  
2 sentencing, and then the third time I met with Counsel McCoy  
3 was at the sentencing hearing. Three times total.

4 Q: Did you ever meet with Mr. McCoy separate from Counsel  
5 Irvin aside from that one-time Mr. Irvin was running late?

6 A: No, sir.

7 Q: And you indicated that you did receive what you believe  
8 to be your discovery, correct?

9 A: Yes, sir.

10 Q: And you received a very full and complete copy of that  
11 discovery additionally after your plea, correct?

12 A: Yes, sir.

13 Q: And said you also got all of your materials before your  
14 plea, correct?

15 A: Materials, as in?

16 Q: The discovery materials.

17 A: From what the state had provided?

18 Q: Yes.

19 A: Yes, sir.

20 Q: And you've had time to review those materials?

21 A: Since after the hearing?

22 Q: Before your plea?

23 A: Somewhat. I never had copies of the detective  
24 interviews. We were allowed those at J. Reuben Long Detention  
25 Center.

1 Q: Did Mr. Irvin or Mr. McCoy ever explain to you what the  
2 contents of those interviews were?

3 A: No, sir.

4 Q: Did Mr. Irvin or Mr. McCoy ever play the recordings to  
5 you?

6 A: No, sir. Mr. Irvin had Ronald Duncan play the interviews  
7 for me.

8 Q: So, a member of their staff did play those interviews for  
9 you?

10 A: Yes, sir. Of Counsel Irvin's staff.

11 Q: Okay. Mr. Powell, today you have spoken primarily at  
12 length about your mental health and the role that your mental  
13 health, you believe, played in your role in this crime and  
14 your culpability as to this crime; is that correct?

15 A: Correct.

16 Q: You also indicated failure to investigate alibi, and your  
17 testimony on direct was not entirely clear to me. Is it your  
18 position here today that your counsel should have established  
19 a defense that you were not there and could not have done it?

20 A: No, sir.

21 Q: Okay. It is your position that your counsel should have  
22 establish a defense somehow based upon your mental health?

23 A: Yes, sir.

24 Q: Okay. Do you understand what an alibi is?

25 A: Yes, sir. I do.

1 Q: Okay. And that's why I had to ask that question.

2 A: Yes, sir. That was just the first time I had filled out  
3 a post-conviction relief application and I had saw that and I  
4 ran it all together. It should have been worded a little bit  
5 better.

6 Q: Was this your first run in with law?

7 A: As far as ---

8 **MR. FOWLER:** Objection, Your Honor, relevance. This case  
9 is about the relationship with Mr. Irvin ---

10 **MR. JAMES:** I'm not trying ---

11 **MR. FOWLER:** --- and his representation.

12 **MR. JAMES:** I apologize. I'm not trying to impeach him  
13 with any priors or anything like that. I'm just trying to  
14 explore his experience with the criminal justice system and  
15 his experience with the law.

16 **MR. FOWLER:** Once again, that's -- he might have had a  
17 lengthy -- I don't know his rap sheet ---

18 **THE COURT:** And how it may be relevant.

19 **MR. JAMES:** He made some miscellaneous allegations of  
20 ineffective assistance of counsel on the part of Mr. Irvin  
21 based upon his observations that Mr. Irvin's health was  
22 declining over the course of time and I was going to explore  
23 the extent to which he would know or not know how that might  
24 impact his effectiveness as an attorney.

25 **MR. FOWLER:** That's -- Your Honor, I'd still renew my

1 objection. This is ---

2 **THE COURT:** I'm going to sustain your objection. I don't  
3 think we need it anyway.

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

5 **BY MR. JAMES:**

6 Q: Did you tell Mr. Irvin your version of events of what  
7 occurred on the day in question?

8 A: Yes, sir,

9 Q: Did you tell Mr. McCoy what happened?

10 A: Yes, sir. I did.

11 Q: Did you tell him right away or did it take you some time  
12 for you to open up to him?

13 A: It took some time.

14 Q: Okay. Did you open up to him before Mr. McCoy came  
15 along?

16 A: No, sir.

17 Q: Okay. So, it wasn't until after Mr. McCoy came into the  
18 picture that you gave him a full recollection of what  
19 occurred?

20 A: Correct.

21 Q: Mr. McCoy didn't join until late in the process, correct?

22 A: Correct.

23 Q: You indicated that Mr. Irvin never discussed any  
24 potential defenses with you?

25 A: Correct.

1 Q: Did you have any idea of what defense you wanted to  
2 pursue or could try to pursue before you told him what  
3 happened?

4 A: As in for myself?

5 Q: From your perspective, did you have any ideas of defenses  
6 that you wanted your attorneys to pursue?

7 A: I knew that I had some mental health issues. I --  
8 growing up my family telling me, my wife constantly putting it  
9 in my face. I just knew that there was some things wrong with  
10 me, but I was told by Counsel Irvin that nothing was wrong  
11 with me. Doctor Irvin said I was fine. So, I really ---

12 Q: Was ---

13 A: I'm sorry. I'm sorry.

14 Q: You don't have to apologize. It's your day in court,  
15 sir. Just, I'll try and guide us along as best I can.

16 A: Yes, sir.

17 Q: Did you hear from Mr. Irvin that your mental health was  
18 fine before or after you told him what happened on the day in  
19 question?

20 A: Before.

21 Q: Before?

22 A: Yes, sir. And I'd like to address, also after, when we  
23 were -- before we were going into that sentencing hearing, I  
24 had refused twice to sign that guilty plea. And at that time  
25 my mental health issues, that I know now that Doctor Morgan is

1 helping me realize that I had, were kicking in. And there was  
2 -- Counsel Irvin said I was fine and then brought up the fact  
3 about he had knew of a client that his dog had told him to  
4 kill his wife on a cruise and nothing happened with him. He  
5 was found guilty and not insane or any mental health problems.  
6 He had brought that up, but other than that it was before and  
7 after when I brought it up again directly before I went into  
8 the courtroom about my mental health issues.

9 Q: My apologizes if I'm misunderstanding you, but is it your  
10 testimony today that you understood that even people with very  
11 severe conditions could be found guilty?

12 A: Correct.

13 Q: Okay.

14 A: It's the culpability of their actions.

15 Q: Were you able to talk to your attorneys over the course  
16 of your representation?

17 A: I was able to talk to Counsel Irvin quite often. I only  
18 got to speak with Jonny three times.

19 Q: Did you understand that questions and comments they had  
20 for you?

21 A: Somewhat. Not completely, but somewhat I understood.

22 Q: To the extent that you didn't understand things, was it  
23 simply because you weren't familiar with the legal concepts  
24 that they were trying to communicate?

25 A: Yes, sir.

1 Q: Okay. And to clarify, because there are a number of  
2 different issues that can be raised in the context of mental  
3 health, is it your position today that you were not competent  
4 to plead at the time of your guilty plea?

5 A: Yes, sir.

6 Q: Is it your position that you were legally insane at the  
7 time that you committed the crime?

8 A: I wouldn't have directly knowledge of that until further  
9 review with Doctor Morgan or another appointed psychiatrist.  
10 I can't make that claim at this time.

11 Q: And so on the day of your plea, did you still understand  
12 what Mr. Irvin and Mr. McCoy were trying to say to you?

13 A: As far as?

14 Q: In the general course of your conversations with them.  
15 Did you understand the words that they were saying and ideas  
16 that they were trying to communicate to you?

17 A: Honestly, I was really stressed out because it was once  
18 again my day in court and I was terrified. And I, I didn't  
19 understand why I was being rushed into -- what I felt was  
20 being rushed into signing a guilty plea. There is numerous  
21 questions and let me -- in that room, you know, I was directed  
22 exactly what to say when I walked into that courtroom and what  
23 not to do and what to do. And as far as that, I understood  
24 some things but not all things I didn't understand.

25 Q: Who directed you to say and do things?

1 A: Counsel Irvin and Co-counsel McCoy directed me to when I  
2 entered the courtroom to not say anything, to not have any  
3 kind of appearance on my face, to answer simple questions and  
4 just be quiet and don't make any kind of facial expressions.  
5 And they told me that my opening statement needed to be, "I'm  
6 guilty for what I'm charged with here today." Which it  
7 clearly states in the record of the court that I did exactly  
8 what they said. And the victim's mother also notified -- said  
9 that I sat there with a no expression on my face, which I did  
10 exactly as co-counsel and lead counsel had directly me to do,  
11 had advised me.

12 Q: You indicated that you felt rushed into the plea,  
13 correct?

14 A: Yes, sir.

15 Q: Did you feel that you needed more time with your  
16 attorneys?

17 A: I, I felt -- yes, sir. I did.

18 Q: Did you tell the Court that you wanted more time with  
19 your attorneys?

20 A: No, sir, because I was following advisement of counsel  
21 just to keep it short and simply.

22 Q: In fact, you told the Court that you didn't need anymore  
23 time, correct?

24 A: I believe I might have said that. Yes, sir. Do you know  
25 exactly which line I stated that?

1 Q: By my notes, sir, I am looking at page 7, lines 6 through  
2 14 if you have a copy of the transcript up there.

3 A: It's -- my counsel has it.

4 **MR. JAMES:** May I approach?

5 **THE COURT:** Here's one right here if you want it.

6 **MR. POWELL:** Thank you.

7 **BY MR. JAMES:**

8 Q: Can you flip the pages, or do you need assistance?

9 A: I think I can. What page did you say?

10 Q: I'm looking at page 7.

11 A: Okay. All right. Which line.

12 Q: And to get the full context, lines 6 through 14.

13 A: Okay. Okay. Yes, they explained to me what voluntary  
14 manslaughter was.

15 Q: Okay.

16 A: I didn't need to ask Judge Hyman what manslaughter was or  
17 anything.

18 Q: So, you understood what voluntary manslaughter was?

19 A: Yes, sir.

20 Q: And the elements of that crime that the state would have  
21 to prove?

22 A: Yes, sir.

23 Q: Okay. If you'll flip over to page 12 for me.

24 A: Yes, sir.

25 Q: If you will look at lines 3 through 24. It's almost the

1 entire page.

2 A: Okay.

3 A: And at that time, the Court again and more broadly asked  
4 you if you were satisfied with you counsels and you said,  
5 "Extremely."

6 Q: And the Court asked you if you needed anymore time to  
7 prepare with your attorneys and you said, "No." But deep down  
8 you felt rushed and you needed more time?

9 A: Correct.

10 Q: But you didn't communicate that to the Court?

11 A: No, sir. And may I just add that at the time I was  
12 satisfied, but once I began to research and came into contact  
13 with Doctor Morgan, I was extremely dissatisfied.

14 Q: Thank you for that clarification.

15 A: Yes, sir.

16 Q: And as I'm up here taking notes, in the silence if you  
17 think of anything else that you want to clarify, feel free to  
18 fill the silence.

19 **MR. FOWLER:** Objection, Your Honor.

20 **THE COURT:** Overruled.

21 **MR. FOWLER:** Thank you.

22 **BY MR. JAMES:**

23 Q: And once last time, I hate to beat the horse, but if  
24 you'll flip over to page 18. We're going to look at lines 15  
25 through 20. And one last time that Court asks you if you've

1 had plenty of time to think about your plea. And you say,  
2 "Yes", correct?

3 A: Let's see. Okay. What was -- will you repeat that  
4 question? I'm sorry.

5 Q: You told the Court that -- you agreed with the Court that  
6 you had plenty of time to think about your plea, correct?

7 A: Yes, sir.

8 Q: And that you did not need to discuss it any further with  
9 your attorneys?

10 A: Correct.

11 Q: So, it was three times that the possibility was raised by  
12 the Court to ask for more time, correct?

13 A: Yes, sir.

14 Q: But you never asked for it.

15 A: No, sir, because I was directed by counsel to keep short,  
16 simple answers and get it done with as fast as possible.

17 Q: What did you tell your attorneys occurred on the day in  
18 question?

19 **MR. FOWLER:** Objection, Your Honor. That doesn't go to  
20 the plea or anything like that. It's irrelevant to this case,  
21 Your Honor.

22 **THE COURT:** Why don't you clarify your question a little  
23 bit more. That's a little broad question.

24 **MR. JAMES:** It's a very broad question, Your Honor.  
25 However, I think it's necessarily (inaudible) in this context

1 because it is important to gage what the attorneys knew about  
2 the viability of any kind of insanity defense or any kind of  
3 competency issues.

4 **THE COURT:** That might be the better way to phrase it:  
5 What did you tell your lawyer I regard to ... I mean, he could  
6 sit here all day talking about what he talked about.

7 **MR. JAMES:** True.

8 **BY MR. JAMES:**

9 Q: What did you tell your attorneys about your mental  
10 health?

11 A: What did I tell them about my mental health?

12 Q: Correct.

13 A: Basically, some of the issues that I had been  
14 experiencing that I had had, I never had a chance to explain  
15 to them anything. They never investigated the evidence or  
16 Doctor Morgan to even know that I had any mental issues. The  
17 evidence was there. The discovery evidence that was given to  
18 them on August 2014, almost three years to the sentencing and  
19 they never investigated it, any of it, any of the claims.

20 Q: Did you ever tell them how you felt on the day in  
21 question?

22 A: Yeah. I told -- I was -- it was ---

23 Q: And how did you feel?

24 A: So many different ways that I felt. It was unbelievable  
25 the emotions that were over me, up and down, sad, happy at the

1 same time, racing thoughts, anxious. There's so many  
2 different ways that I felt. And I believe if I would have  
3 known these things everything could have been prevented. If I  
4 would have listened to my wife and her telling me over and  
5 over that I had issues, mental health issues, instead of not  
6 wanting to face it and realize it and I, I didn't listen to  
7 her. And I did and it took me finding this out by talking to  
8 Doctor Morgan.

9 Q: You shot Charles Royal, correct?

10 A: Correct.

11 Q: And then you held the gun to Angelina Powell's head,  
12 correct?

13 **MR. FOWLER:** Your Honor, I'd like to object to this line  
14 of questioning including the previous question. This is not  
15 about the substance of the case, this is about the interaction  
16 between Mr. Irvin, and possibly Mr. McCoy, and my client in  
17 terms of what their relationship was. Any factual substance  
18 of the case, I don't think is relevant at this time.

19 **THE COURT:** All right. Let me hear from you, Mr. James.

20 **MR. JAMES:** I am attempting to very narrowly set the  
21 predicate to question as to his thoughts and his feelings at  
22 the time of the crime as would be relevant to his allegations  
23 relating to mental health, including not in this case his  
24 competence to enter a plea but rather any viability of an  
25 insanity defense.

1           **MR. FOWLER:** And, Your Honor, I would contend that it's  
2 not ---

3           **THE COURT:** Overruled. Go ahead.

4 **BY MR. JAMES:**

5 Q: You then held the gun up to Angelina Powell's head,  
6 correct?

7 A: Incorrect.

8 Q: Incorrect.

9 A: Incorrect.

10 Q: That is not what occurred?

11 A: No. A witness saw me after Charles Royal and I got into  
12 it. Angelina came up behind me, I was startled. The witness  
13 saw me turn around as in a state of panic because when you  
14 have shot somebody there is a feeling you get inside of you  
15 that I've never experienced anything like it before. It was  
16 terrifying. And she came behind me and I heard her. She  
17 stepped on some twigs and I turned around and had the gun  
18 pointed at her. I never pressed it to her head, ever.

19 Q: So, it was pointed at her but not pressing it right up  
20 against her?

21 A: Correct.

22 Q: You said it was a feeling unlike anything else you'd ever  
23 felt, correct?

24 A: After I'd shot him. Yes, sir.

25 Q: How did you feel immediately after you'd shot him?

1 A: Horrified that the whole situation had happened. It  
2 was, it's not like, it's not like going hunting or anything  
3 like that. It's something different because when you go  
4 hunting you're proud to, you know, for your game. Whatever  
5 you get you're proud of it. This was just, it was just, it  
6 was insane. I just couldn't believe that it had happened.  
7 There's no way that I can describe it. You know, maybe  
8 further review with Doctor Morgan he could help me describe it  
9 more because I don't know. There was so many different  
10 feelings inside of me at that time.

11 Q: You were afraid?

12 A: Yes, sir.

13 Q: Did you regret what you had done?

14 A: Yes, sir.

15 Q: You knew it was wrong?

16 **MR. FOWLER:** Objection, Your Honor. This seems to be  
17 some kind of deliberation in terms of ---

18 **THE COURT:** Well, I think he's going toward mental health  
19 and the issues of mental health.

20 You can answer it.

21 **BY MR. JAMES:**

22 A: Did I think it was wrong? Is that what you're ---

23 Q: Yes.

24 A: At the time I was, I was -- the whole interaction between  
25 me and him that night from what I thought might have happened

1 to what had happened, we were in further discussion with  
2 Doctor Morgan the initial time that he had met me. He had  
3 told Mr. Irvin that he believe that I had suffered from some  
4 type of black out due to high levels of anxiety or stress or  
5 something like that. So, from what I remembered, when I  
6 remembered when Charles fell, Charles Royal fell I stopped. I  
7 stopped immediately because he was no longer a threat to me.  
8 So, at that time I was just -- I didn't know if it was right  
9 or wrong because of the whole situation. So, it could be yes,  
10 it could be no. I don't know. I need further, I need further  
11 psychiatric evaluation with somebody qualified as Doctor  
12 Morgan to review and go back and open up some of the whole  
13 situation of what happened. So, that could be a yes or a no.

14 Q: And do you remember running off afterwards?

15 A: Yes, sir.

16 Q: And do you remember being picked up at the club later  
17 that night?

18 A: Yes, sir. In fact, the police officers called me, and I  
19 told them where I was. And they asked if they could come  
20 speak to me and I told them yes, and I told them exactly where  
21 I was sitting. They came in, they gave me a Terry pat, they  
22 escorted me to their police car, and I sat out there for about  
23 three hours talking to detectives. And there was a -- the  
24 first detective on the scene was a Mr. Troy Allen Large. He  
25 was the first detective to question me and my first detective

1 interview.

2 Q: And you denied any involvement?

3 A: Correct.

4 Q: Were you then taken into custody at that time?

5 A: I was in -- they kept -- yes, sir. I guess that was I  
6 was being detained. They served the first arrest warrant on  
7 June 2nd, 2014.

8 Q: Did you tell Mr. Irvin or Mr. McCoy any witnesses that  
9 they should go speak with?

10 A: Yes, sir. Now as far -- let me be direct with that. I  
11 told Counsel Irvin. Now, what he told Counsel McCoy, I'm not  
12 certain of that. I only met with McCoy briefly for maybe a  
13 total of an hour and 15 minutes combined.

14 Q: Who'd you tell Mr. Irvin to go speak with?

15 A: I asked him to speak to my wife, Angelina (inaudible)  
16 Powell. I asked him to speak to Thomas W. Davis, Senior. I  
17 asked him to speak to my mother. I asked him to speak to all  
18 of my family members. Pretty much anybody that might have  
19 known issues that might have helped me out in a defense. And  
20 he never, never even talked to my wife. In fact, my wife came  
21 into his store with her mother to file a civil suit on  
22 somebody who spilt some kind of substance on one of her  
23 mother's dresses or gowns and ---

24 Q: I'm going to stop you there because I think ---

25 A: Okay.

1 Q: --- that's a little bit more of your personal knowledge.

2 A: Okay. He directly told me this, Counsel Irvin told me  
3 that she came into the office and he decided that he didn't  
4 want to talk to her or have any kind of interview with her.  
5 And I was real upset about that. He needed to get facts, it's  
6 important to get facts from witnesses in a case.

7 Q: It is. And I understand that you want to communicate  
8 that to the Court.

9 A: Yes, sir.

10 Q: Ultimately, what we need to focus on ---

11 A: I'm sorry.

12 Q: --- is what you saw, what you did, your communications  
13 with Mr. Irvin.

14 A: Okay.

15 Q: And getting a little bit beyond that, what you saw in  
16 your discovery and relied upon in pleading guilty.

17 A: Yes, sir.

18 Q: You feeling okay up there?

19 A: I'm just -- it's, it's really stressful. This has been  
20 the most stressful part of my life.

21 Q: Are you as stressed today as you were at the time of your  
22 guilty plea?

23 A: Yeah. I'm kind of there. No. Not really, because this  
24 is, this is trying to get some kind of relief for the  
25 ineffectiveness of counsel. That was being told I was going

1 to prison the rest of my life if I didn't take the guilty  
2 plea. That's kind of terrifying for anybody, especially if  
3 you have mental health issues that haven't been investigated.

4 Q: When did you first learn of the offer to plead guilty to  
5 the lesser included offense of voluntary manslaughter?

6 A: On April 24th, 2017, I believe. Mr. McCoy, Allie Argoe,  
7 Counsel Irvin, and Ronald Duncan came out to the detention  
8 center to briefly talk to me about it. No. Let me -- that  
9 was the second time. The first time was at the courthouse. I  
10 have in my notes over there that Allie Argoe and Counsel Irvin  
11 had me called out in the morning. I came up here and they  
12 presented it to me, and I refused it. And Counsel Irvin got  
13 upset I wouldn't sign it. I refused politely again and ---

14 Q: What date was that?

15 A: It was -- I believe it was -- it was mid-April 2017.

16 Q: And you rejected it once?

17 A: Beforehand and then I rejected it again that day, which  
18 it says in the notes that Judge Hyman took a recess so they  
19 could come back and talk to me. And that's when they came  
20 back, and I was terrified with what they told me and went with  
21 exactly what they told me to do.

22 Q: So, ultimately that was the third time that the plea  
23 offer had been brought to you and the attorneys said you need  
24 to consider this?

25 A: Right. The first time was when his assistant attorney,

1 Allie Argoe, and Counsel Irvin met me here in mid-April. Then  
2 it was brought to me April 26th, 2017 at the hearing. They  
3 came, I refused it, they went back in there and discussed and  
4 then came back to see me again and that's when everything  
5 started happening right there. I was frightened, I felt as  
6 though I was being coerced to sign this plea and if I didn't I  
7 was going to go to prison for the rest of my life. So, right  
8 there you have a fight or flight response and I was terrified.  
9 So, I did what my counsels had advised me to do, I plead  
10 guilty under advisement of now deceased plea counsel Jim  
11 Irvin, who had everything to do with the plea hearing  
12 according to Counsel McCoy's testimony at that hearing.

13 Q: You were afraid that you were going to get a life  
14 sentence if you went to trial?

15 A: I was -- that's what I was told. They said, "if you go  
16 to trial, you're going to spend the rest of your life in  
17 prison." But there's no way that they could know that 100  
18 percent, because Jim Irvin always told me, "every case is  
19 different and you can never know what those jurors are going  
20 to do until you've presented your case."

21 Q: And you understood that murder carried 30 years to life?

22 A: Yes, sir.

23 Q: You mentioned that Counsel Irvin represented your former  
24 landlord, correct?

25 A: Correct.

1 Q: That was for an apartment?

2 A: That was for an apartment that I had rented. Yes, sir.

3 Q: It was rented in your name or in your wife's name, I'm  
4 sorry, ex-wife's name?

5 A: It was rented in both of our names.

6 Q: Both of your names.

7 A: But the lease had my name on it. She would make payments  
8 every now and then to him. But from the separation Ms. Powell  
9 had her own apartment at Broadway Station. She, she had moved  
10 out, I think it was March 16th, 2013.

11 Q: Was the eviction before or after your plea?

12 A: It was before my plea.

13 Q: Was it before or after the shooting?

14 A: It was after the shooting.

15 Q: And when Mr. McCoy came on to the case you didn't object  
16 to him joining Mr. Irvin?

17 A: No, sir.

18 Q: In fact, you wanted him to be the lead counsel, correct?

19 A: That's, that's after I started seeing Counsel Irvin --  
20 three months after he was appointed by Judge John, Counsel  
21 Irvin was just showing, he was showing significant health  
22 decline. And I actually sent that letter to Counsel McCoy  
23 requesting him to be lead counsel, but it was not, it's didn't  
24 happen.

25 Q: You indicated that you asked Mr. Irvin to appeal your

1 plea and sentence, correct?

2 A: Yes, sir.

3 Q: And you insisted on it?

4 A: Yes, sir.

5 Q: Even though he was telling you, you don't have a chance?

6 A: Correct.

7 Q: Okay. Did you ever ask Mr. McCoy to file an appeal for  
8 you?

9 A: No, sir. I didn't because he was co-counsel.

10 Q: Did you primarily communicate with Mr. Irvin or Mr. McCoy  
11 after your plea?

12 A: Equal.

13 Q: Equal.

14 A: That's correct. I sent two letters to Mr. McCoy's  
15 office: one, requesting that my documents from my case be  
16 turned over to my brother. And the second time I asked them  
17 about a post-conviction relief at which time Allie Argoe  
18 responded with a lengthy letter trying to tell me that I had  
19 every right to file a PCR and what happened if I was  
20 successful in providing enough evidence for the PCR for the  
21 Court to decide in my favor.

22 Q: Gave you a quick primer on what PCR is?

23 A: Yes, sir.

24 Q: So, you did ultimately ask Jonny McCoy to do things for  
25 you, correct?

1 A: After, after -- I just asked him to -- which I had a  
2 right for any counsel that was representing me to turn over  
3 that evidence to a family member or somebody that I deem  
4 necessary. So, that, yes, that is by South Carolina code of  
5 laws I asked him to do that. And the second thing is that I  
6 told -- I sent him a letter notifying him that I thought as  
7 respect for fellow Seahawks graduating, that I wanted to file  
8 a post-conviction relief hearing and I got a letter back.  
9 That's the only two letters I ever sent him.

10 Q: But you didn't ask him to file the appeal because he was  
11 co-counsel?

12 A: No, sir. Because I consistently asked him that day,  
13 asked Counsel Irvin when he came to visit me that night with  
14 Ronald Duncan, who unfortunately is not in the courtroom, to  
15 file that appeal. Because I was kind of upset at the  
16 declining representation. He was sick and he didn't tell me  
17 until after I plead guilty. I think I had a right to know  
18 before I plead guilty that he was sick.

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

20 **BY MR. JAMES:**

21 Q: So, you understood that Mr. Irvin was your lead counsel  
22 and that Mr. McCoy was your co-counsel?

23 A: Correct.

24 Q: And was it your understanding that if you sent something  
25 to one of them that it would also go to the other?

1 A: I would hope so.

2 Q: All right. So, if you sent a letter to Jonny McCoy, Mr.  
3 Irvin would also get it, correct?

4 A: That's correct.

5 Q: And if you sent a letter to Mr. Irvin, Mr. McCoy would  
6 also get it?

7 A: I believe so. Now, I've got some letters here, I don't  
8 know if Mr. McCoy's received them or not from Counsel Irvin  
9 while I was pre -- post-conviction.

10 Q: That was certainly your expectation.

11 A: Well, not necessarily because, I mean, his representation  
12 just declined and, I mean, there's certain things that Mr.  
13 McCoy, I mean Counsel McCoy didn't even know of until Jim  
14 Irvin had told him at the time about certain *Brady* violations.  
15 I still remember our last hearing McCoy was real upset with  
16 Irvin that he didn't press Solicitor Livesay for certain  
17 things that he was allowing her to get away with. It was  
18 clear *Brady* violations. So, there was things that Jim Irvin  
19 was not keeping Counsel McCoy in the loop on everything.  
20 There's a lot of things that Counsel McCoy don't know that  
21 Irvin had done over the three years ---

22 Q: Well, you're speculating, you're speculating a little bit  
23 right now.

24 A: Okay. I'm sorry. Okay.

25 Q: You would concede that?

1 A: The speculation?

2 Q: Just a little bit.

3 A: What is the definition of speculation?

4 Q: We'll not go down that road.

5 A: Okay.

6 Q: I think it's something more appropriate that I would  
7 argue to His Honor than with you directly.

8 A: Okay.

9 Q: Did you ever specifically ask Mr. Irvin or Mr. McCoy to  
10 try to suppress evidence?

11 A: I specifically asked Counsel Irvin. Yes, sir.

12 Q: Did he give you a response as to why he did not do so?

13 A: He just told me he'd take care of it.

14 Q: Okay.

15 A: Sharde Crawford, who is an assistant public defender  
16 here, was the co-counsel on my case. I had asked for her to  
17 be here today to possibly offer some extra evidence to support  
18 some of my client. Unfortunately, she's not here. And she  
19 knows, she witnessed me specifically ask him to do certain  
20 things that he never did.

21 **MR. JAMES:** I beg a moment of the Court's indulgence. I  
22 have no further questions for this witness, Your Honor.

23 **THE COURT:** All right.

24 **REDIRECT EXAMINATION OF MR. POWELL BY MR. FOWLER:**

25 Q: How long did you know Mr. Irvin?

1 A: I had met Mr. Irvin previously and he had reminded me  
2 that I had met him about two weeks before the incident  
3 occurred with me and Charles Royal. So, from May 2014 up  
4 until I'd spoke to him about a week and a half before his  
5 passing in October 2017. So, close to three, three years and  
6 a couple of months.

7 Q: Okay. But did you know him before that?

8 A: No, sir.

9 Q: Well, now you said in one of your letters or the letter  
10 that is in evidence that he's a great friend to me and has  
11 been a good friend to family members you state; is that  
12 correct?

13 A: Yes, sir.

14 Q: So, did you rely on his expertise in these matters, at  
15 least initially?

16 A: Yes, sir.

17 Q: Okay. And by that, him being an attorney, you took his  
18 word as truth; is that correct?

19 A: Yes, sir.

20 Q: Okay. Now, when Attorney McCoy came on, he was named co-  
21 counsel eventually, correct?

22 A: That's correct.

23 Q: All right. Now, but in your mind were McCoy and Irvin  
24 equal as co-persons or did you see as Mr. Irvin as more of the  
25 lead attorney and Jonny as the secondary, Mr. McCoy as a

1 secondary?

2 A: Mr. Irvin was the boss.

3 Q: Okay. Why do ---

4 A: Because he specifically -- I'm sorry. I didn't mean to  
5 interrupt you.

6 Q: Why did you say that?

7 A: He specifically told me that Jonny McCoy was his protégé  
8 and that he taught Jonny McCoy everything he knows.

9 Q: So, you viewed it, I don't know the word to say, but like  
10 you said Mr. Irvin was the boss.

11 A: He made all the decisions. He handled everything.

12 Q: You mentioned the letter that was entered into evidence,  
13 you stated on March 21st that you were uncomfortable with Mr.  
14 Irvin being your lead counsel, correct?

15 A: Yes, sir.

16 Q: Okay. You also stated that he, that Mr. Irvin, had  
17 allowed you to sit in jail for 35 months; is that correct?

18 A: Yes, sir.

19 Q: Now, what did you mean by, other than -- what did you  
20 mean by he had let you sit in jail for 35 months?

21 A: He -- I had requested numerous times for him to file a  
22 motion for a fast and speedy trial to hurry things up because  
23 at that time that's what I wanted. He never did it. And then  
24 Jonny McCoy when we met in January for the bond hearing Jonny  
25 got onto him for some of those things. And Mr. Irvin was a

1 very prideful man, so.

2 Q: All right. And you stated in the letter of March 21st,  
3 2017 that Irvin had not made any headlines in your case. What  
4 did you mean by that?

5 A: He ---

6 **MR. JAMES:** Objection. This is beyond the scope of cross  
7 examination.

8 **THE COURT:** Sustained.

9 **BY MR. FOWLER:**

10 Q: The attorney general asked you what kind of defense you  
11 wanted, you're not familiar -- you were not familiar with the  
12 type of defenses that you were eligible for, were you?

13 A: It's ---

14 Q: In cross examination ---

15 A: Okay.

16 Q: --- Mr. James asked you were you aware of the types of  
17 defenses you would want.

18 A: Right.

19 Q: Do you remember that question?

20 A: Yes, sir.

21 Q: But you had no -- did you have any idea of what defense  
22 were available for you?

23 A: No, sir. None was ever discussed with me.

24 Q: Also, on cross examination there was a conversation about  
25 you refusing to sign something. What was that specifically

1 that refused to sign, the plea?

2 A: On which cross examination?

3 Q: Johnny James, he mentioned -- you guys went over the  
4 refusal to sign.

5 A: Yes, sir.

6 Q: What was that specific document that you refused to sign?

7 A: That was a plea, a plea offer from the solicitor's office  
8 for 25, 25 years negotiated -- recommended.

9 Q: And you refused to sign it at least twice; is that  
10 correct?

11 A: That's correct.

12 Q: So, so does that mean that you were uncomfortable with  
13 signing the plea?

14 A: Yes. It wasn't what I was -- Counsel Irvin and I had  
15 talked previously before Jonny McCoy had arrived on to the  
16 case; and he had told me that if it ever did come down to a  
17 plea that it was going to be a negotiated plea between 10 to  
18 15 years, but that never happened.

19 Q: You requested Jonny McCoy to be your lead attorney. Why  
20 did that not happen?

21 **MR. JAMES:** Objection: Speculation.

22 **MR. FOWLER:** Well, I will rephrase the question, Your  
23 Honor.

24 **BY MR. FOWLER:**

25 Q: In March, in the letter specifically provided, you asked

1 Jonny to be your lead attorney and this was discussed on cross  
2 examination.

3 **MR. JAMES:** Additionally, Your Honor, I'm going to  
4 objection it's outside of the scope of cross examination and  
5 asked and answered. I'm pretty sure we went over this in  
6 pretty good detail on direct.

7 **THE COURT:** I think we've gone over everything that's  
8 been asked in the last 10 minutes before.

9 **MR. FOWLER:** No further questions, Your Honor.

10 **THE COURT:** I mean, if you've got something new feel free  
11 to do it but make it new.

12 **MR. FOWLER:** There was the direct -- cross examination  
13 covered several topics in my notes, so I just wanted to be  
14 clear.

15 **THE COURT:** All right.

16 **MR. FOWLER:** But no further questions, Your Honor.

17 **THE COURT:** You may take a seat.

18 **MR. POWELL:** All right. Thank you, sir.

19 **THE COURT:** Let's take a 5-minute break and we'll come  
20 back and wrap it up.

21 **MR. JAMES:** Absolutely, Your Honor.

22 **THE COURT:** Thank you.

23 **(COURT IS IN RECESS)**

24 **THE COURT:** All right. Call your next witness.

25 **MR. FOWLER:** Your Honor, I'd like to call Harold Morgan

1 to the stand.

2           **THE CLERK:** Please have a seat and state your name for  
3 the Court, please.

4           **DOCTOR MORGAN:** Harold Clifford Morgan.

5           **MR. FOWLER:** Your Honor, at this time I'd like to ask if  
6 the attorney general's office would stipulate to Mr. Morgan  
7 being an expert witness.

8           **THE COURT:** Any objections?

9           **MR. JAMES:** Just specify the field right quick.

10           **MR. FOWLER:** He's a medical doctor and psychiatrist in  
11 the psychiatry field.

12           **MR. JAMES:** No objection.

13           **THE COURT:** All right.

14 **DIRECT EXAMINATION OF DOCTOR MORGAN BY MR. FOWLER:**

15 Q: Mr. Morgan, you have dealt with my client, Mr. Powell; is  
16 that correct?

17 A: That's correct. Yes.

18 Q: And if I may -- and you've billed him for services  
19 previously; is that correct?

20 A: I beg your pardon.

21 Q: You've billed my client for services, correct?

22 A: Well, indirectly, yes.

23 Q: Okay.

24 A: I was retained by Mr. Irvin and I billed Mr. Irvin.

25 Q: Okay. So, how did -- let's ask you that question. How

1 did you come to find out about my client? Did Mr. Irvin bring  
2 him to your attention?

3 A: Mr. Irvin, with whom I worked on several other cases,  
4 asked me to examine Mr. Powell.

5 Q: Okay. So, how often did you examine Mr. Powell.

6 A: I examined him one time in January, I think it was, in  
7 2015.

8 Q: Okay. All right. And you have documentation to that  
9 effect, correct? You have records showing that you --

10 A: Sure. Yes, I do. I also gave him a psychological test  
11 to administer -- it's a self-administered thing, so I left it  
12 with him to complete and send back to me. So, my examination  
13 and psychological testing was the basis for the brief note I  
14 sent to Mr. Irvin.

15 Q: But you did -- but you did show that you billed Mr. Irvin  
16 to pay you for services rendered, correct?

17 A: Yes.

18 Q: Okay. And what I'm showing you now is a bill from July  
19 5th, 2015. Is that a bill that you provided to Mr. Irvin?

20 A: Yes.

21 Q: Okay. Was that ever paid?

22 A: It's never been paid.

23 Q: Okay. Now, so this was in ---

24 **MR. FOWLER:** I'd like to ask the Court to enter this in  
25 to evidence by stipulation the July 5th, 2015 bill.

1           **MR. JAMES:** No objection. It is my understanding that  
2 this is number 6.

3           **THE COURT:** All right.

4                                   **(PLAINTIFF'S EXHIBIT NUMBER 6**  
5                                   **IS ADMITTED INTO EVIDENCE.)**

6           **BY MR. FOWLER:**

7           Q: So, getting back to your interviews with Mr. Powell, or  
8 your discussions with Mr. Powell. So, basically you and Mr.  
9 Irvin set up an appointment in January of 2015; is that  
10 correct?

11          A: That's correct.

12          Q: Okay. And where did you examine Mr. Powell?

13          A: I beg your pardon.

14          Q: The place, the place? Where did you examine Mr. Powell?

15          A: At the detention center here in Conway.

16          Q: Okay. And what were the issues that Mr. Irvin has asked  
17 for you to go over?

18          A: Well, basically he asked me to examine him for the usual  
19 things of competency to stand trial and criminal  
20 responsibility.

21          Q: Okay.

22          A: Did you understand what charges Mr. Powell was charged  
23 with?

24          A: I did. Yes.

25          Q: Okay. And what, based on your recollection, were those

1 charges?

2 A: Murder was the main one. There might have been some  
3 incidental charges too.

4 Q: Okay. Did Mr. Irvin say that the funds were available to  
5 pay for your professional services?

6 A: Yes, he did.

7 Q: Did he indicate if that would be through Mr. Powell or  
8 some other source?

9 A: To bill him.

10 Q: Okay. To bill him.

11 A: He said, he said he had funds to pay me so to bill him.

12 Q: All right.

13 A: I had worked with Mr. Irvin before. He had always paid  
14 his bill, so I took him at his word and didn't send him for a  
15 retainer.

16 Q: Okay. So, in retrospect should you have done that in  
17 this case?

18 A: Not the first time it's happened, so no.

19 Q: Very good. So, you examined Mr. Powell in January of  
20 2015, correct?

21 A: That's correct.

22 Q: Was it the 10th of January?

23 A: I'll have to look at my chart to see, but that sounds  
24 right. I assume it's on the bill. I've got lots of notes  
25 here. Yes. January the 10th, 2015.

1 Q: What kind of psychological test did you give to Mr.  
2 Powell?

3 A: He had something called the Millon, M-I-L-L-O-N, Clinical  
4 Multiphasic Inventory III, Roman numeral III.

5 Q: Okay. Is that the Minnesota Multiphasic Personality ---

6 A: No. It's kind of a variation of that in that it's a  
7 bunch of true/false questions about one's self and it's  
8 computerized kind of score sheet.

9 Q: What did you find out from those -- that testing?

10 A: Well, it just shows that he's -- you want to know just  
11 from the test or from ---

12 Q: Well, from the test what did you find out?

13 A: Okay. It shows that he has emotional problems. The  
14 scores -- I've got it here somewhere. It's scored along  
15 several lines, but he's got personality problems; he's got  
16 emotional problems. This is not a test that gives you a  
17 diagnosis. It gives you some things to consider, but it  
18 doesn't, does not make a definitive diagnosis. But I'll tell  
19 you -- here was go. It can be a very lengthy interpretation,  
20 and this is what comes out of it, a lot of scales on there.  
21 But it's reduced to a summary over here and I'll just, if I  
22 may, read you pretty much what it says.

23 It says, "Capsule Summary. Profile Severity. On the  
24 basis of the test data, it may be assumed that the offender",  
25 they know he is awaiting trial, "is experiencing a sever

1 mental disorder. Further professional observation and  
2 inpatient care may be appropriate. The text of the following  
3 interpretive report may need to be majorated up or be given  
4 the probable measure of severity." And then it says,  
5 "Possible diagnosis: Narcissistic Personality Disorder,  
6 Borderline Personality Features, and Depressive Personality  
7 Features." And other clinical syndromes suggested by the  
8 profile are: delusional, that is Paranoid Disorder; Bipolar  
9 Disorder; Manic Severe without psychotic features; and  
10 Adjustment Disorder with anxiety. Then it goes on to talk  
11 about therapy.

12 Q: So, tell me, what was your diagnosis of him based on  
13 those results?

14 A: I did not make a diagnosis as a final conclusion. I just  
15 said there's enough here to warrant further investigation.  
16 It's pretty clear that he met the standards for competency to  
17 stand trial and did not have an insanity defense at all,  
18 that's very clear. But in the process of this examination, my  
19 own examination and this testing, it was clear that it needed  
20 further evaluation to come up with a clear diagnosis that  
21 would be -- could hold up in court and the possibility then of  
22 using the -- I mean, I'm not an attorney I don't make the  
23 advice, I just suggest the possibility that guilty but  
24 mentally ill may be a possible plea.

25 Q: So, how did you express that guilty but mentally ill as

1 a possible plea to Mr. Irvin?

2 A: I sent him an e-mail. It took a while to get all of this  
3 together.

4 **MR. FOWLER:** May I approach, Your Honor?

5 **THE COURT:** Yes.

6 **BY MR. FOWLER:**

7 Q: Is this the e-mail that you're referring to?

8 A: No. This is a letter to Mr. Powell. There's a brief e-  
9 mail somewhere. I think you have it but I -- it looks like an  
10 e-mail rather than a letter.

11 Q: Is this what you're looking for?

12 A: Yes. Yeah.

13 Q: Okay. Tell me about what you discussed with Mr. Irvin in  
14 that.

15 A: Okay. On March 28th of 2015 I sent Mr. Irvin an e-mail  
16 and said, "It will come as no surprise to you that your client  
17 has lots of problems. He is sensitive and tends to be  
18 volatile and acts impulsively. His excessive drinking makes  
19 all of these qualities more extreme. I have not seen any of  
20 the investigative material yet, so I don't know what the  
21 police and prosecution are saying about his behavior. If it  
22 comes to a plea, guilty but mentally ill may be appropriate.

23 Q: Okay. So, it was your advice that if he did plea, guilty  
24 but mentally ill would be the proper ---

25 A: Yes. He needs treatment.

1 Q: Okay. So, you based on this that he needed treatment,  
2 correct?

3 A: Yes, because the mentally ill plea, I'm sure as you know,  
4 essentially promises treatment even if you're in prison.

5 Q: Did you request to have any additional meetings with Mr.  
6 Powell?

7 A: I did not. At that time, I assumed that he would want to  
8 pursue this further. I mean, I didn't know if he was going to  
9 take my suggestion or not.

10 Q: Right.

11 A: But if he did, then certainly we needed to do more work.

12 Q: Okay.

13 A: I asked for the investigative material. That's an  
14 important part in making the final diagnosis.

15 Q: Did you -- did he provide you that material?

16 A: I never received anything, anything by writing, anything  
17 by phone, or any other communication, e-mail or anything from  
18 Mr. Irvin.

19 Q: Okay. Now, let me ask you this question. In terms of  
20 the clinical scales, you mention I think ---

21 **THE COURT:** Just a moment, Your Honor.

22 **BY MR. FOWLER:**

23 Q: You mentioned, I think, you did not mention, the early  
24 life. He did the testing on January 10th, 2015, but did you  
25 do any kind of discussion of Mr. Powell's early life?

1 A: Oh yes. We spent two hours talking about all of that.

2 Q: Tell me about your findings from that.

3 A: Well, it's hard to know where to start. Let's just say  
4 it was chaotic. A lot of instability, a lot of you might say  
5 abuse, and he described his mother as being very emotional and  
6 very volatile. Once she told him that she wished she's had  
7 him aborted and things like that. And this was when he was  
8 very small, not a toddler but maybe grade school. His father  
9 had died somewhere in there and then it just goes on and on  
10 from there getting more and more erratic and his behavior  
11 becomes more problematic. His mother sends him off, or  
12 somehow, he gets sent off for an evaluation and they have  
13 trouble controlling his behavior. They make some suggestions,  
14 but it looks like nothing was ever done. It was basically  
15 just very unstable and very conflicted in terms of his mother  
16 was married several times, he never had a real father figure  
17 until she married a Mr. Knowdon (ph), I think his name was,  
18 for a short time. And he was the most -- closest thing to a  
19 father figure I guess you could say. But basically, it was a  
20 very unstable, chaotic early life.

21 Q: Did you do any -- you mentioned relatives, did you  
22 interview relatives to get a better picture of his situation  
23 or not?

24 A: I didn't get anything after I'd seen him. I was waiting  
25 for some kind of follow-up from Mr. Irvin as to how he wanted

1 to pursue this, if at all.

2 Q: Was there a Malcolm Knowdon (ph) that you interviewed or  
3 spoke with?

4 A: Later.

5 Q: Okay.

6 A: Much later on, and I've got the notes here. In March of  
7 '18, Mr. Knowdon (ph) called me and told me a little bit more  
8 about the background.

9 Q: Why was there such a long disconnect between the 2015  
10 apparently and your 2018 discussions with the relative? I  
11 mean, was there a long -- it seems like there was a long  
12 period ---

13 A: There was a long time. After I finished up my work with  
14 Mr. Irvin and got nothing further from him, that was pretty  
15 much it until Mr. Powell started writing to me.

16 Q: Right.

17 A: And that telephone call from Mr. Knowdon (ph) was as a  
18 result of Mr. Powell asking Mr. Knowdon (ph) to call me or he  
19 might have given me the number to call him, I don't remember  
20 exactly how it happened. But it was Mr. Powell's influence  
21 that got Mr. Knowdon (ph) talking to me.

22 Q: When was that date?

23 A: That was, I think I said March, March 26th, 2018.

24 Q: Okay.

25 A: I'm sorry. Are you waiting for me to say something?

1 Q: No. I apologize. I was looking at this. This -- you  
2 did contact him in October of 2017; is that correct?

3 A: Contact who, Mr. Powell?

4 Q: Mr. Powell, yes.

5 A: Oh yeah. We corresponded several times. He wrote me  
6 several times; I would always reply.

7 Q: So, were you surprised that there was not a follow-up  
8 done; is that correct?

9 A: By Mr. Irvin?

10 Q: Yes.

11 A: Yes, indeed.

12 Q: Okay.

13 A: In the past when I had worked with him, he had always  
14 been very thorough in pursuing whatever kind of issues, mental  
15 health issue there was.

16 Q: Okay. But in your opinion did he not do that in this  
17 case?

18 A: He did not. He did nothing that I'm aware of.

19 Q: Very good. Just a moment please.

20 **MR. FOWLER:** If I may have a moment, Your Honor, briefly.

21 **BY MR. FOWLER:**

22 Q: So just to conclude, you're saying that in this situation  
23 Attorney Irvin didn't follow-up in this situation like he had  
24 in others, correct?

25 A: That's exactly right.

1 Q: Did you have any contact with Jonny McCoy?

2 A: Not at all.

3 Q: Okay. Did he, did Mr. McCoy contact you at any point?

4 A: Not to my knowledge.

5 Q: Okay. And did you send any reports to Attorney McCoy?

6 A: No.

7 **MR. FOWLER:** Your Honor, after consulting with my client,  
8 no further questions of this witness.

9 **THE COURT:** All right. Cross?

10 **MR. JAMES:** I hate to pass up on an opportunity to have a  
11 conversation with you Mr. Morgan, but I don't have any  
12 questions for you.

13 **DOCTOR MORGAN:** Well, I'm sure I'd enjoy it as well.

14 **THE COURT:** All right. You may step down. Thank you.  
15 Any other witnesses?

16 **MR. FOWLER:** No -- just a moment, Your Honor. Your  
17 Honor, not to evade your question, but I don't have any  
18 further questions for Mr. Morgan, and he can leave as far as  
19 our position.

20 **THE COURT:** All right.

21 **MR. JAMES:** No objection from the State.

22 **DOCTOR MORGAN:** Thank you, Your Honor.

23 **THE COURT:** Thank you.

24 **MR. FOWLER:** And, Your Honor, after consulting with my  
25 client, we have no further witnesses.



1 Q: All right. You are an attorney licensed to practice in  
2 this state, correct?

3 A: Yes, sir.

4 Q: All right. And how long have you been so licensed?

5 A: 2008, so that's 11 years, carry the 2.

6 Q: What portion of your practice has been criminal law?

7 A: Ten years.

8 Q: And you knew James Irvin?

9 A: I did.

10 Q: How did you know James Irvin?

11 A: After I left Collins and Lacy in Columbia, I was  
12 practicing insurance defense, I wandered into a criminal  
13 defense law firm and asked if he needed anybody to sweep the  
14 floors. Jim gave me my first opportunity when I was in a bind  
15 and, you know, he taught me where to stand in the courtroom  
16 and a few other things. But we mostly learned about life from  
17 each other.

18 Q: Would you describe him as your mentor?

19 **MR. MCCOY:** Am I too close to this thing, Judge?

20 **THE COURT:** I can hear you, so whatever.

21 **MR. MCCOY:** Okay.

22 **BY MR. JAMES:**

23 A: I would describe his as like a life mentor. Yeah. Yeah.  
24 As far as like a legal mentor, I mean, I've got like 10 of  
25 those. Joey Jackson is my legal mentor.

1 Q: How did you come to represent, in part, Mr. Powell?

2 A: Mr. Powell -- towards the of Jim's life, Mr. Powell is  
3 correct. I mean, it was obvious that he was going through  
4 some stuff. He lost all of his hair, you know, he had a cane.  
5 And there was a bond hearing where Jim had a car accident. He  
6 called me and asked me if I could fill in for him or help or  
7 something to that affect for CJ's, Clifford Powell's bond  
8 hearing. And so, I did the bond hearing, or attended the bond  
9 hearing. And I talked to CJ Powell and he was happy with what  
10 I said or did at the bond hearing. And after that I had a  
11 roster with Judge John on some other cases and I -- that bond  
12 hearing was in front of Judge John. And I told Judge John I  
13 said listen, you know, "I love Jim and trials can be grueling.  
14 They can be physically demanding. If there's ever a point in  
15 time where, you know, I need to be added for physical  
16 participation for Jim, let me know." And he said, "Well do  
17 you want to be added?" And I said, "I think Clifford Powell  
18 wants me to be added for sure." And so, they added me. And  
19 then, I mean, for a murder case -- I mean, I don't even want  
20 to say what we quoted CJ at for a murder case, but it would  
21 have been impossible for him to retain me.

22 Q: You managed to get appointed to him through 608, correct?

23 A: Right. Right.

24 Q: At no cost to him.

25 A: At no cost. And that is, and that is more for things

1 like costs associated with trial, like expenses. You know, I  
2 wanted to help out Jim, you know. I wanted to make sure that  
3 CJ had, Mr. Powell had a zealous, you know, advocacy on both  
4 sides from me and from Jim. And the only way that you can do  
5 that is to ensure that the lawyer doesn't go into his own  
6 pocket. I do do cases for free; I've just never done a murder  
7 for free. And I would have done it for free. I had no idea  
8 that we'd even gotten the 608; I don't even know what that is.  
9 I don't apply for that stuff; I don't care about it. I don't  
10 care about the money. My paralegal probably did it to make  
11 sure that we got the expenses paid, but I can tell you right  
12 now that, you know, that's what it had to do with. It didn't  
13 have anything to with, you know, Jim saying that he needed  
14 help. Jim would have never said that he needed help, ever.  
15 And that's not the conversation that I had with CJ. He just  
16 like what I said at the bond hearing. He just liked the way I  
17 performed. I mean, we can, we can read through the letter  
18 that he wrote me where he was like, man I just, you know, you  
19 did better at this bond hearing than Jim has at all five of  
20 the previous hearings. And Jim was healthy in the beginning,  
21 so he's talking about five previous hearings all the way to  
22 the beginning. He just liked -- he just thought I was a  
23 better lawyer, I guess. I mean, as a matter of fact, I know  
24 that's what he said. He said it in my -- he said it in the  
25 letters where he wrote to me.

1 Q: So, just to kind of clarify and walk through to our next  
2 step here. You represent him at the bond hearing, correct?

3 A: Right.

4 Q: And then he sends you a letter after that bond hearing,  
5 correct?

6 A: Right.

7 Q: And he says, you were great, please be my lawyer?

8 A: That's right.

9 Q: And was it about that time you turned around and told  
10 Judge John and kind of volunteered to help out if need be?

11 A: That's right.

12 Q: Okay. Do you have a copy of that letter here today?

13 A: Yeah. I do. It's in that yellow folder. Sorry, I  
14 should have brought it up here.

15 **MR. JAMES:** Your Honor, if I may approach the witness  
16 with his notes?

17 **BY MR. JAMES:**

18 A: All right. So, it's dated Tuesday, March 21st at  
19 5:30p.m.

20 Q: Now, is this a hand-written or type-written letter?

21 A: These are all hand-written.

22 Q: And who does it report to be from?

23 A: It's from CJ.

24 Q: All right.

25 A: Clifford Powell.

1 Q: If I may see a copy of that letter right quick.

2 A: Yes, sir.

3 Q: Is this the entire thing?

4 A: Yes, sir.

5 Q: And this letter is already in evidence as Plaintiff's  
6 Exhibit Number 4, but I understand that you have an identical  
7 copy of it from your file that you've high lit for your own  
8 purposes, correct?

9 A: Right.

10 Q: All right.

11 A: So, you know, the letter starts out by saying that his  
12 uncle, that he was talking about, was duly represented by Jim  
13 and him. Jim was representing somebody who was adversarial.  
14 So, he said his uncle was going to contact me because he heard  
15 about this very big civil rights case, "big" in quotes, people  
16 hear about it. And I am representing -- I was representing  
17 some guy, you know, and so CJ liked -- or Mr. Powell liked  
18 that case and so he referenced that. And he said that his  
19 uncle is going to contact me to hire me.

20 "Jonny I want you as my lead counsel on my case in trial  
21 and my family has agreed that you are my best chance at  
22 winning my trial because you are young, smart, adept, alert,  
23 and a powerful speaker. You did a better job at my bond  
24 hearing on 1/8/17 than Irvin ever did at the previous five  
25 hearings."

1 Q: All right. So, you come into the case, correct?

2 A: That's right.

3 Q: All right. How many times did you meet with Mr. Powell  
4 before he plead guilty?

5 A: He says three, I'll go with that. Well, it would  
6 technically be four because Allie Argoe is an extension of me.  
7 My associate lawyer, she would always report back to me.

8 Q: So, you and your staff?

9 A: Yeah. Me and my staff, so four times in three months  
10 plus letters.

11 Q: So, you communicated outside of the meetings?

12 A: That's right.

13 Q: And discovery had already -- discovery motions had  
14 already been filed in this case, correct?

15 A: Oh yeah. I mean, this thing was three and a half old --  
16 three and a half years old. You know, look, I'm a trial  
17 lawyer, I've been doing it for ten years. I try cases, you  
18 know, plea hearings are good and all to take the risk out, but  
19 when I came into this thing, I came in to try the case. And  
20 then we had a meeting with Clifford Powell, and we realized  
21 that it was impossible to try the case.

22 Q: What meeting caused you to change your mind about trying  
23 this case?

24 A: As he referenced earlier, it was two days before -- he  
25 says it was two days before his plea. So, we went to discuss

1 with him about what a plea or what an arraignment will be  
2 like. He was just going to be arraigned. And I was there;  
3 Allie was there, my associate; Jim was there, his attorney or  
4 his lead counsel; and Ron, Jim's private investigator was  
5 there and we meet with him in one of the big conference rooms  
6 at the jail. And, you know, he was, he was real calm. And I  
7 told him, "just tell us the truth because we can't put you on  
8 the stand if we think that, you know, you're going to lie."  
9 I'll never put somebody on the stand that I don't think is  
10 telling the truth. I said, "So just break it down and tell me  
11 everything." And he just took a deep breath and was like, "I  
12 lied in wait, I planned it, I smoked weed, I shot her -- I  
13 shot him ---"

14 **MR. FOWLER:** Objection. Objection, Your Honor.

15 **THE COURT:** What grounds?

16 **MR. FOWLER:** Relevance. I think this relates to  
17 discussions with Mr. Irvin and my client and not Mr. McCoy.

18 **MR. MCCOY:** He was clear headed.

19 **THE COURT:** I think it's very relevant.

20 **MR. JAMES:** It's very relevant, Your Honor. He was  
21 there. He was the one having the conversation.

22 **THE COURT:** Right.

23 **MR. FOWLER:** Thank you, Your Honor.

24 **THE COURT:** Overruled.

25 **BY MR. JAMES:**

1 A: He was, he was clear -- I mean, this all goes into -- I  
2 mean, I've been doing this ten years. I'm a mental health  
3 advocate. I have plenty of clients who are up in Columbia. I  
4 have plenty of clients from down in Charleston. I have plenty  
5 of clients right now who are being mentally evaluated. If he  
6 would have given me any inkling during any course of  
7 representation of him that he needed some sort of mental  
8 health evaluation, he would have gotten it. But anyway, so he  
9 said, he said, "I planned it. I concealed my identity. I  
10 lied in wait. I, I waited until the arrived. I walked, you  
11 know, I walked up on the guy." And, you know, whatever  
12 happened between the two of them, he ended up shooting him.  
13 He pointed the gun at the girl and then he left. And then he  
14 took his, he took his clothes and he threw his clothes in one  
15 of those bins. I mean, this isn't in the discovery; the  
16 clothes were thrown in a bin that you drop of clothes for  
17 like, for people to like recycle, like those yellow bins that  
18 are in parking lots. So, that's where the clothes are,  
19 they've never been found, I mean, you know. And then he put  
20 the gun where they found it in the trash, in the dumpster.  
21 And then he went to the strip club and, you know, that's where  
22 the police found him at the strip club. And at no point  
23 during that time when he was going through that did I feel  
24 like he was coming from any other place than he wanted to feel  
25 relief. He wanted to tell the truth to two lawyers that he

1 trusted, particularly me, and see what I thought could happen  
2 or would happen. That's what I felt. I mean, and I'm glad  
3 that he did that because as I sit here right now, I personally  
4 feel he will get life if this is overturned, 100 percent. He  
5 would have gotten it then -- I'm sorry. I'm sorry.

6 Q: If he ---

7 A: He would have gotten it then and he'll get it now if this  
8 is overturned in my vast experience. That's just how I feel.  
9 Lying in wait and the coverup and the other things that took  
10 place. And also, he confessed, you can't put him on the stand  
11 then. He talks about, well, it could have been -- he even  
12 wrote in his thing, well I have an argument for self-defense.  
13 Really? You can't bring about the occurrence, you can't bring  
14 -- there's no self-defense, no self-defense. And then he  
15 talks about well Jim should have brought up my mental health.  
16 No. What I just heard today, Jim did everything right, you  
17 know, God rest his sole. If Jim had heard exactly what this  
18 guy testified to ---

19 **MR. FOWLER:** Objection. Objection.

20 **BY MR. JAMES:**

21 A: --- in my professional opinion ---

22 Q: Hold on. Hold on, now we're speculating.

23 A: Okay. All right.

24 **MR. FOWLER:** Speculation, Your Honor.

25 **MR. MCCOY:** I understand.

1           **THE COURT:** Sustained.

2           **BY MR. JAMES:**

3           A:    Having said that, I'll take it back down to -- I, I  
4           after, after listening to what the Doctor said about how this  
5           man was not insane under M'Naghten and how he testified here  
6           today and he was competent to stand trial, you know, in  
7           criminal law we don't have a guilty but mentally ill defense  
8           during a plea negotiation. You don't stand up and say well  
9           he's guilty that's the mitigating factors, right, that come  
10          into it. Now, if you want to mitigate the factors and say  
11          well, you know, he's got bi-polar and he's angry and depressed  
12          and all of these other things, yeah, that could have been  
13          brought up in the final plea. But when we were going through  
14          our plea, everything in the transcript was what was brought  
15          up. Now, in our mitigation we did talk about things. We  
16          talked about him in the community; we talked about his past;  
17          we talked about, you know, his contributions; and we talked  
18          about him being a local; we talked about, you know, where he  
19          went to high school, knowing me from high school and all of  
20          that other stuff. But the idea that somehow this plea was  
21          incorrect because we didn't, or Jim didn't, say he's guilty  
22          but mentally ill. I mean, you run the risk or the Court, of  
23          the prosecutors, and they will literally tell you, you want to  
24          go down that road we'll through out the plea. But in this  
25          case, it's not like -- I mean, we had our own expert. All

1 right. Let's say this expert -- you know, we've got to turn  
2 over everything in discovery. Let's say we turned over this  
3 expert, and he testified and said this guy is competent to  
4 stand trial and I don't find him criminally insane at the time  
5 of the thing. That's life without parole on our own, on our  
6 own client in my opinion which is what I advised him at the,  
7 at the sentencing hearing. And, and I just don't feel like  
8 anything that Jim could have or would have said in mitigation  
9 would have affected ---

10 **MR. MCCOY:** Objection.

11 **BY MR. JAMES:**

12 A: --- the 25-year sentence, or I would have said. I don't  
13 think there's anything I could have said ---

14 **MR. FOWLER:** Can we get a ruling from the ---

15 **MR. MCCOY:** Okay.

16 **THE COURT:** Regarding to what Jim would have said,  
17 sustained. He can say what he would have said.

18 **MR. FOWLER:** Thank you, Your Honor.

19 **BY MR. JAMES:**

20 A: I mean, that's it in a nutshell.

21 Q: Okay. We just went over a lot of material. I got a few  
22 notes to make sure that we cover it on the record.

23 A: Sorry, man. I've been waiting on this.

24 Q: That's all right. I could see you building up back  
25 there. We talked about the discovery. You had an opportunity

1 to review all of the discovery, correct?

2 A: That's right.

3 Q: All right. And you reviewed the state's evidence against  
4 your client?

5 A: Yes.

6 Q: And did you ever review it with your client or had that  
7 already been done?

8 A: That had already been done, but like he testified, we  
9 went out to the courthouse on the arraignment day. My  
10 assistance, Allie Argoe, brough her laptop, we had all the  
11 flash drives, we had everything, and we said what is it that  
12 you want to review? What do you want to talk about? And we  
13 got to learn a whole new thing that wasn't in the discovery;  
14 we got to learn the truth. And the reason that there weren't  
15 defenses brought up is because how can you, how can you defend  
16 -- how can you say a month into it, a year into it, or two  
17 years into it when the guy is telling you I had nothing to do  
18 with this, this isn't me, I had nothing to do with it, how can  
19 you say all right well you're insane anyway. Why would his  
20 insanity matter if he -- if it wasn't him?

21 Q: That actually gets to a point that I wanted to go over  
22 with you. What was your trial strategy before he came clean  
23 to you and admitted that he was the person who shot the victim  
24 in this case?

25 A: In this case?

1 Q: In this case.

2 A: My trial strategy?

3 Q: What was the trial strategy or defense that you had in  
4 mind before that day for the arraignment when he came clean  
5 about everything and ---

6 A: Well, we had no witnesses and after he -- before he,  
7 before he told us the truth, the trial strategy was poke holes  
8 in, you know, the Allen Large thing. And, you know, poke  
9 holes in some of their other theories about him, you know, him  
10 being camouflaged, and weighing too much, and him never  
11 finding the clothes, and then him getting to the strip club  
12 too fast, the taxi cab driver not really seeing him. But, you  
13 know, the guy followed him. I mean, it wasn't much of a  
14 defense. You know, I've won on a lot less, but it wasn't but  
15 of a defense.

16 Q: Could you clarify one point, and I hate to cut you off  
17 here, but when you said the Allen Large thing, to which Allen  
18 Large thing are you referring? I have an idea, but we need to  
19 put it on the record.

20 A: So, every client that hires you brings up who the  
21 detectives are and their personnel file rightfully so. I have  
22 no problem with that as a defense attorney, credibility is a  
23 huge issue. Allen Large, his credibility, he almost ruined  
24 his entire departments credibility for what went down. I have  
25 no problem -- the guy has been criminally charged, he's passed

1 away now, you know. I'll not get into it any further. But,  
2 yeah, he was one of the first ones on the scene that  
3 interviewed CJ. But then, you know, a dozen other police  
4 officers conducted interviews and, you know, he testified to  
5 how many other people were interviewed including his wife, ex-  
6 wife, and other family members and whatnot. So, you know, you  
7 can only poke holes so much in credibility. There just wasn't  
8 anything there. He wasn't involved that much.

9 Q: So, it was already going to be touch sledding?

10 A: Yeah. I mean, it was going to be -- to get it out of  
11 murder would have been almost impossible to get it into  
12 manslaughter. You're talking about heat of passion. Heat of  
13 passion is not preparation, that's murder. And then once  
14 you're into murder you don't get 30 years, nobody gets the  
15 minimum in a murder case, you start out at 45. In my opinion,  
16 you start out at 45 and it goes all the way up to life  
17 depending on how hard you drag the family through a trial.

18 Q: How did you enter into plea negotiations with the state  
19 after his disclosures at the pre-arraignment meeting?

20 A: Well, I asked Jim, you know, what his, what his strategy  
21 was for that. He had been working on the case for three and a  
22 half years. So, I asked him where he was as far as  
23 negotiations went and he said, "I've got ---

24 **MR. FOWLER:** Objection, Your Honor, hearsay.

25 **THE COURT:** Sustained.

1 **BY MR. JAMES:**

2 Q: It's unfortunately sustained -- not to pass any opinion  
3 on the ruling of the Court.

4 A: Well, I came to, I came to learn that he had an offer of  
5 25 years during the course and scope of my representation and,  
6 you know, I thought that that was great after the story that I  
7 had heard: lying in wait, camouflaged, covering up and all of  
8 that stuff. Particularly in that neighborhood, I mean, this  
9 happened at Broadway Station on 38th Avenue, you know, that's  
10 where I used to spend the night when I was in like -- when I  
11 was 18 years old. I didn't bring that into a factor in my  
12 discussion, but I knew how that would play out with a jury in  
13 Horry County, South Carolina. It's a subdivision.

14 Q: To circle back around to a line of questioning that I  
15 started you on and I didn't complete it quite yet, we went  
16 over your strategy of essentially poking holes in the state's  
17 case and putting them to their burden. Did you explain to  
18 your client that that was going to be a strategy at trial?

19 A: No.

20 Q: Okay.

21 A: No. I mean, we went over his -- we went over, yeah. I  
22 mean, we went over -- so once I went out to get ready for  
23 trial with him, the first thing he told us was the truth, how  
24 it all went down, and that he wanted to plead guilty and put  
25 it behind him. So, at that point, you know, I mean we

1 explained him once you plead guilty you lose the right to  
2 cross-examine. I mean, we go over a form.

3 Q: So, you really didn't have, you yourself, Jonny McCoy,  
4 didn't really have the opportunity to explain to him the  
5 strategy that you were going to go on?

6 A: Yeah, nor was it necessary.

7 Q: Okay. And the 25 years was already on the table and  
8 y'all went to the solicitor and ---

9 A: Yeah. I think that they had like taken it off and I told  
10 them to go see if they'd put it back on and then they put it  
11 back on. And then Allie and I, yeah, made sure that it was  
12 still on and then we came out here and he had already known.

13 Q: And I know you've touched on this already, but we'll go  
14 through it real quick. You discussed all of his rights to a  
15 jury trial?

16 A: Right. Yeah.

17 Q: And his right to remain silent?

18 A: That's right.

19 Q: And his right to confront the witnesses against him?

20 A: Yes, sir.

21 Q: And his right to an instruction that the jury should not  
22 taken an inference if he did remain silent?

23 A: That's correct.

24 Q: Okay.

25 A: I think that's what he was referring to when he said we

1 went over everything that was going to be said, because I  
2 mean, we always do.

3 Q: Did you tell him what to say during the plea proceeding?

4 A: No. I mean, so, so sometimes clients can, you know, run  
5 off and say things that have no bearing on what's going on.  
6 So, I always certainly tell my clients, remember we're here to  
7 plead guilty and put this behind you. We're not here to, you  
8 know, kind of discuss things like oh there not talking about  
9 the right color shoes I was wearing, because that'll be  
10 brought up, right, we'll you know he had a brown pair of shoes  
11 on or whatnot. You know, stay focused on what we're doing and  
12 that is you are guilty of this, we've been over -- we've read  
13 over everything. You've had three and a half years, we're  
14 here to plead guilty, put it behind you. So, yeah, no, we  
15 certainly -- and I've always done it that way and I think  
16 every attorney does that out of respect for the victims, the  
17 witnesses, and the Judge, and the Court to make sure that it's  
18 limited to what we're doing. I mean, you're there for a plea.  
19 You're not there for some sort of diatribe about what, you  
20 know, what you think should be going on. The Judge is asking  
21 you do you have any questions, are you understand -- you know,  
22 we just tell them to limit it to answering those questions.

23 Q: You mentioned all of this came out at a pre-arraignment  
24 meeting. Was this case on the trial roster?

25 A: Yes.

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

2           **BY MR. JAMES:**

3           Q: There's already been some testimony from other witnesses  
4 on this subject, but Mr. Powell never asked you to file a  
5 notice of appeal, did he?

6           A: No, sir.

7           Q: Did you speak with Mr. Powell about the case after he  
8 plead guilty?

9           A: No, sir.

10          Q: Did you exchange letters with him?

11          A: No, sir. Maybe somebody from my office did, but not me.  
12 I think Ms. Argoe wrote him a letter. She gave him all of his  
13 stuff and explained everything.

14          Q: And in your interactions with Mr. Powell he seemed to  
15 understand what you were telling him?

16          A: That's right.

17          Q: And he was able to communicate to you?

18          A: Yes, sir.

19          Q: And clearly remember everything that occurred at the time  
20 of the killing?

21          A: Yes, sir.

22          Q: And you were prepared to go ahead to trial?

23          A: Yes, sir.

24          Q: And Mr. Powell initially declined the plea offer,  
25 correct?

1 A: Yeah. I mean, not to me.

2 Q: Okay.

3 A: So, to my understanding, you know, Mr. Powell did the  
4 exact same thing that everybody does, and that is ---

5 **MR. FOWLER:** Objection, Your Honor, speculation.

6 **MR. MCCOY:** Okay. Yeah, I won't speculate on it.

7 **BY MR. JAMES:**

8 Q: Let's not speculate.

9 A: Yeah. I mean, Ms. Argoe or Mr. Irvin would be better to  
10 answer that one.

11 Q: You were, of course, present and representing Mr. Powell  
12 at the plea proceeding, correct?

13 A: Yes, sir.

14 Q: Did you see any basis upon which you could object to the  
15 statements of the victim's family members during the plea?

16 A: No, sir.

17 Q: Did you ever consider filing motions to suppress any of  
18 the evidence in the state's case?

19 A: No, sir.

20 Q: Is that something you would have done potentially if you  
21 were proceeding ahead to trial?

22 A: That's right. And I mean, suppressing interviews? I'm  
23 not really sure how you suppress an interview, the office can  
24 still testify as to what he was told. And again, he confessed  
25 to us in full, so he could not have taken the stand in his

1 defense. We had very limited stuff to go on at that point.

2 And also, he said he wanted us to talk to his ex-wife and  
3 that's criminal law 101, you cannot talk to a victim in a  
4 criminal case. Especially, in a case like this where she is  
5 the victim of the crime.

6 Q: Why not?

7 A: I mean, because first of all it was an order, no contact  
8 order as part of the bond and it says anyone -- I mean, I've  
9 just been always told that and I never do it. I mean, I maybe  
10 wrong but I never contact a victim on my client's behalf and I  
11 never will. But I can tell you right now in a case where  
12 she's on the bond, no contact order in place, that means the  
13 attorney and the family as well.

14 Q: In your experience as a criminal attorney, do you believe  
15 that contacting the victim could potentially create problems  
16 for you at trial?

17 **THE COURT:** Objection, Your Honor, speculation as to  
18 other issues not this issue particularly.

19 **THE COURT:** I get the gist; you can go ahead.

20 **BY MR. JAMES:**

21 A: I mean, it could create issues for me at the bar too. I  
22 mean, I don't want to be ---

23 **MR. JAMES:** We'll move on, we'll move on. No further  
24 questions for this witness.

25 **THE COURT:** All right.

1 **CROSS EXAMINATION OF MR. MCCOY BY MR. FOWLER:**

2 Q: Now, you said that he had a no contact order in  
3 conjunction with his bond; is that correct?

4 A: I would imagine so.

5 Q: Did he have a bond in this case?

6 A: I mean, no he didn't have a bond in this case but, I --  
7 so could he have called her from the jail?

8 Q: I guess my question was did he have a bond in this case,  
9 and you said no; is that correct?

10 A: Yeah. He didn't have a bond, but he couldn't have called  
11 her from jail. So, I'm operating on the same rules that my  
12 client is an extension of me, and if he can't contact her  
13 obviously, I can't contact her either.

14 Q: So, did you not know he didn't have a bond in this case?

15 A: Hold on, let me see. No. I attended the bond hearing,  
16 the one where he said I did a fantastic job. Hold on, let me  
17 read it. "You did a better job at my bond hearing on 1/8/17  
18 that Irvin ever did at the previous five hearings." And then  
19 he goes on to say that I'm in beast mode all the time.

20 Q: But you ---

21 A: So, yeah. I knew there was a bond hearing. I was just  
22 saying that there's a no contact order in place during the  
23 procedures of bond which is also at intake. I got the words  
24 scrambled up.

25 Q: You called him CJ quite frequently during your direct

1 examination. Why did you call him CJ?

2 A: Same reason people call me Jonny.

3 Q: Well, his name is Clifford Powell. What the difference -  
4 - where did the CJ come in?

5 A: I don't know. People called him CJ from high school.

6 Q: Okay. So, you went to high school with him.

7 A: That's right.

8 Q: So, how long have you known him?

9 A: I don't know him.

10 Q: But you felt, but you felt comfortable enough to call him  
11 CJ ---

12 **THE COURT:** What does that have to do with the PCR  
13 hearing?

14 **MR. FOWLER:** I'm just trying to find out ---

15 **THE COURT:** We know what he's talking about. He's  
16 referring to this guy right here as CJ for some reason because  
17 he knew him in high school. Let's go ahead and move on.

18 **MR. FOWLER:** Thank you, Your Honor.

19 **BY MR. FOWLER:**

20 Q: What did you do in terms the notice of appeal  
21 notification to my client, Mr. Powell?

22 A: I didn't do anything.

23 Q: Okay. In terms of the competency and insanity defense,  
24 did you provide him any information?

25 A: No.

1 Q: Okay. In terms of asserting defenses, possible defenses,  
2 what did you do in regards to that with Mr. Powell? How did  
3 you notify him of asserting possible defenses?

4 A: Well, he didn't have any defenses. He didn't want any  
5 defenses. He confessed and told me he wanted to plead guilty,  
6 but he didn't have an insanity defense either.

7 Q: Okay. Well, now you said that Jim, I think you said, did  
8 everything right; is that correct?

9 A: Yes, sir.

10 Q: Okay. Well, now ---

11 A: In my opinion.

12 Q: --- that's your opinion.

13 A: But it's a moving target in criminal law. See, in  
14 criminal it's practicing criminal law because there's no right  
15 or wrong answer. But I'll just say in CJ's own words in the  
16 letter ---

17 **MR. FOWLER:** Objection, Your Honor. I'd like to a  
18 response to my question and move on, please.

19 **MR. MCCOY:** Well, you asked me what I thought Jim did ---

20 **BY MR. FOWLER:**

21 Q: I mean, you're talking about CJ. I mean, you started  
22 talking about what CJ said. I would prefer to hear from you  
23 about what you did in terms of ---

24 A: You asked me if Jim --- if I thought he did a good job.  
25 That's what you said.

1 Q: Right. You said that on direct and I'm asking a follow-  
2 up question.

3 A: Okay.

4 **THE COURT:** And what is that question?

5 **BY MR. FOWLER:**

6 Q: The follow-up questions is: You were in the courtroom  
7 when Mr. Morgan talked about him treating Mr. Powell in  
8 January 2015.

9 A: I was.

10 Q: And you heard Mr. Morgan say that there was no follow-up  
11 done, correct?

12 A: That's right.

13 Q: And you heard Mr. Morgan say that there was no ---

14 A: Insanity.

15 Q: Well, you heard Mr. Morgan say that he had recommended a  
16 follow-up, correct?

17 A: Right.

18 Q: So, did Jim do anything incorrect in not following up on  
19 Mr. Morgan's summary in testing?

20 A: No.

21 Q: Why not?

22 A: Because Jim's job is to see if there is any legal defense  
23 to criminal law. Once he realized that CJ Powell, or that  
24 Clifford Powell, had no insanity defense and was competent to  
25 stand trial just as Mr. Morgan testified here today, Jim Irvin

1 is no longer indicted to this client to make sure that he gets  
2 proper health care. You're now talking about personal health  
3 care for CJ, for Clifford Powell. You're not talking about  
4 defenses. Jim Irvin did it right. You don't further, you  
5 don't further drag an expert down the road who has already  
6 clarified that he is: (a) not incompetent, and (b) not insane.  
7 He testified, "I had an hour lunch with Jim where we talked  
8 about everything." Now, you don't want me to assume what they  
9 talked about during that hour, but I think we already heard it  
10 here today.

11 Q: You said that it was personal health care; is that how  
12 you phrased it?

13 A: If he says I need to see CJ because I think that he has  
14 mental issues like bipolar and this, that, and the other,  
15 those are things that will not affect trial. Competency?  
16 Yes. Insanity? Yes. Is he depressed? No.

17 Q: But that would have been found out with further review  
18 with Mr. Morgan, Doctor Morgan; is that correct?

19 A: That's fine. That's fine. That's for his family. We're  
20 talking about criminal defense: insanity defense, and  
21 incompetency. Jim hit those two things and it's no longer in  
22 the realm of hey let's travel down this -- I mean, no wonder  
23 Jim stopped. The guy testified here today he's not, he's not  
24 insane under M'Naghten. You want Jim to run down the gamut  
25 and make sure that Mr. Powell has depression medication and

1 that, you know, he gets a diagnosis for bipolar? What's that  
2 got to do with his trial?

3 Q: But all of this was found out while he was incarcerated,  
4 correct?

5 A: Yeah. I guess.

6 Q: In terms of investigation, what did you go to investigate  
7 the charges against my client in this case?

8 A: I listened to him tell me that he put on camouflage gear,  
9 he loaded a gun, he went to the address, he waited at the  
10 parking lot, he waited for them to pull in from a date, he  
11 waited for the man to get out of the car, he pulled up behind  
12 him, he shot him, he turned around, he pointed the gun at the  
13 girl. He told her, "you're lucky I f'ing love you". He left,  
14 he took off his clothes, got naked in the car, that's where  
15 the taxicab saw him. He threw his clothes into a bin where --  
16 again the Goodwill bin. He took the gun, he threw it in a  
17 dumpster, and then he changed his clothes, and he drove to the  
18 Gold Club as an alibi. That's what I investigated.

19 Q: Okay. And you didn't investigate any other witnesses or  
20 anything else, correct?

21 A: Um ---

22 Q: I mean, your scope of responsibility was just listening  
23 to what he said in a conversation, correct?

24 A: Right. And then after he told me that, he said I want to  
25 get the best plea possible.

1 Q: The state had a witness at sentencing. Did you challenge  
2 anything about that state's witness testimony or conversation  
3 with the Court under oath at the sentencing hearing?

4 A: I'm sorry.

5 Q: Did you have -- in terms of his sentencing -- you were  
6 there at his sentencing, correct?

7 A: Yes. I was.

8 Q: And the state had a witness at sentencing, correct?

9 A: A witness.

10 **MR. JAMES:** Objection: asked and answered. This line of  
11 questioning was fully covered on cross.

12 **THE COURT:** I agree. Sustained.

13 **BY MR. FOWLER:**

14 Q: Were you familiar with any dual representation?

15 A: No.

16 Q: Okay. Did you move to suppress any evidence?

17 A: No.

18 **MR. FOWLER:** If I may have a moment, Your Honor. Your  
19 Honor, after discussions with my client, no further questions.

20 **THE COURT:** All right.

21 **MR. JAMES:** Nothing further from the state.

22 **THE COURT:** All right. You may step down. Thank you.

23 **MR. MCCOY:** Thank you, Judge.

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

25 **MR. JAMES:** That will be the state's showing, Your Honor.

1           **THE COURT:** All right. Anything you want to put on the  
2 record.

3           **MR. FOWLER:** No, Your Honor. Just briefly, we've gone  
4 over the grounds that my client and I discussed. I've  
5 discussed this with my client several times and we feel -- we  
6 ask for the Court's approval of his PCR application and as  
7 quickly as possible.

8           **THE COURT:** All right. Anything you'd like to say?

9           **MR. JAMES:** Before I continue with my closing, Your  
10 Honor, this is -- well, first, may Mr. McCoy be excused?

11           **THE COURT:** Yes.

12           **MR. FOWLER:** No objection, Your Honor.

13           **THE COURT:** Have a good day. Thank you.

14           **MR. JAMES:** This is potentially something that should  
15 have been brought out on the testimony, but I should like to  
16 clarify is Mr. Powell requesting a belated direct appeal to  
17 his guilty plea in addition to the request for a new trial, or  
18 is he exclusively requesting a new trial? And if you need a  
19 moment to answer that question.

20           **THE COURT:** I think he's already testified as to what he  
21 wants.

22           **MR. JAMES:** Okay.

23           **THE COURT:** So, I don't see the need to go down any  
24 further roads. The witnesses have already left.

25           **MR. JAMES:** I understand. My concern, Your Honor, is

1 that there has been some testimony as to a White claim that he  
2 did assist upon an appeal from his guilty plea and I have no  
3 evidence to -- but the testimony that he's provided.

4 **THE COURT:** I think he's just trying to say that his  
5 lawyer didn't tell him.

6 **MR. JAMES:** Right. Your Honor, I believe that the  
7 testimony presented here today shows that he was not insane,  
8 shows that he was thoroughly competent at the time of his  
9 plea, shows that any further exploration of that could have at  
10 best lead to a guilty but mentally ill plea, but there's  
11 nothing to show that the state would have been willing to  
12 enter into that. And additionally, guilty but mentally ill  
13 pleas only pertain to the conditions of the incarceration, not  
14 the validity of the plea itself. Your Honor, none of the  
15 testimony today shows any deficiency on the part of either  
16 counsel. None of the testimony today shows any prejudice that  
17 would have caused Mr. Powell to not plead guilty but instead  
18 proceed to trial. As Mr. McCoy very clearly testified at that  
19 pre-arraignment meeting, he and Mr. Powell met, and he asked  
20 Mr. Powell to tell him the truth. Mr. Powell told him the  
21 truth, the whole truth, and nothing but the truth and at that  
22 point asked them to get him the best plea that they could.  
23 So, Your Honor, I'd respectfully request that this Court deny  
24 the application for post-conviction relief.

25 **THE COURT:** All right.



## C E R T I F I C A T E

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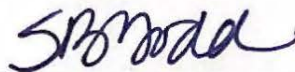
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I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Clifford Wayne Powell versus The State of South Carolina held in the Common Pleas Court for Horry County, Horry County Courthouse, Conway, South Carolina, on October 9th, 2019.

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



Sallie Beth Todd, CVR

Official Reporter

September 9, 2020.

in:sent

The conversation has been moved to the Inbox. [Learn more](#) [Undo](#)

Gmail

Move to Inbox

More

COMPOSE

Clifford Powell Inbox x

Inbox (17)

Important

Sent Mail

Drafts

Circles

More

Harold Morgan <dochmorgan@gmail.com>

Mar 28

to JIMIRVINJR

Jim,

It will come as no surprise to you that your client has lots of problems. He is sensitive and tends to be volatile and acts impulsively. His excessive drinking makes all of these qualities more extreme. I have not seen any of the investigative material yet so don't know what the police and prosecution are saying about his behavior. If it comes to a plea guilty but mentally ill may be appropriate.

Please send me the investigative material when it is available.

Best regards,

(Harold Morgan)

3/28/15

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STATE OF SOUTH CAROLINA )  
 COUNTY OF HORRY )  
 )  
 STATE OF SOUTH CAROLINA )  
 Vs. )  
 )  
 Clifford Powell, )  
 Defendant. )  
 )  
 )  
 )  
 )  
 )

IN THE COURT OF GENERAL SESSIONS  
 OF THE FIFTEENTH JUDICIAL CIRCUIT  
 WARRANT #

**AMENDED ORDER  
 APPOINTING CONFLICT ATTORNEY  
 PURSUANT TO RULE 608**

FILED  
 HORRY COUNTY  
 7/17 APR - 2 11 AM 10:29  
 CLERK OF COURT  
 HORRY COUNTY, SC

This matter comes before me regarding appointing co-counsel for the Defendant, pursuant to Rule 608 SCACR. The Defendant was arrested on June 2, 2014, for the offenses:

1. 2014A2610201447 Murder/Murder
2. 2014A2610201448 Weapons/Possession of Firearm of Ammunition by person convicted of violent felony
3. 2014A2610201449 Weapons/ Possession of weapon during violent crime, if not also sentenced to life without parole or death
4. 2014A2610201481 Assault/Attempted Murder

Upon application of the Defendant, Clifford Powell, through the Office of the Public Defender, the Court finds that the Defendant is eligible for court-appointed co-counsel, based upon the attached Certificate of Representation.

The Defendant is placed on notice that Defense of Indigents Act as contained in S.C. Code 17-3-310 (G)(6), (1993 as amended), authorizes OID to enter into contracts with qualified private counsel.

Pursuant to Rule 608 and S.C. Code 17-3-310(G)(6), the below listed attorney, who is an active qualified member of the South Carolina Bar, is appointed as co-counsel to represent the Defendant.

*10/2*  
*[Signature]*

PLAINTIFF'S  
 EXHIBIT #2  
 10.9.14


IT IS ORDERED that, pursuant to Rule 608 and S.C. Code 17-3-310(G)(6), the following attorney is appointed as co-counsel to represent the Defendant on the above-referenced offense(s).

Jonathan D. McCoy  
Attorney at Law  
1240-21<sup>ST</sup> Avenue North, Suite 105  
Myrtle Beach, SC 29577  
(P): 843-848-7325

FILED  
HARRY FOWMI  
2017 APR -3 AM 10:29  
CLERK OF COURT  
HORRY COUNTY, SC

AND IT IS SO ORDERED:

DATED: 3/31/17  
CONWAY, SOUTH CAROLINA

  
THE HONORABLE STEVEN H. JOHN  
CHIEF ADMINISTRATIVE JUDGE  
FOR GENERAL SESSIONS  
FIFTEENTH JUDICIAL CIRCUIT

**NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online within fifteen (15) days of this appointment at WWW.SCCID.SC.GOV and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or the clerk of court. See SCCID website for further details.**

2/2  
S.H.J.

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

IN THE COURT OF GENERAL SESSIONS  
OF THE FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA )  
VS. )

**ORDER**  
**APPOINTING CONFLICT ATTORNEY**  
**PURSUANT TO RULE 608**

CLIFFORD POWELL  
DEFENDANT )

FILE NO: 26A14-00001516

This matter comes before me regarding appointing counsel for the Defendant, pursuant to Rule 608 SCACR. The Defendant was arrested on June 06, 2014 for the offense(s) of:

2014A2610201481 Assault / Attempted Murder

Upon application of the Defendant, Clifford Powell, through the Office of the Public Defender, the Court finds that the Defendant is eligible for court-appointed counsel, based upon the attached Certificate of Representation.

The Defendant is placed on notice that Defense of Indigents Act as contained in S.C. Code 17-3-310 (G)(6), (1993 as amended), authorizes OID to enter into contracts with qualified private counsel.

Pursuant to Rule 608 and S.C. Code 17-3-310 (G)(6), the below listed attorney, who is an active qualified member of the South Carolina Bar, is appointed to represent the Defendant.

IT IS ORDERED that, pursuant to Rule 608 and S.C. Code 17-3-310 (G)(6), the following attorney is appointed to represent the Defendant on the above-referenced offense(s)

JONATHAN D. MCCOY  
ATTORNEY AT LAW  
1240 21ST Ave North Suite 103  
Myrtle Beach, SC 29577

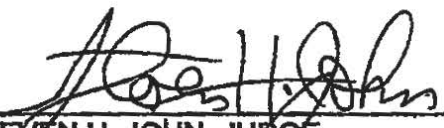
PHONE: 843-848-7325

FILED  
JAN 11 2015  
CLIFFORD POWELL  
Horry County, SC



AND IT IS SO ORDERED:

DATED: 1/4/17  
CONWAY, SC

  
STEVEN H. JOHN, JUDGE  
FIFTEENTH JUDICIAL CIRCUIT  
COURT OF GENERAL SESSIONS

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online within fifteen (15) days of this appointment at [www.sccid.sc.gov](http://www.sccid.sc.gov) and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or the clerk of court. See SCCID website for further details.

FILED  
HORRY COUNTY  
2017 JAN -4 PM 2:54  
CLERK OF COURT  
HORRY COUNTY, SC





DEAR JONNY,

TUESDAY, MARCH 21ST 2017 - 5:30PM

Hey Jonny. I'm Really Concerned About Something. I've Requested My Uncle Tom Davis - 843-457-5402 To Contact You In Concerns For What I Spoke With Him On The Date Of This Letter. You're Representing A Previous Tenant Of My Uncle's Who Was Paralyzed In A Shooting By Numerous Officers And The D.E.U.! Jonny I Want You As My Lead Counsel On My Case And Trial. My Family Has Agreed That You Are My Best Chance At Winning My Trial Because Your Young, Strong, Adept, Alert And A Powerful Speaker. You Did A Better Job At My Bond Hearing 01/18/17 Than Irvin Ever Did At The Previous 5 Hearings. The Paperwork I Received From Orrie E. West States You're My Counsel In The Certificate Of Representation. Ronald Duncan Who Works For Sim Irvin Said You Were Only Assisting In The Background!! I Am Uncomfortable At This Time With Sim Being My Lead Counsel At Trial Due To His Age Of 77 And His Numerous Health Issues And Accidents And Injuries Sustained Over The Past 18 Months. I Love Mr. Irvin Very Much!! He Is A Great Friend To Me And Has Been Good Friends With My Uncle Tom Davis & Aunt Nancy Davis For A Long Long Time. Jonny It's Time You Take Over! I Want You As My Lead Counsel And Mr. Irvin Assisting You. Mr. Irvin Has Allowed Me To Sit In This Jail For 35 Months And Haven't Made Any Headlines In My Case. I've Given Requests After Requests For Ronald Duncan Of Irvin Law Firm To Deliver To You All My Divorce Documents From Bultz Law Firm, Conway Clerk Of Court And The Divorce Transcripts, As Well As A Composition Notebook Of 76 Pages Of Notes On The Discovery Documents/Evidence. They Also Have A Video Of My Ex-Wife "Mrs. Powell" Harrassing Me At My Residence 5 Months Before The Shooting Incident Occured, That Is Important To My Case. I've Spent Thousands Of Hours On My Discovery I Handed Over To You At My Bond Hearing 01/18/17. I've Had 30 Months - 24 Hours A Day To Work On My Case. I Know My Case. Those Notes Will Save Your Team Numerous Hours. Jonny We Have A Strong Case And Once You Really Get Into It, Your Assistant And You Will Discover That. Please Call My Uncle, And Please Tell Me Your My Lead Counsel. I'm Terrified To Go To Trial On May 8th 2017 With Mr. Irvin Not Calling Any Witnesses On My Behalf And Him Allowing Me To Sit Here Almost 35 Months. Thank You For Your Time And Consideration! G. Powell

**HAROLD C. MORGAN, M.D.**  
**CONSULTANT IN GENERAL AND FORENSIC PSYCHIATRY**

Telephone 404-885-1235  
 Cell 803-238-7040

Facsimile 404-410-4053

**July 5, 2015**

**James T. Irvin, Esq.**  
**P.O. Box 2677**  
**Myrtle Beach, SC 29578**

**Re: Clifford Powell**

**STATEMENT OF CHARGES**

**Professional Services 1 day January 10, 2015**

**(\$2000.00)**

**Examination of client**  
**Travel**  
**Psychological Testing**  
**Consult with attorney**

**DBA AS**  
**PSYCHIATRIC CONSULTANTS, P.A.**  
**FEIN 57-0549931**

**MAILING ADDRESS: 75 14<sup>th</sup> Street, NE, #3940, Atlanta, GA 30309-7614**



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Clifford Wayne Powell, Jr.,	)	Case No.: 2017-CP-26-07756
S.C.D.C. No. 372293,	)	
	)	
Applicant,	)	
	)	<b>ORDER OF DISMISSAL</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Clifford Wayne Powell, Jr. ("Applicant") on November 28, 2017. Respondent made its return on or about March 1, 2018. The Court convened an evidentiary hearing into the matter on October 9, 2019, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. One of Applicant's two plea counsels, Jonny D. McCoy, Esq., as well as Dr. Harold Morgan also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, the pleadings, and the exhibits introduced at the evidentiary hearing. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the September

2014 term of the Horry County Grand Jury for murder (2014-GS-26-03666).<sup>1</sup> James Irvin and Jonny D. McCoy, Esqs. (collectively "Counsels") represented Applicant. Nancy R. Livesay and Christopher D. Helms, Esqs., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 26, 2017, Applicant pled guilty to the lesser-included offense of voluntary manslaughter. Upon recommendation by the State of a sentence of no more than twenty-five years, the Honorable Larry B. Hyman, Jr. sentenced Applicant to imprisonment for a term of twenty-five years. Applicant did not appeal his plea or sentence.

### Present Application

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

1. "Ineffective Assistance of Counsel"
  - a. "For Failure to File Notice of Appeal"
    - i. "Applicant did not knowingly, intelligently, and voluntarily waive his rights to a direct appeal."
  - b. "For Failure to Present a Competency and Insanity Defense"
    - i. "Counsel failed to present a competency and insanity defense."
  - c. "For Failure to Advise and Assert Defenses to Applicant"
    - i. "Counsel failed to inform Applicant adequately of all available defenses including failure to inform Applicant of the M'Naughten insanity defense, codified as S.C. Code 17-24-10"
  - d. "For Failure to Adequately Investigate and Prepare for Trial"
    - i. "Counsel failed to adequately investigate and prepare for trial by not investigating mental illness claims of Applicant by State's witnesses, State's victim/witness, Applicant's family, Applicant himself, and a psychiatrist's diagnosis informing Applicant's counsel of findings of mental illnesses."
  - e. "For Failure to Challenge Statements Presented By State's Witness At Sentencing"
    - i. "Counsel failed to challenge statement's presented by State's witness at sentencing to the Court, towards Applicant which was blast, held no value, was no evidence to support witness' claim accusing the Applicant of a hate crime using racial terminology."

<sup>1</sup> Applicant was additionally indicted for attempted murder (2014-GS-26-03665; superseding 2014-GS-26-04029); unlawful possession of a firearm by a person convicted of a violent offense (2014-GS-26-03667); and possession of a weapon during the commission of a violent crime (2015-GS-25-00423). These indictments were dismissed *nolle prosequi* as part of Applicant's plea.

Counsel's failure to raise challenge to this statement as well as notify the Court of Applicant's mental illnesses was erroneous and possibly affected the Court's consideration for leniency and a considerably lower sentence."

- f. "By Dual Representation"
  - i. "Applicant's counsel began representing Applicant on June 10, 2014 and dual represented a State's witness in November 2014. This State witness had collected evidence and turned said evidence over to police, gave statements to State prosecutor and a detective interview which was used in having Applicant plead guilty. Counsel represented said State's witness, in the company of the State's "star" witness/victim in a separate hearing/case. The Applicant's counsel maintained a close relationship with this State witness throughout pre-trial. This believability affected Applicant's case and in turn prejudiced counsel towards Applicant's defense and decisions concerning trial."
- g. "For Failure to Move For Suppression of Evidence"
  - i. "Counsel failed to move to suppress evidence used in having the Applicant plead guilty, such as:"
    - 1. "Written statement, (2) detective interviews of State's "star" witness/victim/[illegible]"
    - 2. "Written statement, (2) detective interviews of State's witness/roommate of Applicant."
    - 3. "Investigative report of State's 2<sup>nd</sup> Eyewitness provided by Ginger Pop in April 2017."
  - ii. "Incorrect/misdated residential search warrant used to collect items from Applicant's home used in having the Applicant plead guilty."
  - iii. "The items listed [above] were used to get the Applicant to plead guilty. These witnesses gave inconsistent statements and in audio recordings on 911 calls, detective interviews and written; Investigator Pop's investigation report of eyewitnesses in April 2017 completely contradicts and is very inconsistent with his (2) 911 calls and detective interview on June 1<sup>st</sup> 2014."
- h. "For Advice Concerning Plea, Going to Trial And Preserving the Applicant's Rights"
  - i. "Counsel advised Applicant to plead guilty despite the repeated objections to doing so by the Applicant on April 24<sup>th</sup>, 2017 at the Horry County Courthouse and repeatedly on April 26<sup>th</sup> 2017 at the Horry County Courthouse immediately before the hearing for sentencing, at which time Applicant was coerced and frightened into pleading guilty."
- i. "Miscellaneous Ineffectiveness of Counsel"
  - i. "Applicant's counsel was undergoing treatment for lung cancer while representing Applicant at the January 2017 bond hearing and at the April 26<sup>th</sup> 2017 sentencing hearing. Counsel never informed Court of life threatening illness, treatment of disease including

medication, or the Applicant. It is possible Applicant's Counsel's judgment and performance was effected by his illness, treatment and medication."

- j. "For Failure to Investigate Witnesses"
  - i. "Counsel failed to investigate all witnesses who had information concerning the Applicant's guilt and innocence. Counsel had a duty and obligation to investigate all witnesses who may have had information concerning the Applicant. Counsel failed to contact and investigate all alibi witnesses. Complete failure to investigate these witnesses can hardly be considered a tactical decision."
- 2. "Voluntariness of Plea Unrelated to Attorney Error"
  - a. "The court failed to advise the Applicant about supervised release upon completion of prison sentence term at the sentencing hearing."

Applicant requests relief as follows:

- "Direct Appeal to Be Reinstated, Guilty Plea And Sentence To Be Vacated, And A New Trial Ordered."

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” Id. at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient

before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

### ***1. Failure to Review or Introduce Footprint Evidence***

Applicant alleges that Counsels were ineffective for failing to file a notice of appeal from his plea. Given the collection of claims raised, the Court must consider whether Applicant was wrongly denied his right to an appeal both (1) in the context of his mental health claims and (2) divorced from the context of mental health. The Court here considers the claim as divorced from the context of mental health. Applicant's White claim as it arises through his competence claims is considered in later sections.

Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

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

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted); see also Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) (imposing the duty to consult when there is reason to think either that a rational defendant would want to appeal or that the particular defendant reasonably demonstrated interest in doing so); contra Frazer v. South Carolina, 430 F.3d 696 (4th Cir. 2005) (reading Flores-Ortega to mean counsel generally has a duty to consult with his client regarding whether to pursue an appeal). Therefore, in a collateral action attacking a guilty plea, the "bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

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

Near the outset of the plea proceeding, McCoy explained to the court that he was appointed to the case roughly two months prior “to insure that if Mr. Irvin had any difficulties with health issues that we’d have somebody here just in case.” (Tr. 5, ll. 5-8). Later in the proceeding, the plea court explicitly informed Applicant of his right to file an appeal, and Counsels affirmed their ability and obligation to assist Applicant in filing one if so desired. (Tr. 19, ll. 6-18). Applicant confirmed his understanding of that right and how to act upon it. (Tr. 19, ll. 19-23).

At the evidentiary hearing, Applicant testified that after the plea proceeding he was taken to J. Reuben Long Detention Center. Irvin visited him some four hours later. Applicant claimed that the post-plea meeting was when he first learned Irvin was battling cancer. Applicant testified he asked Irvin to file a notice of appeal during that meeting. No such appeal was filed, and Irvin died shortly thereafter.

Applicant acknowledged McCoy was appointed as co-counsel, and acknowledged McCoy’s statement during the plea proceeding explaining his appointment, but nonetheless asserted he did not understand why McCoy was brought on at the time he was appointed. Applicant testified McCoy was appointed pursuant to a contract under Rule 608, SCACR, even

though he had retained Irvin at considerable expense. Applicant testified he was told that McCoy would be co-counsel, but the original order of appointment indicated he was lead, and that the order had to be amended. Notwithstanding Applicant's avowed lack of knowledge about Irvin's cancer, Applicant wrote a letter to McCoy prior to the plea, explaining he was worried about Irvin, that he respected McCoy, and that he wanted McCoy to be lead counsel. McCoy did not become lead counsel.

On cross-examination, Applicant testified he never asked McCoy to file an appeal. Applicant explained McCoy was co-counsel, and so he asked Irvin. Applicant understood that a letter to one attorney would be made known to the other, but testified there were things McCoy didn't know about.

McCoy testified warmly to Irvin's role as his mentor. Irvin was in poor health and asked McCoy to appear on his behalf at a bond hearing after Irvin was injured in a car wreck. McCoy subsequently met with the Honorable Steven H. John and volunteered to help Irvin with Applicant's case, which Applicant wanted. McCoy was appointed to the case at no cost to Applicant. Applicant wrote a letter to McCoy praising him. On cross-examination, McCoy affirmed he filed no notice of appeal.

The Court finds Applicant has failed to meet his burden of proof. There is no question that Applicant was aware of his right to file an appeal, as it was clearly explained during the plea proceeding. Applicant's White claim turns on the credibility of Applicant's testimony that he told the now-deceased Irvin to file a notice of appeal. This Court enjoyed the opportunity to closely observe Applicant during his testimony and weigh his statements against the other testimony and records before this Court. This Court finds Applicant's testimony that he told Irvin to file a notice of appeal is not credible. There being no other evidence to support

Applicant's claim, Applicant presents no credible evidence to support his claim of deficient performance, and his claim for relief by way of this allegation is **DENIED**.

## ***2. Failure to Investigate, Prepare, Present, and Advise of Mental Health Defenses***

Applicant alleges Counsels were ineffective in failing to investigate, prepare, present, and advise him of potential mental health defenses. Though raised as separate allegations in the application, because of shared relevant law and testimony, all of Applicant's mental health related ineffective assistance claims are addressed together in this section.

### *Law*

"Due process of law prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992) (citing Bishop v. United States, 350 U.S. 961 (1956)). "This right cannot be waived by a guilty plea." Id. (citing Pate v. Robinson, 383 U.S. 375 (1966)). "The test of competency to enter a plea is the same as required to stand trial." Id., 308 S.C. at 232, 417 S.E.2d at 595-96 (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976)). An accused is competent to stand trial if he or she has sufficient capability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings. Id., 308 S.C. at 232, 417 S.E.2d at 596. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he [or she] has the *ability* to understand the proceedings." Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (quoting Godinez v. Moran, 509 U.S. 389 (1993)).

As to the deficiency prong under Strickland, an attorney may reasonably rely upon his or her own perceptions of a defendant in determining whether or not their client should be mentally evaluated. Jeter, 308 S.C. at 233, 417 S.E.2d at 596. When establishing Strickland prejudice in the context of counsel's failure to request a mental competency evaluation, the applicant need

only show a reasonable probability that he was incompetent at the time of the original proceeding. Garren, 423 S.C. at 12, 813 S.E.2d at 710 (citing Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017)). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable mental health issues which undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. Id., 423 S.C. at 13-14, 813 S.E.2d at 711.

An applicant alleging incompetence *in fact* must show by a preponderance of the evidence that he was incompetent at the time of his original proceedings. Id., 423 S.C. at 16, 813 S.E.2d 704, 713; Hall v. Catoe, 360 S.C. 353, 358, 601 S.E.2d 335, 338 (2004).

Irrespective of a defendant's competency to stand trial or plead guilty, "[a]n accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong *at the time of the crime* is relieved of responsibility for his acts." Davenport v. State, 301 S.C. 39, 40, 389 S.E.2d 649, 649 (1990) (emphasis added); see also S.C. Code Ann. § 17-24-10 (codifying the same).

"The key to insanity is the power of the defendant to distinguish right from wrong in the act itself—to recognize the act complained of is either morally or legally wrong." Sate v. Senter, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct. App. 2011) (quoting State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997)) (cleaned up). "A criminal defendant is presumed to be sane; the State does not have to prove sanity." Id. (quoting State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989)).

However, a defendant is merely "guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong . . . , but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. Code Ann. § 17-24-20(A).

“The purposes for the enactment of GBMI statutes are (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society’s benefit while incarcerated.” State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997) (citing State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992)). “A verdict of GBMI does not absolve a defendant of guilt.” Id. “A defendant found GBMI must be sentenced as provided by law for a defendant found guilty.” Id. As such, a claim that defense counsel was ineffective for failing to pursue a GBMI “defense” does not constitute a *prima facie* case against the validity of the conviction, but only regards the conditions of the applicant’s incarceration, and is thus inadequate to establish prejudice under Strickland and Hill. People v. Manning, 883 N.E.2d 492, 504 (Ill. 2008) (“[T]here is virtually no difference in the treatment that defendant will receive under GBMI as opposed to a guilty plea. The [E]ighth [A]mendment to the United States Constitution requires that inmates receive adequate mental care[,]” to include mental health care.); see also Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (holding complaints regarding the conditions of incarceration are administrative matters not properly raised in a PCR action); cf. Wade v. State, 348 S.C. 255, 559 S.E.2d 843 (2002) (noting Al-Shabazz and that PCR actions do not treat the conditions of incarceration in determining Inmate Litigation Act was inapplicable to PCR actions); but cf. State v. Curry, 410 S.C. 46, 54-55, 762 S.E.2d 721, 725-26 (Ct. App. 2014) (vacating an entire conviction upon finding error in trial judge’s refusal to instruct the jury on the option of a GBMI verdict).

#### *Plea*

During the plea proceeding, Applicant consistently affirmed he understood the plea court’s questions. When asked about prior employment, Applicant answered: “I’ve owned – I started off with my ex-wife with an ice cream business and went from there. And I opened an air

brush business with her, and we built our empire from there. And things just fell apart.” (Tr. 13-

14). Applicant subsequently denied ever suffering from any mental health problems, addiction issues, or “anything of that nature” that would impair his ability to understand the proceedings.

(Tr. 14, ll. 10-14). The plea court concluded his colloquy with Applicant:

THE COURT: Okay. Mr. Powell, I asked you these questions because I want to know if there is any reason in the world that you can think of or suggest to me that might keep you from fully appreciating what we’re doing here and the consequences of your plea.

THE DEFENDANT: Absolutely clear, Your Honor.

THE COURT: Okay, you understand.

THE DEFENDANT: Yes, I do.

(Tr. 14-15).

The State set out a detailed factual recitation:

On June the 1<sup>st</sup> of 2014, in the early morning hours of around 1:30 a.m., 2 a.m., Angela Powell, the victim of the attempted murder that’s been dropped, was out celebrating her birthday with three other friends, including the victim Charles Royal.

When they were out that night, they saw Clifford Powell. There was no altercation at that time, no issues. She saw him, he saw her, there was a brief speaking, that was the end of it. They then make arrangements all to come back to Angelina Powell’s apartment to continue hanging out for her birthday. Her and Mr. Royal, the victim, get there first. They get out of the vehicle.

Charles Royal is walking up first. Clifford Powell is there waiting. They both approach, there’s some words exchanged. The Defendant then shoots the victim six times with a 9 millimeter. He then holds the gun up to Angelina Powell’s head, makes some statements to the gist of, you would be dead too, but I still love you. He then takes off running.

The six gunshot wounds to the victim were all to the right side, the right back of the head, the right elbow, the right abdomen, the right thigh and below the kneecap. I just bring that up because the State believes it’s indicative of some sort of defensive position where he’s leaning to the right. And the shots are fired.

He then takes off running. There is a fence that separates where the victim’s apartment is to where the Defendant lives. A witness sees him run to that fence, climb over the fence. He then is seen minutes later at a trash can or a

dumpster a few blocks down, a witness sees him dumping things into the dumpster. He gets back in the vehicle, takes off to his apartment.

Later on what's found in that dumpster is a 9 millimeter, two holsters and 9 millimeter bullets. The State through investigator [Pop] and the ATF was ultimately able to trace that gun back to Clifford Powell. He goes back to the apartment, the roommate testifies he then sees the Defendant in a towel, indicating that he had showered. He says he then tells him that he is going to the gold club.

Later on that night he's at the gold club, the police of course come to the scene. Angelina Powell immediately identifies Clifford Powell, she recognizes his voice and she recognizes all the clothes he's wearing. The police immediately go pick up Mr. Powell and interview him. At that time, of course, he denies any sort of involvement with the murder.

(Tr. 15-17). Applicant confirmed the State's version of the facts and admitted he did shoot and kill the victim, Charles Royal. (Tr. 15-17). Applicant affirmed to the plea court that he was entering the plea freely and voluntarily, that he had plenty of time to think about it, and that he did not need to discuss the matter any further with his attorneys. (Tr. 17, ll. 12-20).

Five individuals spoke on behalf of the victim. (Tr. 19-26). After remarks from attorney Irvin, Applicant addressed the plea court:

THE DEFENDANT: I'm guilty for what I'm charged with. There's nothing that I can say or do to replace Charles Royal. There's nothing that I can say or do to please his family. For three years I've had this on my conscience. And I've wanted to come forward, but I had to find God, like Mr. Royal said. And I have, but it's been hard for me to forgive myself for what happened. I can never go back to that split second that I saw him with my wife, I had a break. In that split second I did something terrible and I've –

THE COURT: Did you know him? I mean, there seems to be some people who know you and knew him. I just wonder if you knew him.

THE DEFENDANT: I knew him on the boulevard.

THE COURT: Okay.

THE DEFENDANT: And he had come to work, my wife had hired him at the air brush store, and we began to work together. And then things started arising between us three, and then he left our – he stopped working. And then he began working across the street at our other air brush store.

But there's not a day that goes by that I'm not sorry for this. I feel so much remorse because I can – they can never see their son again, and I feel the worst for his daughter because I know what it's like to grow up without a father, it hurts. And there's nothing that I can do to replace him. There's nothing that I can say. And I'm sorry for what I did, and I'm guilty of it. And I'm sorry.

THE COURT: All right.

THE DEFENDANT: There's nothing I can do, just go back and stop what I did. I wish I could, but I can't. That's all I got to say.

(Tr. 28-30). Attorney McCoy then emphasized in mitigation that Applicant passed on the opportunity to plead under North Carolina v. Alford, 400 U.S. 25 (1970) and instead “said that the family deserves closure.” (Tr. 30-31, quotation at Tr. 30, line 10). McCoy touched on the long familiarity with Applicant, and opined that in high school “he was probably more afraid of me than I was of him[.]” (Tr. 31, ll. 2-12). McCoy emphasized again that “this was his idea not to plead under Alford, it was his idea to say, I'm sorry, it was his idea to stand here with us today regardless of what we wanted to go forward with on the trial.” (Tr. 32, ll. 1-4). The plea court sentenced Applicant to twenty-five years. (Tr. 32, ll. 19-20).

#### *PCR Evidentiary Hearing*

At the evidentiary hearing, Applicant testified that after he reviewed his evidence and discovery after the plea, he started consulting with Dr. Harold Morgan. Applicant testified that he originally met with Dr. Morgan on January 10, 2015, for about two hours. Dr. Morgan and attorney Irvin subsequently went to lunch. After the lunch meeting, Applicant recalled Irvin told him that he suffered from no mental health issues whatsoever. Applicant testified that when he reported Irvin's version of the lunch meeting to Dr. Morgan after his plea proceeding, Dr. Morgan replied that Applicant in fact did have mental health issues, and that Irvin never paid him for his services. Applicant testified he was never told about the concept of an insanity defense, or any defense strategy for that matter.

Applicant testified that Counsels received discovery, then brought a copy to Applicant and told him to review the materials. Applicant did not receive audio/video recordings as part of the copied materials, but testified he received full discovery days before the plea proceeding. Applicant explained that his brother obtained an additional copy of his file from McCoy after Applicant was sentenced. In the files, Applicant obtained an e-mail dated March 28, 2015, from Dr. Morgan to Irvin which offered a cursory opinion:

It will come as no surprise to you that your client has lots of problems. He is sensitive and tends to be volatile and acts impulsively. His excessive drinking makes all of these qualities more extreme. I have not seen any of the investigative materials yet so don't know what the police and prosecution are saying about his behavior. If it comes to a plea guilty but mentally ill may be appropriate.

Please send me the investigative material when it is available.

(Applicant's Exhibit #1). Applicant testified the e-mail prompted him to contact Dr. Morgan in October 2017. Applicant opined that Irvin's representation was impacted by his declining health. Applicant recalled Irvin was strong and healthy at the outset of his representation, but that "things slowed down" and he communicated less frequently as time passed.

On cross-examination, Applicant testified he met at least once a month with Irvin, for a total of dozens of meetings. Applicant testified he met with McCoy three times. Applicant disclosed his version of what happened to Counsels only after McCoy joined the case.

Reviewing the timeline, Applicant recalled that Irvin told him there were no mental health issues before hearing Applicant's version of events. Applicant acknowledged he understood that even with severe mental health issues, he could still be guilty. Applicant testified he understood his Counsels and was freely able to communicate with them. Applicant declined to assert that he was insane at the time of the crime, but offered that he was not competent at the time of the plea. Applicant explained that he was very stressed at the plea and was directed what to say and do by Counsels: answer simply, say he was guilty, and offer no expression. Applicant testified he had

wanted more time with his attorneys, but did not tell the plea court. Applicant affirmed he understood the elements of the offenses charged and that he had been satisfied with his attorneys at the time.

Applicant recalled the events of the day of the killing, and described his emotions as volatile. Applicant opined that he should have listened to his wife, Angelina Powell. Applicant admitted he pointed a gun at Angelina. Applicant described his reaction to killing Royal as "horrified," "afraid," full of regret, and distinguished the act from hunting. Applicant slipped in that Dr. Morgan believed he blacked out. Applicant denied knowing at the time that it was right or wrong to shoot Royal. Applicant recalled that law enforcement called him; he told police where he was, then denied involvement in the shooting. Applicant retained Irvin and, while he did not admit to what happened, Applicant offered Irvin a list of potential witnesses who could speak to his defense: his wife, his mother, an individual named Thomas Davis, and family. Applicant testified he had been afraid of a life sentence, as Irvin told him that he never knew what jurors would do.

Dr. Harold Morgan testified at the evidentiary hearing. Dr. Morgan testified he was retained by Irvin to check Applicant's competency and criminal responsibility. Irvin told Dr. Morgan he had funds to pay for the examinations, but he never paid. Dr. Morgan evaluated Applicant on January 10, 2015. After a series of true/false questions with Applicant, Dr. Morgan concluded he showed emotional problems and felt he could assume Applicant was suffering a severe mental disorder; the doctor floated bipolar and adjustment disorders as potential candidates. Dr. Morgan did not reach a final clinical diagnosis.

However, Dr. Morgan firmly concluded Applicant was competent to stand trial and had no insanity defense at all. At best, Applicant was a possible candidate for entering a plea of

guilty-but-mentally-ill. After evaluating Applicant, Dr. Morgan reported his conclusions to Irvin. Dr. Morgan never asked for additional meetings with Applicant, but asked Irvin to provide investigative materials; the documents were never provided. The doctor described Applicant's life as chaotic and abusive, recalling one instance described by Applicant where Applicant's mother told him she wished she had aborted him. No real father figure existed in Applicant's life. Nonetheless, without any further follow-up from Irvin, Dr. Morgan performed no further work, and the doctor heard nothing more about the matter until Applicant began writing him personally. Dr. Morgan thereafter corresponded numerous times with Applicant. Dr. Morgan expressed his surprise that Irvin never followed up with him, and testified that he never had any contact with McCoy. The State did not cross-examine Dr. Morgan.

McCoy described himself as a *trial* lawyer, and that he joined the case with the expectation of a trial. McCoy recalled that he went to the detention center to discuss "arraignment" with Applicant at the jail. Applicant was very calm. McCoy told Applicant to tell the truth, and Applicant opened up. McCoy punchily described Applicant's disclosure: Applicant planned it, concealed it, lay in wait, shot Royal, pointed the gun at his wife, and threw his guns into a dumpster. McCoy felt Applicant wanted to tell the truth, and noted there was no indicia of self-defense. McCoy, who was present in the courtroom during Dr. Morgan's testimony, opined that Irvin did everything correctly, and noted that Dr. Morgan's conclusions were that Applicant was not insane and competent to stand trial. McCoy believed the expert would have potentially harmed Applicant's case and risked a life sentence. After Applicant disclosed, McCoy learned there had been an offer of twenty-five years, which the State was willing to put back on the table.

On cross-examination, McCoy testified he had gone to high school with Applicant. McCoy again opined Irvin was not wrong to not follow up further with Dr. Morgan after his findings that Applicant was competent and sane.

#### *Findings*

The Court finds no ineffectiveness on the part of Counsels. No evidence supports Applicant's claims as to either prong of Strickland. The Court finds Irvin conducted an appropriate and reasonable investigation by contacting Dr. Morgan and having Applicant preliminarily evaluated. Dr. Morgan reported his preliminary findings to Irvin that Applicant was competent and criminally responsible. With the mental health lead exhausted, Irvin properly ceased pursuing it, and turned his attention to other matters. Applicant thus fails to show any deficiency under Strickland and Hill.

The Court concurs in Dr. Morgan's conclusions that Applicant was criminally responsible. Applicant lay in wait, ambushed the victims, fled, attempted to dispose of evidence, and denied his involvement when apprehended by law enforcement. These are not the actions of one who is criminally insane, but repeatedly reflect Applicant's knowledge that he knew right from wrong, that what he was doing was wrong. Applicant himself could not assert he was insane at the time of the crime. No evidence is before this Court to show Applicant was criminally insane.

The Court also concurs in Dr. Morgan's conclusions that Applicant was competent to stand trial and plead guilty. The record as a whole reflects that Applicant was thoroughly capable of assisting his attorneys throughout representation. Applicant—as evidenced by his statements both at the plea and the PCR hearing—understood the charges against him, the elements of the offenses, the possibly and likely punishment if convicted, and his various

constitutional rights as a defendant. Applicant's statements to the plea court were eloquent and poignant, and reflected his deep understanding and acceptance of the gravity of his actions. No evidence is before this Court to show Applicant was not competent to enter his guilty plea.

The Court does not concur in Dr. Morgan's preliminary conclusion that Applicant was a good candidate for a plea of guilty-but-mentally-ill. The facts of the case and Applicant's intelligent conduct throughout his relationship with Irvin and McCoy, throughout the plea proceeding, and throughout the evidentiary hearing, at no point reflect the actions of a man who was incapable of conforming his conduct to the confines of the law. Applicant was able to lay in wait to ambush Angelina and Royal. Applicant was able to restrain himself from killing Angelina even as he murdered Royal. Applicant was able to attempt to conceal his culpability after the killing by disposing of evidence in different locations and denying involvement when law enforcement caught up with him. Though this Court is not in a position to deny Applicant suffers from some mental defect, such defect alone does not provide for a GBMI plea. Furthermore, even if Applicant could have theoretically pled GBMI, Applicant's knowledge of as much would not have changed the outcome of Applicant's plea, as a guilty-but-mentally-ill plea is still a guilty plea, and would have only impacted the conditions of Applicant's incarceration. To establish prejudice under Hill, an applicant must show that but for the deficiency alleged, Applicant *would not* have pled guilty, but would have proceeded to trial, and this Court is presented no evidence to show that had Applicant known of the GBMI statute, he would have turned down the State's offer and insisted on proceeding to trial. Applicant pled pursuant to a plea agreement with the State due, in part, to his fear of receiving a life sentence, a fear that could not have been otherwise mollified by knowledge of GBMI. There is nothing to show the State would have extended the same offer in the GBMI context.

For all of these reasons, Applicant has failed to meet his burden of proof as to either prong of Hill, and his request for relief by way of this allegation is **DENIED**.

### 3. Conflict of Interest

Applicant alleges Counsels were ineffective because one of them represented one of the State's witnesses while also representing Applicant. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object a trial must show an *actual* conflict of interest adversely affected his attorney's performance." Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001)).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Id. (quoting Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008)). An actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties. . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Lomax, 379 S.C. at 101, 665 S.E.2d at 168 (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. "However, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." Id. (quoting Staggs v. State, 372 S.C. 549, 551-52, 643 S.E.2d 690, 692 (2007)). Conflicts of interest may be waived so long as such waiver is done knowingly, intelligently, and voluntarily. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

At the evidentiary hearing, Applicant testified Irvin previously represented Applicant's landlord, Tom Davis, who was to be a witness for the State. Applicant testified Davis was his grandmother's sister's husband, and had turned evidence over to the State. Applicant testified Irvin had represented Davis in an eviction action against Applicant. Applicant opined Irvin had no right to represent Davis against Applicant when Davis was going to testify against Applicant.

McCoy testified he was not familiar with anything related to the dual representation allegation.

The Court takes judicial notice of case number 2014-CV-26-1092605, which appears to be an eviction matter between Applicant and Tom Davis, which was resolved September 3, 2014. Curiously, the public index does not indicate representation by either party.

The Court finds Applicant has failed to meet his burden of proof as to this allegation. Aside from his limited testimony and this Court's *sua sponte* judicial notice, Applicant presented no evidence to provide *any* details regarding Irvin's alleged representation of Davis in the eviction action. Given the absence of any record to corroborate Applicant's claim that Irvin represented Davis, and the self-serving character of the claim, this Court gives no weight to Applicant's testimony and cannot conclude Irvin represented Davis at all. Assuming *ad arguendo* that Irvin represented Davis in the eviction matter, no evidence has been presented to this Court to show that it created any conflicting interest in Irvin's criminal defense of Applicant. This Court is left with the scantest speculation of the mere possibility of a conflict, which is simply inadequate to sustain any relief. Finally, Applicant was represented by not only Irvin, but McCoy, and pled guilty consistent with the advice of both attorneys; this Court finds even if Irvin had recused himself from the case, Applicant still would have pled guilty. For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

#### *4. Failure to Move to Suppress Evidence*

Applicant alleges Counsels were ineffective by failing to file a motion to suppress various items of evidence. “Under the Fourth and Fourteenth Amendments to the United States Constitution, a defendant has the right to challenge false statements in a search-warrant affidavit.” State v. Robinson, 415 S.C. 600, 606, 785 S.E.2d 355, 358 (2016); see also Franks v. Delaware, 438 U.S. 154 (1978) (establishing same). “In order to obtain relief, the defendant must prove the affiant knowingly and intentionally, or with reckless disregard for the truth, included false statements in the search-warrant affidavit.” Robinson, 415 S.C. at 606, 785 S.E.2d at 358. “The burden is on the defendant to establish the falsity by a preponderance of the evidence.” Id. (citing Franks, 438 U.S. at 156).

Applicant testified a witness named “Robert” gave inconsistent statements, such that they could have been suppressed. Applicant also asserted that a search warrant executed by law enforcement was backdated and thus false. Applicant complained of the lack of a motion to suppress before the plea. As noted previously, Applicant testified he had all of his discovery prior to his plea.

McCoy testified that he would have moved to suppress evidence at the time of trial, not before.

This Court finds no ineffectiveness on the part of Counsels. First, and most simply, the Court is satisfied with McCoy’s answer, and finds Counsels were not deficient in delaying in filing motions to suppress until trial. Filing and pursuing motions prior to trial could have, and likely would have, risked the availability of the plea offer Applicant accepted. Second, Applicant presents no probative evidence to support any proposed motions to suppress. As to the first suggested motion, that a statement bears inconsistencies does not in and of itself provide a

basis for its suppression; to the contrary, inconsistent prior statements are often admissible under Rule 801(d)(1)(A), SCRE. In any event, Applicant did not present Robert's statements to this Court. As to the second suggested motion, Applicant did not present the search warrant to this Court, or any evidence to support the falsehood he alleges, and so he has failed entirely to meet his burden of showing he could have prevailed in a Franks<sup>2</sup> hearing, such that he would not have pled guilty but would have proceeded to trial.

Applicant additionally alleged in his original application that various other ill-defined elements of evidence in his discovery should have been suppressed. Applicant presented no evidence at the evidentiary hearing in support of these remaining grounds, and the Court considers these allegations to be abandoned.

Accordingly, Applicant has failed to meet his burden of proof as to either prong of Hill by way of these allegations, and his request for relief is **DENIED**.

#### *5. Coerced Guilty Plea*

Applicant alleges Counsels were ineffective by coercing him into pleading guilty by advising him to do so despite his repeated objections. "All that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him." Gustine v. State, 325 S.C. 123, 128, 480 S.E.2d 444, 446 (1997).

This Court will not address this meritless allegation at great length: Applicant presented no evidence in support of the claim at the evidentiary hearing. In any event, advice by counsel to accept an offer and plead guilty does not amount to undue coercion. The record reflects Applicant was fully aware of the consequences of the plea, the charges against him, and his constitutional right to a jury trial, to remain silent, and to confront the witnesses against him.

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<sup>2</sup> Franks v. Delaware, 438 U.S. 154 (1978).

Applicant has failed to meet his burden as to either prong of Hill, and his request for relief by way of this allegation is **DENIED**.

#### ***6. General Ineffectiveness Due to Illness***

Applicant alleges Irvin's "judgment and performance" was possibly affected by his illness, treatment, and medication. Respondent argues in its Return that while Irvin's cancer could be argued as an underlying cause of specific deficiencies alleged, the illness in and of itself does not constitute an independent, *prima facie* ground for relief under the Uniform Post-Conviction Procedure Act. This Court concurs in Respondent's judgment, and finds that Irvin's infirmity, divorced from the other allegations, does not in and of itself provide a colorable claim for relief under Strickland and Hill. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

#### ***7. Failure to Investigate Witnesses***

Applicant alleges in the original application for relief that Counsels were ineffective for failing to investigate potential alibi witnesses. The Supreme Court of South Carolina "has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis original). Applicant presented no alibi witnesses at the evidentiary hearing, and stated on cross-examination that he was not arguing he had an alibi. As Applicant failed to present any evidence as to this claim and affirmatively abandoned it in his testimony at the evidentiary hearing, his request for relief is **DENIED**.

### B. Due Process Violations

Applicant alleges his rights to due process of law were violated, primarily in the context of his mental health. “Due process considerations apply in contested cases or hearings which affect an individual’s property or liberty interests as contemplated by the federal and state constitutions.” Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008) (citing U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3). “The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.” Id., 376 S.C. at 179, 656 S.E.2d at 354 (citing State v. Hill, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006)). The substantive component of due process, meanwhile, “requires a rational basis for legislation depriving a person of life, liberty, or property.” In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 311 (2003).

However, when asserting a violation of a constitutional right in a post-conviction relief action, the applicant “generally must frame the issue as one of ineffective assistance of counsel.” Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)); but see Fortune v. State, 428 S.C. 545, 559, 837 S.E.2d 37, 44-45 (2019) (recognizing rare cases of due process violations may be exceptions). Issues which could have been raised at trial or on direct appeal are not cognizable in an action for post-conviction relief. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Therefore, an applicant who contends his due process rights were violated must usually show he was deprived of those rights due representation that fell below an objective standard of

reasonableness, and that but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

*1. Court Failure to Advise of Supervised Release*

Applicant alleges his plea was not voluntarily entered because the plea court "failed to advise the Applicant about supervised release upon completion of prison sentence term at the sentencing hearing." As previously noted, "[a]ll that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him." Gustine, 325 S.C. at 128, 480 S.E.2d at 446.

Applicant cites to no authority to support his claim that a plea is rendered involuntary in the absence of some discussion of supervised release, nor can this Court independently find any. To the contrary, the possibility of supervised release is a collateral consequence, such that it need not be specifically advised before entering a guilty plea. See Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)) (parole eligibility is a collateral consequence that need not be specifically advised before entering a guilty plea); Id., 329 S.C. at 284-85, 494 S.E.2d at 628-29 (violent classification and associated impacts are all collateral consequences, including preclusion from supervised furlough). Applicant's claim is without merit as a matter of law. Additionally, this Court perceives no reason why this allegation could not have been more properly framed as an allegation of ineffective assistance of counsel, such that it is not cognizable as presented. For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

### III. CONCLUSION


Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

#### IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 23 day of April, 2020.

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

  
 \_\_\_\_\_, South Carolina

**WITNESSES**

David Hain Horry County Police Department

**The State of South Carolina**  
**County of Horry**

FILED  
HORRY COUNTY  
2014 SEP 15 PM 1:53  
MELANIE HULLINS-WARD  
CLERK OF COURT  
DATE RECEIVED FROM  
GRAND JURY

Nancy Livesay 14H02417

COURT OF GENERAL SESSIONS  
SEPTEMBER 11, 2014 TERM

**ARREST WARRANT NUMBER**

2014A2610201447  
CDR: 0116 16-03-0010, 0020  
DOA: 6/2/2014

THE STATE

vs.

**ACTION OF GRAND JURY**

**TRUE BILL**

Clifford W Powell Jr  
W/ M  
37th Ave N Apt  
Myrtle Beach, SC 29577  
DOB:  
SSN:

Foreperson of Grand Jury  
Date: SEP 11 2014

ATTORNEY: James T. Irvin, Jr.

**VERDICT**

Indictment for  
MURDER

Jimmy A. Richardson, II, Solicitor

Foreperson of Petit Jury  
Date:

**ORIGINAL**



(0-30)

226  
COUNTY OF Horry  
STATE VS.  
Clifford W Powell Jr  
AKA:  
Race: WHITE Sex: M Age: 35  
DOB: [redacted] SS#: [redacted]  
Address: [redacted] 37th Ave N Apt [redacted]  
City, State, Zip: Myrtle Beach, SC 29577  
DL#: [redacted] SID#: [redacted]

INDICTMENT/CASE#: 2014GS2603666  
A/W#: 2014A2610201447  
Date of Offense: 6/1/2014  
S.C. Code § : 16-03-0010, 0020  
CDR Code #: 0116

SENTENCE SHEET

\*CDL Yes  No  CMV Yes  No  Hazmat Yes  No   
In disposition of the said indictment comes now the Defendant who was  
TO: Voluntary Manslaughter

CONVICTED OF or  PLEADS

in violation of § 16-03-0050 of the S.C. Code of Laws, bearing CDR Code # 0217  
 NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  Mandatory GPS(CSC  §17-25-45 w/minor 1st or Lewd Act)

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. (defendant's initial)  
The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST: [Signature] SCB75159 [Signature] [Signature] 77510  
Livesay, Nancy Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center,  
for a determinate term of 25 days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years  
and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment  
of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with **probation** for \_\_\_\_\_

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

CONCURRENT or  CONSECUTIVE to sentence on:  
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 3 years  
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-136  
Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20, 16-25-61 (Domestic Violence ) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION:  Deferred  Def. Waives Hearing  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
Payment Terms: \_\_\_\_\_  
 Set by SCDPPPS \_\_\_\_\_

PTUP \_\_\_\_\_ days/hours Public Security Employment

Recipient: \_\_\_\_\_

\*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 61.6 (Public Def/Probation)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)		\$3.75

Obtain GED   
Attend Voc. Rehab. or Job Corp.   
May serve W/E beginning \_\_\_\_\_  
Substance Abuse Counseling   
Random Drug/Alcohol testing   
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 25.00 beginning 5/26/2014  
\$ \_\_\_\_\_ paid to Public Defender Fund  
Other: \_\_\_\_\_

TOTAL \$128.75 + \$40.00 = \$168.75

Clerk of Court/ Deputy Clerk Renee N. Elvis  
Court Reporter: Teresa Bautz  
SCCA/217 (07/2016)

Presiding Judge [Signature]  
Judge Code: 2152  
Sentence Date: 4-26-17

FILED  
Horry County  
APR 26 PM 12:23  
CLERK OF COURT  
HORRY COUNTY, SC

CAP OF 25