

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

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S.C. Supreme Court

ORIGINAL

LENSON CLYBURN, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

ANDREW JOHNSON  
Assistant Attorney General

P. O. Box 11549  
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF CHESTERFIELD	)	
	)	
THE STATE OF SOUTH CAROLINA	)	
	)	NOVEMBER 7, 2007
PLAINTIFF,	)	
	)	
VERSUS	)	
	)	2007-GS-13-0702
LENSON CLYBURN, JR.	)	2007-GS-13-0703
	)	
DEFENDANT.	)	
_____	)	

**BEFORE**

**THE HONORABLE EDWARD B. COTTINGHAM**

**APPEARANCES**

Daniel Jones, Esquire  
Attorney for the State

Patricia Rivers, Esquire  
Attorney for the Defendant

Pamela Ozment-Cartee  
Circuit Court Reporter

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No Exhibits Offered

**THE STATE V LENSON CLYBURN, JR.**

1 THE COURT: Madame Court Reporter, we are going to  
2 take four pleas at one time. All right.

3 MADAME COURT REPORTER: Yes, sir.

4 THE COURT: All right. Now, just go forward. Swear  
5 each one of them.

**WHEREUPON, RICHARD BYRD, LENSON CLYBURN**

**MICHAEL HOUGH AND DAN HANNA NICHOLSON**

**FIRST BEING DULY SWORN TESTIFIES AS FOLLOWS**

9 SOLICITOR: Your Honor, this is docket number 07-GS-  
10 13-0939, State versus Richard Byrd.

11 THE COURT: Which one is Richard Byrd.

12 SOLICITOR: This is Mr. Byrd. Mr. Byrd has been  
13 charged with burglary in the first degree. He has not been  
14 indicted on these charges, but he has decided to waive  
15 presentment to the grand jury. He is present today, he is  
16 unaccompanied by counsel. He has agreed to charge to  
17 burglary, second degree, a lesser included offense. The  
18 state is going to recommend a sentence of ten sentence  
19 deferred upon successful completion of Drug Court.

20 Would you like for me to go to the next one?

21 THE COURT: Yes, sir.

22 SOLICITOR: The next one here is Mr. Lenson Clyburn,  
23 and this is Docket Number 07-GS-13-0702, and 0703. Mr.  
24 Clyburn has been charged with PWID Marijuana, and PWID Crack  
25 Cocaine. Mr. Clyburn is present today. He is unaccompanied

## THE STATE V LENSON CLYBURN, JR.

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1 by counsel. He has indicated to the state a willingness to  
2 plead guilty on these charges as indicted on each one.

3 THE COURT: Mr. Clyburn --- what is the state's  
4 negotiation?

5 SOLICITOR: The state is going to recommend seven  
6 years on these charges concurrent, deferred to Drug Court.

7 THE COURT: All right, sir.

8 SOLICITOR: And the third gentleman we have here is  
9 Mr. Michael Hough. This is Docket Number 07-GS-13-0899, and  
10 0901. Mr. Hough is charged with pointing a firearm, assault  
11 and battery of a high and aggravated nature, and assault and  
12 battery with intent to kill. Mr. Hough is present. He is  
13 unaccompanied by counsel today. He has indicated to the  
14 state a willingness to plead guilty to these charges. He is  
15 going to plead as indicted to pointing a firearm. He is  
16 going to plead guilty on the assault and battery of a high  
17 and aggravated nature, and on the ABWIK. He is going to  
18 plead guilty to ABHAN.

19 THE COURT: To ABWIK to one ABHAN? And what is the  
20 negotiation?

21 SOLICITOR: The state is going to recommend a sentence  
22 of five years to successful completion of Drug Court.

23 THE COURT: Five years concurrent. All right.

24 SOLICITOR: And the last gentleman we have down here  
25 is Mr. Dan Hanna Nicholson, and Mr. Nicholson is present

## THE STATE V LENSON CLYBURN, JR.

5

1 today with his counsel. Who do you represent?

2 MS. RIVERS: Mr. Clyburn.

3 SOLICITOR: I'm sorry, Mr. Clyburn does have an  
4 attorney Ms. Rivers.

5 THE COURT: We will go over that again.

6 SOLICITOR: This is Docket Number 05-GS-16-0791, and  
7 07-GS-13-0831. The first is a charge of purse snatching  
8 which came out of Darlington County, and the second is charge  
9 of possession of a adulterants which is intended to defeat a  
10 drug or alcohol test.

11 THE COURT: What charge is for the purse snatching ---  
12 That's okay, go ahead. Is that under the five year statute?

13 SOLICITOR: Which one, the adulterant or the purse  
14 snatching?

15 THE COURT: Purse snatching.

16 SOLICITOR: I believe that is five years, I'm not sure  
17 off hand.

18 THE COURT: Where else was the charge, where?

19 SOLICITOR: Possession of an adulterant intended to  
20 defeat a drug or alcohol test. It would be something that  
21 you would use to defeat a drug test.

22 He is going to plead guilty to these charges. The state  
23 is recommend three years on the purse snatching charge. And  
24 thirty days on the possession of an adulterant charge  
25 concurrent. Deferred upon successful completion of Drug

1 Court.

2 THE COURT: Which one is a waiver?

3 SOLICITOR: All right. Those two --- actually the  
4 purse snatching charge was true billed on May 19, 2005. And  
5 the possession of an adulterant charge was true billed on  
6 October 30, 2007.

7 THE COURT: The second was a waiver, I assume the rest  
8 of them were true billed. I just want to know the waiver.

9 SOLICITOR: Okay. The first was Mr. Richard Byrd, he  
10 waived presentment to the grand jury.

11 Mr. Nicholson, he is number four, he has been true  
12 billed on each of his charges. Mr. Clyburn, his charges were  
13 true billed on September 24, 2007. That was two charges,  
14 they were both true billed.

15 THE COURT: How about Byrd?

16 SOLICITOR: And Mr. Byrd is waiving presentment to the  
17 grand jury.

18 THE COURT: And about Mr. Hough?

19 SOLICITOR: He is waiving presentment to the grand  
20 jury.

21 THE COURT: I have two waivers, have they been signed  
22 on the back of the Indictment?

23 SOLICITOR: We are going to have them sign them up  
24 here in front of the court.

25 THE COURT: Byrd and Hough, both of you are entitled

THE STATE V LENSON CLYBURN, JR.

1 to have these serious Indictments presented to the grand  
 2 jury. The grand jury is comprised of eighteen people.  
 3 Twelve people must find probable cause before we proceed.  
 4 Mr. Byrd do you wish to waive that procedure and plead?

5 MR. BYRD: Yes.

6 THE COURT: How about you?

7 MR. NICHOLSON: Yes, sir.

8 THE COURT: Now, Ms. Rivers, do you represent all four  
 9 of them?

10 MS. RIVERS: No, sir. I represent Mr. Clyburn.

11 THE COURT: The other three are not represented?

12 MS. RIVERS: No, sir.

13 THE COURT: Mr. Byrd you don't have a lawyer?

14 MR. BYRD: No, sir.

15 THE COURT: Is that your own choice?

16 MR. BYRD: (No response.)

17 THE COURT: Sir?

18 MR. BYRD: Yes.

19 THE COURT: How about you? You are Clyburn, you got a  
 20 lawyer, how about you?

21 MR. NICHOLSON: I don't have a lawyer, because I am  
 22 already in Drug Court, sir.

23 THE COURT: You are already in Drug Court?

24 MR. NICHOLSON: Yes, sir. This is my sixth week.

25 SOLICITOR: These two individuals are already

## THE STATE V LENSON CLYBURN, JR.

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1 attending and participating in Drug Court, but have not yet  
2 been before the court.

3 THE COURT: All right. So they are waiving their  
4 right to trial?

5 SOLICITOR: Yes, sir.

6 THE COURT: Now, you need to know particularly that  
7 you are going to have ten years hanging over your head. And  
8 if you fail Drug Court, you will go; do you know that?

9 MR. NICHOLSON: Yes, sir.

10 THE COURT: Do you know that?

11 MR. BYRD: Yes, sir.

12 THE COURT: Do you two know that?

13 MR. HOUGH: Yes, sir.

14 MR. CLYBURN: Yes, sir.

15 THE COURT: Hough, Byrd you are going to get ten years  
16 concurrent.

17 Clyburn, you are going to get seven years concurrent.

18 Hough, you are going to get five years concurrent.

19 MR. HOUGH: Yes, sir, I understand that.

20 THE COURT: Nicholson, you are going to get three, do  
21 you understand that?

22 MR. NICHOLSON: Yes, sir.

23 THE COURT: Are you guilty?

24 MR. NICHOLSON: Yes, sir.

25 THE COURT: Are you guilty Clyburn?

## THE STATE V LENSON CLYBURN, JR.

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1 MR. CLYBURN: Yes, sir.

2 THE COURT: Are you guilty Hough?

3 Mr. Hough: Yes, sir.

4 THE COURT: Are you guilty Nicholson?

5 MR. NICHOLSON: Yes, sir.

6 THE COURT: And Byrd you say you are guilty?

7 MR. BYRD: Yes, sir.

8 THE COURT: All four of you are waiving your right to  
9 a trial by jury?

10 MR. BYRD: Yes, sir.

11 MR. NICHOLSON: Yes, sir.

12 Mr. Clyburn: Yes, sir.

13 Mr. Hough: Yes, sir.

14 THE COURT: All of you signify by telling me this that  
15 you are charged with?

16 MR. BYRD: Yes, sir.

17 MR. NICHOLSON: Yes, sir.

18 Mr. Clyburn: Yes, sir.

19 Mr. Hough: Yes, sir.

20 THE COURT: Byrd, are you guilty of it?

21 MR. BYRD: Yes.

22 THE COURT: And Clyburn, what are you charged with?

23 MR. CLYBURN: Marijuana and Cocaine.

24 THE COURT: You are guilty of that?

25 MR. CLYBURN: Yes, sir.

## THE STATE V LENSON CLYBURN, JR.

10

1 THE COURT: Hough you are guilty of what you did?

2 MR. HOUGH: Yes, sir.

3 THE COURT: And Nicholson you are guilty of what you  
4 did?

5 MR. NICHOLSON: Yes, Your Honor.

6 THE COURT: All of you understand that you are  
7 entitled to a trial by jury?

8 MR. BYRD: Yes, sir.

9 MR. NICHOLSON: Yes, sir.

10 Mr. Clyburn: Yes, sir.

11 Mr. Hough: Yes, sir.

12 THE COURT: All of you are waiving that procedure?

13 MR. BYRD: Yes, sir.

14 MR. NICHOLSON: Yes, sir.

15 Mr. Clyburn: Yes, sir.

16 Mr. Hough: Yes, sir.

17 THE COURT: Do all of you understand Drug Court?

18 MR. BYRD: Yes, sir.

19 MR. NICHOLSON: Yes, sir.

20 Mr. Clyburn: Yes, sir.

21 Mr. Hough: Yes, sir.

22 THE COURT: If you fail now, you go for the time I'm  
23 saying. Don't tell them that you didn't understand the  
24 consequences of it, because you are telling me now you did.

25 Give me a very limited basis as to what each one did,

## THE STATE V LENSON CLYBURN, JR.

11

1 just give me the Indictment.

2 SOLICITOR: I'll go down the line here, Your Honor.

3 THE COURT: All right. Let's start with Mr. Byrd.

4 SOLICITOR: All right. Mr. Byrd is charged with  
5 burglary in the first. That is his only charge that is  
6 before the court today.

7 On or about September 18, 2007 he entered the dwelling  
8 belonging to James Milton Lloyd, without consent, and with  
9 the intent to commit a crime therein. And this happened  
10 during the nighttime, and that's why it is Indicted as a  
11 burglary first.

12 THE COURT: All right. How about Clyburn.

13 SOLICITOR: Mr. Clyburn has been charged with one  
14 count of PWID Crack Cocaine, and one count of PWID marijuana.  
15 The basis of these charges are that on or about August 7,  
16 2007 Mr. Clyburn did as to the crack, possess a quantity of  
17 crack cocaine. And as to the PWID charge --- marijuana  
18 charge on August 7<sup>th</sup> of this year he was stopped while riding  
19 a moped by Highway Patrol, and he was found to have in his  
20 possession seven small plastic bags containing a green leafy  
21 substance believed to be marijuana.

22 THE COURT: These two charges are what?

23 SOLICITOR: One is PWID Crack Cocaine, and the other  
24 is PWID Marijuana, two charges.

25 THE COURT: Both of them --- what does PWID Marijuana

1 carry?

2 SOLICITOR: I believe PWID Crack would.

3 THE COURT: Crack does, but how about the marijuana?

4 SOLICITOR: That may be five, I don't know off hand,  
5 Your Honor.

6 THE COURT: Well, I can deal with it. How about Mr.  
7 Hough.

8 SOLICITOR: All right. Virtually, Mr. Hough is  
9 charged with pointing a firearm, assault and battery of a  
10 high and aggravated nature, and assault and battery with  
11 intent to kill. He is going to plead guilty to as indicted  
12 to pointing a firearm, as Indicted to --

13 THE COURT: I don't have that up here.

14 SOLICITOR: Number 16-23-410.

15 (PAUSE.)

16 THE COURT: You are recommending five years, and under  
17 that charge I have to make sure that I give him that.

18 SOLICITOR: We do have two ABHAN charges that he is  
19 pleading to, Your Honor.

20 THE COURT: I understand. I can do it under those.  
21 That's all right Solicitor, I can handle it.

22 SOLICITOR: That is five years, Your Honor.

23 THE COURT: All right. Nicholson.

24 SOLICITOR: Mr. Nicholson is charged in one instance  
25 for purse snatching, and in the other for possession of an

## THE STATE V LENSON CLYBURN, JR.

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1 adulterant substance to defeat a drug or alcohol test.

2 THE COURT: That's all I need to know. How long did  
3 you stay in jail, sir?

4 MR. NICHOLSON: Sir?

5 THE COURT: How long did you stay in jail?

6 MR. NICHOLSON: About three years all together.

7 THE COURT: I am talking about on these charges?

8 MR. NICHOLSON: On these charges, it looks like I'd  
9 say about --

10 THE COURT: -- All right. Let me deal with Nicholson  
11 first.

12 SOLICITOR: Your Honor, as to Mr. Nicholson, the  
13 possession of adulterant charge carries not more than three  
14 years.

15 THE COURT: Well, that is what I thought. Well I can  
16 do that then.

17 All right. Let's talk with Byrd. All of his charges  
18 are burglary, burglary first, burglary second. How many  
19 burglary charges does he have?

20 SOLICITOR: One burglary charge, he is going to plead  
21 to burglary second, Your Honor.

22 THE COURT: What?

23 SOLICITOR: One burglary charge, and he is going to  
24 plead burglary second, that is the lesser included.

25 THE COURT: All right. He is going to be sentenced to

## THE STATE V LENSON CLYBURN, JR.

14

1 ten years, subject to completion of Drug Court.

2 SOLICITOR: That is correct, Your Honor.

3 THE COURT: Do you understand that?

4 MR. BYRD: Yes, sir.

5 THE COURT: Now for Clyburn, his was two PWIDs?

6 SOLICITOR: That's correct, Your Honor, marijuana and  
7 crack.

8 THE COURT: You are recommending seven years. Do you  
9 understand that Clyburn? Do you understand that if you fail  
10 Drug Court, you go?

11 MR. CLYBURN: Yes, sir.

12 THE COURT: And Hough, you had two ABHANS of which I  
13 am going to give you five years concurrent. You had a  
14 firearm violation under the one year statute.

15 Nicholson,

16 SOLICITOR: Your Honor, the pointing a fire arm, that  
17 is a five year charge also.

18 THE COURT: It is?

19 SOLICITOR: Yes, Your Honor.

20 THE COURT: So it is five years on all of them.

21 Nicholson, on your drug charge, it is a three year  
22 sentence. So what was the other charge for Nicholson?

23 SOLICITOR: Purse snatching.

24 THE COURT: Under purse snatching, I am going to  
25 sentence you for three years, on the other charge three years

## THE STATE V LENSON CLYBURN, JR.

15

1 concurrent, subject to Drug Court.

2 Now, as to all four of you, that is your negotiated  
3 sentence. Does everyone understand that? Does anybody have  
4 any questions? Is there any question in your mind now that  
5 if you fail Drug Court you are going to serve this time, and  
6 I am talking about quite a bit time, ten for you Byrd.

7 MR. BYRD: Yes, sir.

8 THE COURT: Seven for you Clyburn. Five for you,  
9 Hough, three for Nicholson. What do they call you? Let me  
10 call you good afternoon.

11 MR. HOUGH: That is great, sir. That's great sir.

12 THE COURT: Do you have forms for me?

13 SOLICITOR: We do have forms for you.

14 THE COURT: Well, that is what I thought.

15 SOLICITOR: Thank you, Your Honor.

16 THE COURT: All right. Thank you.

17 -- END OF TRANSCRIPT --

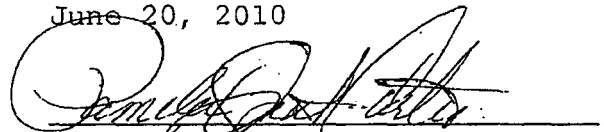
## CERTIFICATE OF REPORTER

16

I, the undersigned, Pamela Ozment-Cartee, official court reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the plea of the above captioned cases, relative to appeal, in The Court of General Sessions in Chesterfield County, South Carolina, on the 7<sup>th</sup> day of November 2007.

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

June 20, 2010

A handwritten signature in black ink, appearing to read 'Pamela Ozment-Cartee', written over a horizontal line.

Pamela Ozment-Cartee  
Circuit Court Reporter



1           Following is a transcript of the proceedings had at  
2 the hearing in this matter.

3           NOTE: There were no exhibits submitted at this hearing.

4           MS. CAMPBELL: Junior Clyburn.

5           THE COURT: Okay. Mr. Clyburn, we see you again under  
6 bad circumstances. All right. The solicitor is here and Mrs.  
7 Kolberg. Have you done your preamble and all, Mr. Harrington?  
8 Have you said your prayer and done the preamble and every-  
9 thing?

10          MR. HARRINGTON: No, sir, we haven't.

11          THE COURT: Well, since they're leaving it won't matter  
12 with them. We'll just get on with that. Solicitor?

13          MR. FOARD: Your Honor, before you is Lenson Clyburn, Jr.  
14 He pled guilty before the Honorable Edward B. Cottingham on  
15 November 7, 2007, to indictment number 07-GS-13-0702, posses-  
16 sion with intent to distribute marijuana, and 07-GS-13-0703,  
17 possession with intent to distribute crack cocaine. Per the  
18 Drug Court he has missed a drug screen on November 10, 2007;  
19 missed group on December 2, 2007; was delinquent in his fee on  
20 January 3, 2008; he was arrested by the Chesterfield County  
21 Sheriff's Office on four counts of distribution of crack  
22 cocaine on June 8, 2008; failed to report to Chesterfield  
23 County Drug Court on June 11, 2009. He has been absconded  
24 from the program up until August 5th, or today, Your Honor,  
25 2009. This being prepared by Kerri H. Campbell of the Drug

1 Court, Your Honor. The State is asking that his sentence be  
2 activated and that he be terminated from the Drug Court.

3 THE COURT: All right, sir. It is so ordered. Mr.  
4 Clyburn, anything you would like to say?

5 MR. CLYBURN: Your Honor, I haven't been found guilty of  
6 these charges he's talking about.

7 THE COURT: We're not here for that.

8 MR. CLYBURN: Right.

9 THE COURT: We are here because you didn't go along with  
10 what you signed the contract to do in Drug Court.

11 MR. CLYBURN: What did--

12 THE COURT: You got arrested for one thing.

13 MR. CLYBURN: That's under false pretense, though, Your  
14 Honor:

15 THE COURT: No. You got arrested for it and you ain't  
16 supposed to do it. One of the things in the preamble says to  
17 stay away from people like that, stay away from anybody. You  
18 didn't do that and you got arrested for it, and that's a  
19 termination. And you also, after ten days, that's automatic  
20 suspension.

21 MR. CLYBURN: I was told I was--

22 THE COURT: After ten days.

23 MR. CLYBURN: I was told I did not have to come back any  
24 more, Your Honor.

25 THE COURT: Okay. Anything further?

1 MR. FOARD: None from the State, Your Honor.

2 THE COURT: That's all? Okay. Mr. Clyburn, it be the  
3 Order of the Drug Court of Chesterfield County that you return  
4 to the Chesterfield County Detention Center, then be trans-  
5 ferred to the South Carolina State Penal System in Columbia.  
6 And good luck to you.

7 (Off the record.)

8 MR. FOARD: If we could let the record reflect that he  
9 has refused to sign the Affidavit for surrender of driver's  
10 license.

11 THE COURT: Okay.

12 MR. FOARD: Which he is required to do by law as deter-  
13 mined in his sentence.

14 THE COURT: He may not do it here but they will over  
15 there.

16 MR. FOARD: Thank you, Your Honor.

17

18 HEARING CONCLUDED, 5:13 p.m., Thursday, August 6, 2009.

19

20

21

22

23

24

25

STATE OF SOUTH CAROLINA |  
 COUNTY OF CHESTERFIELD |

This is to certify that the preceding four (4) pages are a true and correct transcript of my shorthand notes taken during the hearing in the previously captioned matter at the time, place and date aforesaid.

I further certify that I am an independent court reporter in Chesterfield County, South Carolina, and that I am not related to any of the parties to this action or their counsel, nor interested in the outcome of the foregoing litigation, financially or otherwise.

WITNESS my signature and official seal at Cheraw, South Carolina, this 24th day of June, 2010.

*Betty D. Kolberg*  
 BETTY D O KOLBERG  
 Notary Public for South Carolina  
 My commission expires Oct. 31, 2012

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHESTERFIELD )  
 )  
 LENSON CLYBURN, )  
 Inmate # 305094 )  
 Applicant, )  
 vs. )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 THIRD JUDICIAL CIRCUIT  
 CASE NO.: 10-CY-13 000126

APPLICATION FOR  
 POST-CONVICTION RELIEF

CHESTERFIELD COUNTY, S.C.

2010 MAR 29 AM 9 54

1. Place of detention.  
 Kershaw Correctional Institute  
 4848 Gold Mine Hwy  
 Kershaw, SC 9067

2. Name and location of Court, which imposed sentence.

Chesterfield County  
 Circuit Court Judge  
 P. O. Box 1114  
 Bennettsville, SC 29512

A True Copy. Attest  
*Joyce S. Sellers*  
 CLERK OF COURT C.P. & G.S.  
 CHESTERFIELD COUNTY, SC

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

2007-GS-13-00702, 2007-GS-13-00703

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

The trial court sentenced Clyburn on August 6, 2009. The court committed Clyburn to the State Department of Corrections for a period of seven (7) years.

5. Check whether a finding of guilty was made:

(a) After a plea of guilty X

- (b) After a plea of not guilty \_\_\_\_\_
- (c) After a plea of novo contender \_\_\_\_\_
6. Did you appeal from the judgment of conviction or the imposition of sentence?
- Yes
7. If you answered "yes" to (6), list:
- (a) The name of each Court to which you appealed:
- Court of Appeals  
State of South Carolina  
1015 North Sumter Street  
Columbia, SC 29201-3726
- (b) The result of each Court to which you appealed:
- Dismissed – Untimely Filed
- (c) The date of each such result:
- September 24, 2009
- (d) If known, citations of any written opinion or orders entered pursuant to such results:
8. If you answered "no" to (6), state your reasons for not appealing:
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of trial counsel which lead to unconstitutional conviction and confinement
10. State concisely and in the same order the facts which support each of the grounds set out in (9):

1. Trial counsel was ineffective in not filing an Appeal on my behalf. Trial counsel never consulted with me about the issue of appeal and never asked me whether or not I wanted to file an Appeal. I did want to file an appeal but by the time I understood how to do it, I had spoken to another attorney, I could not file an Appeal. The other attorney tried to file an Appeal on my behalf, but it was too late. It was dismissed for untimely filing.
  2. Trial counsel provided ineffective assistance of counsel in failing to adequately go over the discovery material with me including but not limited to evidence against me and my prior criminal record. My prior criminal record that was presented to the court during my guilty plea and at the time of sentencing it inaccurate. Trial counsel had not discussed the written rap sheet with me; therefore he allowed an inaccurate record to be given to the judge. Convictions that do not apply to me are listed on the written rap sheet and trial counsel never discussed this document with me so that I could tell him that these convictions were not mine. The court sentenced me after being told that I was convicted of things I had not been. My trial counsel did not object on my behalf.
  3. Trial counsel was ineffective in failing to inform me of the consequences of my plea in drug court. Trial counsel failed to tell me the procedure of drug court. Trial counsel failed to advise me of the consequences of the sentencing process.
  4. Trial counsel was ineffective in failing to represent me at the sentencing phase of my drug court plea. He failed to advise me of my constitutional rights that I had at the sentencing phase of my drug court plea, because he was not present.
  5. I was not provided representation by an attorney as granted by the constitution during the sentencing phase of my drug court plea. And I was not advised by my trial counsel of the unconstitutional drug court sentencing process at the time that I waived my right to trial and entered a guilty plea based on my trial counsel's advise.
11. 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 petitions in State or Federal Courts for habeas corpus or post-conviction relief?  
No
- (c) Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)?  
No
- (d) Any other petitions, motions or applications in this or any other Court?
12. If you answered "yes" to any part of (11), list with respect to each petition, motion, or application:
- (a) The specific nature thereof:
- (b) The name and location of the Court in which each was filed:
- (c) The disposition thereof:
- (d) The date of each such disposition:
- (e) If known, citations of any written opinions or orders entered pursuant to each such disposition:
13. Has any ground set forth in (9) been previously presented to this or any other Court, State, or Federal, in any petition, motion or application which you have filed?  
NO.
14. If you answered "yes" to (13), identify:
- (a) Which grounds have been presented:
- (b) The proceedings in which each ground was raised:
15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:
- (a) A Post Conviction Relief Petition affords the applicant the first opportunity to allege ineffective assistance of trial counsel, as applicant is prohibited from alleging ineffective assistance of counsel on direct appeal.

16. Were you represented by an attorney at any time during the course of:
- (a) Your arraignment and plea?  
Yes.
  - (b) Your trial, if any?  
He was not present at my sentencing.
  - (c) Your sentencing?
  - (d) Your appeal, if any, from the judgment of conviction or the imposition of sentence?
  - (e) Your preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

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

- (a) The name and address of each attorney who represented you:

Jason Turnblad  
105 W. Main St  
Bennettsville, SC 29512

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

Guilty Plea

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

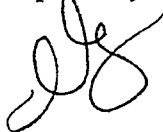
The relief I seek is to reinstate my appellate rights and allow me to file an Appeal in my case.

The relief I seek is to be released from my unconstitutional confinement and allow my case to be remanded, so that I can resolve my charges through a jury trial.

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

No

Respectfully Submitted,



---

Melisa W. Gay  
Attorney for Lenson Clyburn  
P.O. Box 2144  
Mt. Pleasant, SC 29465  
(843)856-0580  
(843)856-0590 fx  
mgaylaw@yahoo.com

Dated: March 24, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2010-CP-13-0126
COUNTY OF CHESTERFIELD	)	
	)	
Lenson Clyburn, Jr.,	)	
S.C.D.C. No. 305094.	)	
	)	
Applicant,	)	
	)	<b>RETURN AND PARTIAL MOTION TO DISMISS</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

In response to the post-conviction relief application filed March 29, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Chesterfield County Clerk of Court's orders of commitment. The Chesterfield County Grand Jury indicted the Applicant at the October 2007 term of General Sessions for possession with intent to distribute (PWID) marijuana (2007-GS-13-0702) and PWID crack cocaine (2007-GS-13-0703). Jason Turnblad, Esquire represented the Applicant.

On November 7, 2007, the Applicant pled guilty. The Honorable Edward B. Cottingham sentenced the Applicant to concurrent terms of seven (7) years for PWID marijuana and seven (7) years for PWID crack cocaine. The sentences, however, were suspended and Applicant was deferred to drug court. The Applicant did not appeal.

Upon information and belief, the Applicant appeared in court on August 6, 2009 for a drug court termination hearing. On that date, the Applicant received the original sentences of seven (7) years imprisonment for each charge. Upon information and belief, the South Carolina

Court of Appeals dismissed the subsequent notice of appeal, finding it was not timely filed.

Attached herewith and incorporated herein by reference are the records of the Chesterfield County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections. The drug court termination hearing transcript will be forwarded upon receipt.

## II.

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

1. Ineffective assistance of counsel "which lead [sic] to unconstitutional conviction and confinement":
  - a. Failed to consult about an appeal.
  - b. Failed to review discovery material – specifically the prior criminal record – before the guilty plea.
  - c. Failed to inform of the consequences of a plea in drug court.
  - d. Failed to represent Applicant "at the sentencing phase of my drug court plea."

## III.

The Respondent submits that all issues related to the Applicant's guilty plea should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina Code Ann. § 17-27-45(a) reads as follows:

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

The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

The Applicant pled guilty to the offenses he challenges in this application on November 7, 2007. The Applicant was therefore required to file his application before November 7, 2008. This application was filed on March 29, 2010, which was more than one (1) year and four (4) months after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

#### IV.

The Respondent interprets the Applicant’s allegations to be that the attorney who represented him at the drug court termination hearing was ineffective. The Respondent asserts this allegation is without merit. The Respondent asserts the Applicant’s attorney rendered effective assistance well within the standard of “reasonableness within professional norms” for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441,

442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

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

V.

WHEREFORE, having made its Return and Partial Motion to Dismiss, the Respondent requests: (1) that all issues related to the November 7, 2007 guilty plea hearing be dismissed and (2) that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel at the August 6, 2009 drug court termination hearing.

Respectfully submitted,

HENRY DARGAN McMASTER  
Attorney General

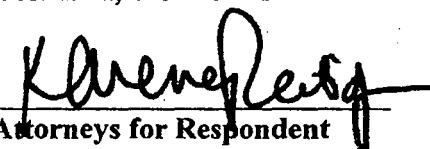
JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

KAREN C. RATIGAN  
Assistant Attorney General

P.O. Box 11549  
Columbia, S.C. 29211

By:

  
Attorneys for Respondent

May 14, 2010

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHESTERFIELD	)	
	)	
LENSON CLYBURN, JR.	)	JUNE 9, 2011
	)	
PLAINTIFF,	)	
	)	
VERSUS	)	
	)	
THE STATE OF SOUTH CAROLINA	)	2010-CP-13-00126
	)	
DEFENDANT.	)	
_____	)	

**BEFORE**

**THE HONORABLE J. MICHAEL BAXLEY**

**APPEARANCES**

Karen C. Ratigan, Esquire  
Attorney for The State

Melisa Gay, Esquire  
Attorneys for the Defendant

Pamela Ozment-Cartee  
Circuit Court Reporter

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**LENSON CLYBURN, JR.**

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**LENSON CLYBURN, JR VERSUS THE STATE**

3

1 (Whereupon, this trial began at on  
2 Wednesday, June 8, 2011.)

3 **THE COURT:** You're Mr. Lenson Clyburn?

4 **MR. CLYBURN:** Yes, sir.

5 **THE COURT:** How are you, Mr. Clyburn?

6 **MR. CLYBURN:** I'm alright.

7 **THE COURT:** I'm Judge Baxley. We are here today  
8 because you have filed an application for Post Conviction  
9 Relief. Ms. Gay has been appointed to represent you. You  
10 have been transported here today obviously so we can have  
11 the hearing.

12 The State is going to give us a history of how you  
13 came to be where you are today. And then they have a  
14 Motion that we're going to take up before we actually have  
15 the hearing.

16 When we get to the hearing you'll have an opportunity  
17 to testify and give your version of events. And we look  
18 forward to hearing from you at that time. All right?

19 **MR. CLYBURN:** All right.

20 **THE COURT:** Ms. Ratigan, let's start with the  
21 history and then let's go to the Motion.

22 **MS. RATIGAN:** Thank you, Your Honor, may it please  
23 the Court. This is the case of Lenson Clyburn versus the  
24 State of South Carolina. Docket Number is 2010-CP-13-  
25 0126.

**LENSON CLYBURN, JR VERSUS THE STATE**

4

1           Mr. Clyburn was initially indicted for possession  
2 with intent to distribute marijuana, and possession with  
3 intent to distribute crack cocaine.

4           He was represented on those charges by Ms. Rivers.  
5 On November 11, pardon me, November 7, 2007, he pled  
6 guilty to the charges as indicted.

7           Judge Cottingham sentenced him to concurrent terms of  
8 seven years for possession with intent to distribute  
9 marijuana, and seven years for possession with intent to  
10 distribute crack cocaine.

11           Both sentences were suspended and the applicant was  
12 actually deferred to Drug Court. He did not file an  
13 appeal at that time.

14           Subsequent to that, August 6, 2009, Mr. Clyburn  
15 appeared back in court for a Drug Court termination  
16 hearing. He was pro se at that hearing.

17           On that date he received the original sentences of  
18 seven-years imprisonment on each charge. He then filed a  
19 Notice of Appeal to South Carolina Court of Appeals.  
20 However, that Notice was dismissed as not timely filed  
21 September of 2009.

22           He then filed this timely PCR application. The State  
23 has, as Your Honor noted a partial Motion to dismiss in  
24 this case. We would argue that any and all issues related  
25 to the November 17, 2007, guilty plea hearing regarding

## LENSON CLYBURN, JR VERSUS THE STATE

5

1 ineffective assistance of counsel should be dismissed as  
2 untimely.

3 As Your Honor knows, you are afforded, one-year from  
4 the date of conviction to file a PCR application. So we  
5 would argue that issues related to the guilty plea are not  
6 timely. However, we would concede that any issues related  
7 to the August 2009 Drug Court termination hearing are  
8 timely.

9 **THE COURT:** All right. Do you want to respond to  
10 the Motion in regard to the guilty plea, or do you oppose  
11 it, Ms. Gay?

12 **MS. GAY:** I oppose it. I can respond, if you would  
13 like me to.

14 **THE COURT:** Go ahead.

15 **MS. GAY:** Well, Your Honor, throughout this case  
16 what you're going to hear from me is that I believe this  
17 is a conditional liberty situation similar to a probation  
18 violation, or some type of other suspended sentence  
19 situation.

20 With that analogy, Your Honor, looking at what and  
21 how probation violations, which are suspended sentences,  
22 are generally handled. It is my understanding from twenty  
23 years of practice that a person would not the ability  
24 and/or consequences in place to file any type of  
25 ineffective assistance of counsel until they get to the

## LENSON CLYBURN, JR VERSUS THE STATE

6

1 Department of Corrections.

2 They'll get to the Department of Corrections, for  
3 instance, even in a probation matter until they are  
4 violated, and then they are placed in the Department of  
5 Corrections.

6 There is case law out there that says that when a  
7 person files a Post Conviction Relief once they get into  
8 prison, and they have gotten there through a violation of  
9 probation that it's timely.

10 The problem in this case obviously is that Mr.  
11 Clyburn was sentenced in 2007, but he never entered into  
12 the Department of Corrections, at which time his liberty  
13 was actually affected. And he felt as if the consequences  
14 of this representation that he had in 2007 had ended up  
15 with an unconstitutional sentence for him to have the  
16 rights attached for the PCR application.

17 A person wouldn't file a PCR application within one-  
18 year if they are in a suspended situation. They are  
19 participating in Drug Court. He didn't even violate ---  
20 allegedly violate anything having to do with Drug Court  
21 until almost two years later.

22 So the consequences of the ineffective assistance of  
23 counsel, which he wasn't even explained at the time of his  
24 plea, just part of this whole case, didn't affect him  
25 until the entered into the Department of Corrections,

**LENSON CLYBURN, JR VERSUS THE STATE**

7

1 which was the 7<sup>th</sup> of June --- of August 2009.

2 And his hearing was the 6<sup>th</sup> of August. He entered  
3 into the Department of Corrections on the 7<sup>th</sup>. Which I  
4 would take the position that he would have then the year  
5 from the time he entered, lost his liberty, and actually  
6 entered into the Department of Corrections. And I believe  
7 in this particular case the plea itself and the Drug Court  
8 situation are so closely tied together, which I can show  
9 the Court throughout testimony in this case, that it is  
10 crucial for fairness and due process for Mr. Clyburn to be  
11 able to relate what happened to him during that plea  
12 process, and how he ended up in the situation he was in  
13 Drug Court.

14 **THE COURT:** Do you wish to reply?

15 **MS. RATIGAN:** Simply that, Your Honor, I do PCR all  
16 over the State and I've never --- I'm sure there is case  
17 law on it, but I can tell you I've never had a Judge say  
18 that probation revocation is conditional.

19 Any time I ever make a partial Motion to dismiss in a  
20 case such as this, but with probation the Courts have a  
21 hundred percent always found at trial level that any  
22 issues with representation arose during that  
23 representation at the guilty plea. If there were any  
24 issues with that representation, they should have file PCR  
25 application within one-year of that guilty plea.

## LENSON CLYBURN, JR VERSUS THE STATE

8

1 Any issues related to problems in Drug Court and  
2 termination from Drug Court, stem from his participation  
3 in Drug Court. It has nothing to do with Ms. Rivers  
4 representation at that time.

5 He wanted Drug Court. He got Drug Court into Drug  
6 Court. He was terminated from Drug Court. That Drug  
7 Court termination has nothing to do with the guilty plea.  
8 And we would argue that any issues related to that are  
9 untimely.

10 **THE COURT:** All right. The dictates of Pelouin,  
11 are fairly, that is The Pelouin Case, P-E-L-O-Q-U-I-N,  
12 which is cited as 321 S.C. 468, are fairly clear. So what  
13 precedence do you have, Ms. Gay, that would say that in a  
14 probation case or in a Drug Court case there would be a  
15 tolling of the Statute?

16 **MS. GAY:** Your Honor, I don't have that case law in  
17 front of me. But I would like to say that in this  
18 particular case, how he ended up in Drug Court which has  
19 to do with his original plea, and I have some  
20 documentation to this. Let me just refer to it. He  
21 signed a form, Special Conditions of Sentence for a Drug  
22 Court plea. It's listed as pro se.

23 In this particular case he started the plea process  
24 and his attorney wasn't even in the room. He was never  
25 informed by his attorney whatsoever about what any of this

## LENSON CLYBURN, JR VERSUS THE STATE

9

1 stuff actually was, the actual program itself. This  
2 particular form has, I believe, an unconstitutional  
3 statement in it. He was never advised to what his rights  
4 were with regard to how and why he may be terminated. At  
5 the time he waived his right to jury trial and pled  
6 guilty.

7 So whether it's a direct correlation the same in the  
8 fact this is a suspended sentence, in this particular case  
9 Mr. Clyburn's case, everything about the termination of  
10 his Drug Court and his participation in this Drug Court  
11 has to do with how he ended up in Drug Court.

12 And as I said, if the Court would like to see this,  
13 this is Exhibit 11, Appellant's Exhibit -- it says defense  
14 counsel, pro se. He had an attorney who was appointed to  
15 represent him. Who I believe at that time was a member of  
16 the Public Defender's Office, who wasn't even in the room  
17 when he signed this piece of paper.

18 **THE COURT:** All right. I feel like that issue is  
19 pretty well crystalized now for Appellant review. I'm  
20 going to grant the Motion of the State, because if he had  
21 some issues about that he would have had one-year to raise  
22 it. He actually got a benefit because Drug Court, of  
23 course, is a significant benefit in not being sentenced  
24 and incarcerated as a result of his charges he was given  
25 an opportunity to go to Drug Court.

**LENSON CLYBURN, JR VERSUS THE STATE**

10

1           So I'm going to grant the partial Motion of the State  
2 over the objection.

3           And please now move forward to issues that have to do  
4 with his revocation.

5           **MS. GAY:** I need to discuss with him. Just one  
6 second.

7           **THE COURT:** Very good.

8           **MS. GAY:** I assume that means that the witness who  
9 would have been here, Ms. Rivers, is not going to be  
10 required to be here.

11           **MS. RATIGAN:** She's here. She's sitting right  
12 there.

13           **MS. GAY:** She only --- At this time, Your Honor,  
14 would you like for me to do a small opening statement? I  
15 think you've heard a good bit of what I'm going to talk  
16 about, before I call my first witness.

17           **THE COURT:** Do you intend to call Ms. Rivers?

18           **MS. GAY:** Yes.

19           **THE COURT:** An opening statement is not necessary.  
20 Please go ahead and call your first witness.

21           **MS. GAY:** I would call Ms. Rivers.

22           **THE COURT:** Ma'am, please come forward and take the  
23 oath of a witness.

24                                   **WHEREUPON, PATRICIA RIVERS**

25                                   **FIRST BEING DULY SWORN TESTIFIES AS FOLLOWS**

## PATRICIA RIVERS - DIRECT EXAMINATION BY MS. GAY

11

1 MS. RIVERS: I do.

2 DIRECT EXAMINATION BY MS. GAY

3 Q. Ms. Rivers, my name is Melissa Gay. I am an  
4 attorney. I'm from the Charleston County area. How  
5 are you?

6 A. Just great, thank you.

7 Q. I'm going to ask you a few questions. It won't take  
8 very long, so we can have you released. I know  
9 you've been here all day.

10 MS. GAY: Ma'am, I did find one more document that I  
11 would like to have marked.

12 Q. At one point you represented Lenson Clyburn, and I  
13 believe at that time you were employed through the  
14 Public Defender's Office.

15 A. That's correct.

16 Q. Was that contract work, or were you working full-time  
17 for them?

18 A. What year was that?

19 Q. 2007.

20 A. That was contract work, I believe.

21 Q. Okay. Now, Mr. Clyburn was indicted, and I would  
22 like to show you what's been marked as Exhibit,  
23 Appellant's Exhibit 7, it is a copy of the  
24 indictment. I ask you if you can identify this  
25 document, and give me the dates that he was indicted.

1 A. 7/29/07.

2 Q. And what is that document?

3 A. This is an indictment.

4 Q. So this is a copy of an indictment where he was  
5 actually indicted. I think it was for possession  
6 with intent to distribute marijuana. And he was also  
7 indicted for possession with intent to distribute  
8 crack, I believe.

9 A. I don't recall. I think you read that out, yes.

10 Q. And with regard to your representation, it is my  
11 understanding that Mr. Clyburn was --- Well, I would  
12 like for you to identify these three documents, four  
13 documents first. I'm going to show you four  
14 documents. This is the sentencing sheet and the  
15 Clerk's file. If you could identify the documents,  
16 This is, Exhibit 12, Exhibit 2. What is Exhibit 12?

17 A. The docket report Chesterfield County for Lenson  
18 Clyburn.

19 Q. At the very bottom of this docket from the Clerk's  
20 Office it says Defendant attorney. Does it have your  
21 name next to that on that space?

22 A. I don't see it. No.

23 Q. And on this document right here, Exhibit 2, can you  
24 identify this document for me and give me the date  
25 that this document occurred?

## PATRICIA RIVERS - DIRECT EXAMINATION BY MS. GAY

13

- 1 A. The sentence date at the bottom says November the 7<sup>th</sup>,  
2 of 07.
- 3 Q. Is that a sentencing sheet?
- 4 A. Sentencing Sheet, yes.
- 5 Q. And normally on a sentencing sheet there's a location  
6 where the Solicitor signs, the defendant signs, and  
7 the defendant's attorney signs.
- 8 A. Right. I don't see an attorney for the defendant,  
9 except seven years deferred to Drug Court.
- 10 Q. Is your name on that document?
- 11 A. I don't see it.
- 12 Q. So your name is not where it says defense attorney on  
13 the sentencing sheet?
- 14 A. No, I don't see a name on there.
- 15 Q. I'm also going to show you Exhibit Number 1, which is  
16 an additional sentencing sheet. This would be for  
17 the PWID crack cocaine. They are different. This is  
18 the first one I showed you with PWID marijuana.
- 19 A. Right.
- 20 Q. And does this sentencing sheet have your name on it  
21 where it says, defendant's attorney?
- 22 A. No, it doesn't.
- 23 Q. So your name is not on any of these sentencing sheets  
24 that the Court signed?
- 25 A. Possession with intent, correct.

1 Q. And that was also dated November 7, 07?

2 A. November the 7<sup>th</sup>, that's correct.

3 MS. GAY: Would you like for me to hand you these  
4 items as we go along, Your Honor, or would you like for me  
5 to hand them to you at the end?

6 THE COURT: You can hand them to me as you go along  
7 would be fine. Thank you.

8 Q. I would also like to show you ---

9 MS. GAY: Your Honor, do you have a copy of the plea  
10 transcript? Would you like for me to make it an exhibit,  
11 or can I just refer to it?

12 THE COURT: No, I have it.

13 Q. I would like to ask you about the situation during  
14 the plea of this case.

15 MS. GAY: It's not to challenge the plea, Your  
16 Honor, it's just to lay the foundation of other arguments.

17 THE COURT: All right. Go ahead.

18 Q. In this plea transcript there is a point --- Have you  
19 had an occasion to read it?

20 A. No.

21 Q. Okay. I have read it. You can look at it, if you  
22 like. There is a point in this plea transcript where  
23 you're not present in the beginning part of this  
24 plea. Would you challenge that?

25 A. No.

1 Q. And then there's a point where you come into the plea  
2 several pages after it's started. And that was on  
3 page seven of the plea transcript. I believe it  
4 says, how about you, now, Ms. Rivers, do you  
5 represent all four of them? No, sir, I represent the  
6 Mr. Clyburn. On page seven of this transcript is  
7 when you actually start making responses when the  
8 Court is asking about an attorney representation.

9 A. I think he was probably pleading several people at  
10 once.

11 Q. I understand that. Do you have any recollection, any  
12 personal recollection of why you weren't present when  
13 the plea started, when the Court actually started  
14 asking questions?

15 A. I probably was there.

16 Q. Just may not been answering the Court's questions?

17 A. Probably not addressing me.

18 Q. But you agree with me that your name is not on the  
19 sentencing sheet.

20 A. No, my name is not there.

21 Q. And I'm going to show you Exhibit 11. This, as I  
22 just mentioned to the Attorney General, is a document  
23 that came out of the drug file. So that was one of  
24 the things that --

25 **THE COURT:** Our Court Reporter has asked that you

1 slow down a little bit Ms. Gay. Thank you.

2 MS. GAY: I'm sorry. I've been up since 5:30 and  
3 here since 8:30.

4 Q. This is Exhibit 11. Can you identify what this  
5 document is?

6 A. Drug Court Plea.

7 Q. Can you read this paragraph for me please into the  
8 record?

9 A. This sentence is suspended, conditioned upon the  
10 successful completion of Drug Court, including  
11 payment of all Drug Court fees and restitution.  
12 Failure to complete the Drug Court program will  
13 result in the automatic implementation of the  
14 sentence by the Drug Court judge, without further  
15 hearing by this Court. Do you want me to read the  
16 next paragraph?

17 Q. Yes, ma'am.

18 A. If Drug Court is successfully completed as certified  
19 by the Drug Court judge, this guilty plea may be  
20 withdrawn and the case may be dismissed by the  
21 Solicitor. The Court of General Sessions retains  
22 jurisdiction for that purpose.

23 Q. And this particular document, it says we consent and  
24 I believe it is signed by Mary T. J. Lee?

25 A. That's correct.

## PATRICIA RIVERS - DIRECT EXAMINATION BY MS. GAY

17

1 Q. And it says Solicitor is assistant Solicitor?

2 A. That's correct.

3 Q. Then it says defense counsel. And above that can you  
4 tell me what it says?

5 A. Pro se.

6 Q. It says pro se?

7 A. Right.

8 Q. And then underneath that it says defendant and it's  
9 signed by?

10 A. Lenson Clyburn.

11 Q. And it's dated?

12 A. November 7, 07.

13 Q. And it's clocked in at the Clerk of Court's Office as  
14 of November 7<sup>th</sup>?

15 A. That's right.

16 Q. But your name isn't on here.

17 A. That's right.

18 Q. Do you recall why your name isn't on here?

19 A. No. I know about what's going on. They were  
20 pleading a group of people at one time. And there  
21 was just probably just some confusion, it looks like.  
22 And probably they had put him in a group and he  
23 didn't let them know he had an attorney. And that's  
24 what happened. And I found out he was up there doing  
25 a plea and I, you know, interrupted and got myself

1           into the group.

2           Q.   I understand that.   So would you agree with me that  
3           at the time that document was signed you were not  
4           standing with Mr. Clyburn?

5           A.   That's correct.

6           Q.   And I believe what I showed you earlier, which is a  
7           copy of the indictment where he was indicted, you  
8           were at some point appointed to represent him well in  
9           advance of November 7, 2007.

10          A.   That's right.

11          Q.   Would have been, at least, a couple of months?

12          A.   But sometimes the defendant's don't understand and  
13          they'll go up and start doing a plea and I have to  
14          catch them and stop it.  They have independently gone  
15          and talked with the Solicitor.

16          Q.   I understand that.  That's kind of my point.  Mr.  
17          Clyburn apparently independently talked with somebody  
18          and signed this document, and signed it and put pro  
19          se, and you are standing with him when he signed this  
20          document.

21          A.   That's right.

22          Q.   When he went to Drug Court, obviously your file would  
23          have ended, when he went to Drug Court, did you go  
24          with him the first time that he went to Drug Court?

25          A.   No.

**PATRICIA RIVERS - DIRECT EXAMINATION BY MS. GAY**

19

1 Q. Would you agree with me that your representation for  
2 all practical purposes ended after that?

3 A. That's correct.

4 Q. Do you recall telling Mr. Clyburn what his right of  
5 either PCR or appeal were on that day?

6 A. On what date?

7 Q. On the date in question.

8 A. On the date that he went to Drug Court? I would have  
9 talked to him about Drug Court when I talked with him  
10 at the office.

11 Q. I understand that. But would you have discussed with  
12 him his rights of appeal and his right to PCR at the  
13 time he entered the plea on November 7, 2007?

14 A. Not that day.

15 **MS. GAY:** I believe we have the transcript. And,  
16 Your Honor, I would note that while she is here and she  
17 was a part of this plea, that at no point did the Court in  
18 the transcript, the judge, indicate to the defendant he  
19 was sentencing what their right for appeal were.

20 **THE COURT:** So noted.

21 **MS. GAY:** I have no further questions for this  
22 witness, Your Honor.

23 **THE COURT:** Are there questions from the State?

24 **MS. RATIGAN:** Just one.

25 **CROSS EXAMINATION BY MS. RATIGAN**

**PATRICIA RIVERS - CROSS EXAMINATION BY MS. RATIGAN**

20

1 Q. Would there have been any basis to appeal this guilty  
2 plea?

3 A. No, he got the best deal he could get.

4 **MS. RATIGAN:** That is all I have, Your Honor. And  
5 would ask Ms. Rivers be released from her subpoena.

6 **THE COURT:** Do you have objection to the release of  
7 the witness?

8 **MS. GAY:** I don't, but, Your Honor, I do have one  
9 question pursuant to that.

10 **THE COURT:** Go ahead.

11 **REDIRECT EXAMINATION BY MS. GAY**

12 Q. Do you think it's your choice, whether or not  
13 somebody a defendant in the many years you've  
14 represented people would feel that they had a right  
15 to appeal?

16 A. Pardon?

17 Q. Is it your choice, and your thought process, that  
18 decides whether or not a defendant, who you  
19 represented, would have a right to appeal, or even  
20 have a right to file a PCR?

21 A. Of course not. No.

22 Q. So the fact that you might not have believed he had  
23 appeal rights to his guilty plea would not have  
24 changed the fact that he might could have done that  
25 in some kind of timely manner if he had chosen to.

**MARY-THOMAS JOHNSON-LEE - DIRECT EXAMINATION BY MS. GAY** 21

1 A. No, he could have, you know, he could have let me  
2 know he wanted to appeal and I would have done that.  
3 I have no problem with that.

4 Q. And we would agree that no where in this record does  
5 the Court tell him he has that right.

6 A. He knew he had a right to appeal. We had talked.

7 **MS. GAY:** I have no further questions, Your Honor.

8 **THE COURT:** Ma'am, please watch your step and you  
9 are free to leave. Have a good day. Thank you.

10 Please call your next witness.

11 **MS. GAY:** Thank you, Your Honor. I would call Mr. -  
12 -- well, I would like to call Ms. Lee.

13 **THE COURT:** Counsel, please come forward and take  
14 the oath of a witness.

15 **WHEREUPON, MARY-THOMAS JOHNSON-LEE**

16 **FIRST BEING DULY SWORN TESTIFIES AS FOLLOWS**

17 **MS. JOHNSON-LEE:** I affirm.

18 **DIRECT EXAMINATION BY MS. GAY**

19 Q. Ms. Lee, we were just discussing the fact that Mr.  
20 Clyburn signed the document that is part of this Drug  
21 Court file that said that he was entering into Drug  
22 Court. And that that document has listed as defense  
23 attorney pro se. Would you like to see the document?

24 A. I've seen it already. You may have had a copy of the  
25 Drug Court file, but that's a form of the official

1 clerk's record, and that's attached to the sentencing  
2 sheet.

3 Q. Okay, I understand. That's actually what I got from  
4 you was part of it. I didn't get that from any other  
5 --- At that time --- You were actually talking with  
6 Mr. Clyburn him signing the form and going into Drug  
7 Court.

8 A. Apparently so.

9 Q. Do you recall telling him specifically in the section  
10 right here that says, termination can be done without  
11 a hearing?

12 A. I recall nothing specifically about this case other  
13 than my review of the documents. As the Drug Court  
14 attorney for Chesterfield County at that time, if  
15 someone was pleading into Drug Court my  
16 responsibility was to make sure that particular form  
17 was signed. That form was provided to me by Judge  
18 Howard King in Beaufort County. We were actually  
19 doing court a different way. I don't know if Judge  
20 King prepared that form personally for Beaufort  
21 County, or if he had it prepared at his direction.  
22 But he's the one that instructed us to use that form.  
23 I don't know if it was at the time of this case or  
24 some prior case. But that is the form that actually  
25 suspends the sentence into Drug Court. And it would

MARY-THOMAS JOHNSON-LEE - DIRECT EXAMINATION BY MS. GAY 23

1 have been my responsibility to make sure that form  
2 get signed. Because if it's not signed by us and by  
3 the judge then that's an active sentence and not a  
4 suspended sentence in the Drug Court. Now, I saw it  
5 was listed pro se. If I put the pro se on the form,  
6 all I can tell you is at the time I talked with that  
7 individual I did not know that individual had an  
8 attorney, and thought that person was pro se.

9 Q. Would not have actually spoken to Ms. Rivers because  
10 you would have thought that he was pro se?

11 A. Apparently so from looking at that document.

12 Q. And with regard to --- You are still the attorney in  
13 the county that handles the Drug Court?

14 A. I am Drug Court attorney for Marlboro County, and I  
15 assist in Chesterfield County as needed.

16 Q. And I'm sure you're aware, because you're the  
17 attorney of the Drug Court, that sometime after this  
18 sentencing, which happened in November of 2007, that  
19 the Supreme Court of South Carolina issued an Opinion  
20 in State-v-Perkins indicating that Drug Court  
21 termination hearings are considered to due process  
22 hearings.

23 A. Absolutely.

24 Q. Now I understand at the time, 2007, this Opinion  
25 hadn't come out. But now this Opinion is here, and

1 as we all would agree, due process doesn't just  
2 evolve one day. It's just sort of there, and is  
3 identified by the Court as of this date, which would  
4 have been May 12 , 2008.

5 A. Absolutely. That's why when that Opinion came down I  
6 spoke with the Drug Court judges from both counties  
7 to let them know about it. And let them know that at  
8 termination hearings to make sure they afford the  
9 participant, who is up for termination, a chance to  
10 speak and say anything he or she wants before they  
11 make their final decision to terminate.

12 Q. And certainly on the date of the sentence, when he  
13 signed the form, that form specifically said, shall  
14 be done without a hearing, that particular form that  
15 he signed.

16 A. It does not go back in front of the general sessions  
17 court. The termination hearing is held at the Drug  
18 Court level by the Drug Court judge. The Drug Court  
19 judge has an Order from Chief Justice Toal that gives  
20 him all the rights and authority of the Circuit Court  
21 judge with respect to Drug Court. So that the Drug  
22 Court judge can handle the termination without us  
23 having to go back in front of the Circuit Court.

24 Q. I'm familiar with the process and I understand that.  
25 With regard to Mr. Clyburn's hearing, do you recall

MARY-THOMAS JOHNSON-LEE - DIRECT EXAMINATION BY MS. GAY 25

1           whether you were involved and were present during the  
2           period of time that he was having his revocation  
3           hearing?

4           A.    I was not present at the termination hearing.  I  
5           believe Adam Ford from my office may have conducted  
6           that.  For whatever reason I could not be there.  I  
7           don't recall what it was.  But I was certainly  
8           familiar with the case prior to the termination  
9           hearing and aware of the reasons for such.

10          Q.    And the reasons for such was because he had been  
11          rearrested.

12          A.    Rearrested on four new drug distribution charges.  I  
13          had confirm this with Lieutenant Chris Paige and  
14          Sergeant Glenn Jacoby with the Sheriff's Office that  
15          had video for each of those.  And in the form signed  
16          by Mr.  Clyburn on the day before the plea, when he  
17          had met with all of the Drug Court personnel, and I  
18          know this from looking at the review of the file, on  
19          the from it specified that he signed the waiver and  
20          understands that he can be terminated if he is  
21          rearrested or convicted.

22          Q.    This is Exhibit 6.  I would like to have you identify  
23          this and then we'll talk about this.  Is this the  
24          waiver and the agreement that you're referring to?

25          A.    Yes, that's it.

1 Q. Okay. Pursuant to his signature and his agreement --  
2 - I believe when I got this from you some of this was  
3 highlighted. It says in Section 20, my arrest or  
4 conviction on other charges, or my failure to report  
5 other charges, may result in termination from the  
6 program. I understand that I can be terminated from  
7 the program if I am arrested in any new charge.

8 A. Yes, ma'am.

9 Q. And so it says it may result in termination. It  
10 doesn't say that it automatically results in  
11 termination. The word is may?

12 A. That's correct.

13 **MS. GAY:** Your Honor, I would like to hand this to  
14 you.

15 **THE COURT:** You may. Thank you.

16 Q. And do you have documentation that you can provide to  
17 me, because I've been looking for it, about --- Okay,  
18 let me do it this way. In Mr. Clyburn's termination  
19 hearing, it specifically says --- Well, let me ask  
20 you this way. Who is in charge in your County of  
21 notifying Mr. Clyburn that he has a Termination  
22 Hearing? Is it the Solicitor's Office or is it the  
23 Drug Court people?

24 A. The Drug Court folks themselves, I assume.

25 Q. Would you agree with me that it's not the Solicitor's

MARY-THOMAS JOHNSON-LEE - DIRECT EXAMINATION BY MS. GAY 27

1           job to notify the person that they are having a  
2           termination hearing?

3           A.    No, I've never done that.

4           Q.    So when I look through his Drug Court file, which was  
5           brought this morning and you gave to me, and I see  
6           nothing that gives him actual notice in any kind of,  
7           you know, you shall have a hearing on such day, this  
8           is hereby your notice. There is nothing like that in  
9           this Drug Court file that I can find from your  
10          office.

11          A.    As far as I know we've never given a written notice.  
12          Once they are rearrested and in jail --

13          Q.    -- Mr. Clyburn wasn't in jail. He was at home and  
14          they came and picked him up and put him back in jail  
15          on the 5<sup>th</sup> of August. He was taken to court on the 6<sup>th</sup>  
16          of August for a revocation hearing. And he entered  
17          the South Carolina Department of Corrections on the  
18          7<sup>th</sup> of August.

19          A.    As far as I know there's nothing in writing.

20          Q.    So would you agree with me that there's nothing in  
21          your County from your Solicitor's Office --- I know  
22          that Mr. Harrington was here to testify for the Drug  
23          Court program --- that would give a person written  
24          notice that they have the hearing that they may need  
25          to have an attorney present that they may qualify for

1 the public defender if they can't afford one. Any  
2 type of what I would call notice type stuff in your  
3 Solicitor's Office, not even a letter sent like that?

4 A. No, ma'am, not for a termination hearing.

5 Q. And your Solicitor's Office so of mushrooms over the  
6 Drug Court program, even though it's part of the  
7 Probate Court, it's definitely, actually overseen by  
8 your office in the sense that it's put together  
9 through your office.

10 A. Our office is not affiliated, our Drug Court is not  
11 affiliated with Probate Court as it is in Charleston.  
12 Our Drug Court is actually a Solicitor's run program.  
13 And our Solicitor's Office is licensed by DHEC to run  
14 that program in-house.

15 Q. Okay. So that's really isn't --- That is why I'm  
16 talking to you and I am talking to Mr. Harrington,  
17 they are all together and the numbers are the same.  
18 It is not a separate group of people.

19 A. That's correct.

20 Q. And your testimony is there is there is no letter  
21 that has ever gone out to Mr. Clyburn indicating to  
22 him that he would have Notice that he had a  
23 termination hearing.

24 A. Not that I'm aware of.

25 Q. And additionally, there would have been no notice in

MARY-THOMAS JOHNSON-LEE - DIRECT EXAMINATION BY MS. GAY 29

1 writing that says that he could seek counsel. And if  
2 he couldn't afford one that counsel would be  
3 appointed to represent him through the Public  
4 Defender's Officer, or something like that. Nothing  
5 like that either.

6 A. None that I'm aware of.

7 Q. Now, also, with regard to the actual termination  
8 hearing, and I know you were not there, but it's my  
9 understanding that the State took the position, and I  
10 think you said through your ADCOR (phonetic) that  
11 because he had been arrested that he automatically  
12 had to be terminated. And that was the position  
13 stated by the Solicitor at the hearing.

14 A. I don't know what was said on the record. But I can  
15 verify there is always a Drug Court team meeting  
16 prior to the Termination Hearing. And the team  
17 consists of, at various times, Vocational Rehab,  
18 sometimes law enforcement, sometimes Probation &  
19 Parole, members of the community, members of faith  
20 community. And those members together discuss the  
21 case with the judge and make the recommendation as to  
22 whether or not they are going to recommend  
23 termination. And at the termination hearing these  
24 individuals presenting for Drug Court, and I'm not  
25 sure Mr. Harrington was here at that time --

1 Q. -- It was Mr. Harrington.

2 A. In any case, makes the presentation for the Drug  
3 Court team. And then the Solicitor then stands up to  
4 do his or her part.

5 Q. Advocates for revocation?

6 A. That's correct.

7 Q. Now, pursuant to all of which you just described, and  
8 all that teaming that they do to discuss whether or  
9 not a person, what they may have done to warrant  
10 termination, is there anything ever given to a Drug  
11 Court person, and or to Mr. Clyburn, and I looked  
12 through his file and I didn't see it --- that would  
13 have said, this is what we believe you did wrong, and  
14 this is what violation and or wrongdoings would have  
15 been to give him notice of what it was so that he  
16 could prepare for his hearing?

17 A. That would have been done verbally. I was not there  
18 if it was done, so I cannot say. I would not be the  
19 proper person. You would have to address that to Mr.  
20 Harrington.

21 Q. And as far as you know there is no written document  
22 where any procedure would put that in writing.

23 A. No, ma'am, because once they sign a waiver agreement  
24 they waive so much of their rights before they even  
25 come in. But as far as whether there is an

**MARY THOMAS JOHNSON-LEE - CROSS EXAMINATION BY MS. RATIGAN**31

1 additional one, no, ma'am.

2 Q. Ma'am, can I ask you a question? Would it be  
3 appropriate for a defendant to waive his due process  
4 rights on that form?

5 A. No, ma'am.

6 **MS. GAY:** Your Honor, I don't have any further  
7 questions.

8 **THE COURT:** Is there cross?

9 **MS. RATIGAN:** Just very briefly.

10 **CROSS EXAMINATION BY MS. RATIGAN**

11 Q. Do you recall whether or not Mr. Clyburn had any  
12 other violations other than his arrest on the  
13 subsequent charges?

14 A. I believe there were. I would have to defer the  
15 extent of his issues to Mr. Harrington. I believe  
16 there was an issue though of his Mr. Clyburn. If I  
17 recall correctly there may be an issue of when he was  
18 actually captured or caught with a suitcase in his  
19 car. And absconding in itself would have been a  
20 violation which allows for termination without  
21 additional charges.

22 Q. Now, when it comes up to a termination hearing, is an  
23 attorney automatically appointed to the defendant?

24 A. No, ma'am. If they request one we always make sure  
25 they get one. We have had a few in the past request

**MARY THOMAS JOHNSON-LEE - REDIRECT EXAMINATION BY MS. GAY 32**

1 an attorney and we've made certain there was someone  
2 there, either a private attorney which they obtain,  
3 or we ask the Public Defender's Office to come in.

4 Q. So if Mr. Clyburn had requested an attorney at that  
5 Termination Hearing y'all would have worked something  
6 out and gotten someone there for him?

7 A. Absolutely.

8 **MS. RATIGAN:** That's all I have, Your Honor.

9 **THE COURT:** All right. Anything in redirect on  
10 those issues?

11 **MS. GAY:** Yes.

**REDIRECT EXAMINATION BY MS. GAY**

13 Q. With regard to Mr. Clyburn obviously in his records  
14 he didn't request an attorney. Was there any  
15 opportunity for him to know in writing that he had  
16 the opportunity to request an attorney? You said  
17 some do and some don't. Is there any letter that  
18 went from your office or the Drug Court file that  
19 says, you have an opportunity to have an attorney;  
20 let us know if you want one and we will help you find  
21 one in the event you need to have one court  
22 appointed?

23 A. Again, there's nothing in writing.

24 Q. And he did have a public defender at his original  
25 hearing. He didn't have a private attorney.

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1 A. Based on what y'all have said. I don't recall the  
2 specifics plea, only from the papers. And from the  
3 paperwork there was pro se on the detention  
4 documents. And there was no signature on the  
5 sentencing sheet. I only know what the folks tell me  
6 from the ---

7 Q. If it was Ms. Rivers who acknowledged that she had  
8 some involvement in this case, the transcript, she  
9 was a member of the public defender's office at that  
10 time. So Mr. Clyburn would have been indigent  
11 pursuant to the plea, which was sometime in 2007.

12 A. I don't recall whether he had a job or not at that  
13 time.

14 Q. Well, he qualified for public defender. He qualified  
15 for indigent status.

16 A. This was two years after he came in. One of the  
17 requirements of Drug Court is that you obtain gainful  
18 employment. If I remember correctly, I thought at  
19 one time he may have been receiving disability. But  
20 I'm not sure if he still would have qualified or not  
21 qualified. I can't say.

22 Q. And we agree there was nothing in writing telling him  
23 that if he wanted an attorney there was a process by  
24 which he could get one?

25 A. I already answered three times.

1           **MS. GAY:** I have no further questions for her, Your  
2 Honor. Thank you. And I have no problem with her being  
3 excused.

4           **THE COURT:** All right. Very good. Any objection  
5 to that?

6           **MS. RATIGAN:** No, Your Honor.

7           **THE COURT:** You are free to leave unless you would  
8 like to stay. Please call your next witness.

9           **MS. GAY:** I call Mr. Harrington from Drug Court.

10          **THE COURT:** Please come forward and take the oath of  
11 a witness.

12                                   **WHEREUPON, MORRIS HARRINGTON**

13                                   **FIRST BEING DULY SWORN TESTIFIES AS FOLLOWS**

14          **MR. HARRINGTON:** I do.

15          **THE COURT:** Good afternoon.

16          **MR. HARRINGTON:** Good afternoon.

17          **THE COURT:** Counsel.

18                                   **DIRECT EXAMINATION BY MS. GAY**

19          **Q.** Mr. Harrington, we've been talking about Mr.  
20 Clyburn's Drug Court Termination Hearing, which  
21 happened on August 6, 2009. You were present at that  
22 hearing?

23          **A.** I was.

24          **Q.** And I believe that you had become the director  
25 shortly before this hearing, but someone else was

## MORRIS HARRINGTON - DIRECT EXAMINATION BY MS. GAY

35

1 running the program before that.

2 A. Yes.

3 Q. Obviously since 2009 you are still the director of  
4 the program.

5 A. Yes.

6 Q. And this morning, pursuant to my request and Mr.  
7 Clyburn's consent form I was handed a full copy of  
8 the actual drug file, Drug Court file for him.  
9 Reviewing those documents, do you have any written  
10 paperwork from you as the Drug Court director that  
11 said that Mr. Clyburn was given notice of this  
12 hearing of August 6, 2009?

13 A. No.

14 Q. Do you have any written notice that would have been  
15 sent to Mr. Clyburn that said, Mr. Clyburn, you have  
16 a hearing, and by the way you can have a lawyer if  
17 you want one? Let us know and we will help you find  
18 one, and you can be appointed a public defender for  
19 that hearing?

20 A. There is no written notice, no. Verbal conversation,  
21 but no written notice.

22 Q. And you said that --- I would like to show you some  
23 documents that have to do with his particular file.  
24 Are you aware, and if you weren't I've got documents  
25 to establish it, that Mr. Clyburn has cancer?

1 A. Yes.

2 Q. And I'm going to show you Exhibit 8, Carolina Blood &  
3 Cancer Care Associates. This is a document, Exhibit  
4 8, that came from the Drug Court file, Carolina Blood  
5 & Cancer Care Associates. Would you recognize that,  
6 or provided that to me as a document from his Drug  
7 Court file?

8 A. Yes, that's it.

9 Q. So obviously Mr. Clyburn had brought, and I believe  
10 in his file it was mentioned, medical records of the  
11 fact that he had cancer and had surgery.

12 A. Yes.

13 Q. And that was all in his file?

14 A. It was in his file. The information he brought up to  
15 put in his file.

16 Q. And with regard to his illness I'm going to show you  
17 some more documents. This is Exhibit 9. These are  
18 just sheets that they fill out every time they come  
19 in, Drug Court status report. And if you don't mind  
20 looking at these documents and reading for the Court  
21 what's written in handwriting, I'll show you where,  
22 in this area on each one of these. I believe there  
23 is three sheets.

24 A. In hospital in Monroe County, did not complete the  
25 CWV going to the hospital.

## MORRIS HARRINGTON - DIRECT EXAMINATION BY MS. GAY

37

1 Q. That's one of them. This too.

2 A. No twelve steps or church, did not complete community  
3 service work. To be in hospital, excused due to  
4 medical leave, work-to-status.

5 Q. And then the third one.

6 A. No medical leave, surgery.

7 Q. I believe it says on medical leave, surgery.

8 A. Excuse me, on medical leave, surgery.

9 Q. So these documents, which would have been dated 11-  
10 22-2007, sometime in 2007, and 5-29-2008, are all  
11 about the fact that he had surgery and is on medical  
12 leave during the period of time he was in Drug Court.  
13 He was bringing the documentation to the office  
14 telling you about his illness. And y'all were giving  
15 him leave or excuse time based on the fact that he  
16 had to go to the hospital.

17 A. Yes.

18 Q. I would like to show you what --- Mr. Clyburn's  
19 termination was August 6, 2009. And his Drug Court  
20 program actually was --- well, his participation I  
21 guess you could say based on what I saw in the file,  
22 had already ended before --- in May of 2009. Do you  
23 have any information to dispute that in your whole  
24 file this morning?

25 A. The information I had is that when a person completes

1 the program, at that time when they complete the  
2 program they were still in the program six months  
3 later. After six months then they were completed.

4 Q. I'm going to show you Exhibit 13, a status report.  
5 This status report is dated 5-14-09. Would you look  
6 at this one?

7 A. Yes.

8 Q. And read what's in the handwriting.

9 A. It says, put on medical leave until graduation.

10 Q. So put on medical leave until graduation would have  
11 been he's completed everything he needed to do at the  
12 program but he had to wait to graduate?

13 A. Clinically, he completed the clinical.

14 Q. Okay. And I believe this document is dated May 14<sup>th</sup>,  
15 09. What would have been the process and the  
16 procedure to tell him when to come back to graduate?

17 A. Actually it would have been to get in touch with him.  
18 But we couldn't contact him. He was not available.

19 Q. Well, I think that when he got arrested on these new  
20 charges those warrants are dated June 2009. And he  
21 got arrested, made a bond, released on a P.R. bond.  
22 And then in August of 2009 that y'all came and picked  
23 him up on the 5<sup>th</sup>. Termination hearing was the 6<sup>th</sup>.  
24 Do you know when his four charges came in June of  
25 2009?

1 A. Let me explain this, what I do know, okay? May I?  
2 May I?

3 **THE COURT:** Go ahead.

4 Q. Yes, sir.

5 A. Mr. Clyburn was in the program. And, of course, I  
6 think he still owed some money. He still was  
7 financially involved in the program without having  
8 paid everything he owed. He asked us permission to  
9 not come because it was very costly for him to have  
10 to come every day, come all the time to the program,  
11 so we allowed him not to have to come until the day  
12 of graduation. We even told him he would not  
13 graduate on the first that he completed the program.  
14 He would graduate when we set graduation up. And he  
15 agree to that. In the meantime he said he had some  
16 work he wanted to do in pinestraw. He said I was  
17 doing some pinestraw work and I think I can do some  
18 pinestraw work and catch my fees up. We gave him  
19 permission to do that. Then it got to the point  
20 where Mr. Clyburn was being accused, I'm not saying  
21 it would happen, but he was being accused of selling  
22 drugs. I contacted Mr. Clyburn at one time. He and  
23 I talked on the phone about that situation. From  
24 that time forward I was not able to get hold of Mr.  
25 Clyburn. He assured me that he was not doing drugs,

1 he was not selling drugs. He said, I'm not the  
2 person that's selling the drugs. It's my son that's  
3 selling the drugs, not me. That's what he said to  
4 me. I said, well, whatever you are doing wrong out  
5 there you need to stop it because you're going to get  
6 into some trouble, and you are not going to be able  
7 to graduate. That was our conversation with he and  
8 his girlfriend.

9 Q. I understand that. Ultimately the warrants --- He  
10 has not been convicted of those warrants. The  
11 warrants are still pending. Are you aware they are  
12 still pending and he's never been convicted on them?

13 A. But he has been charged.

14 Q. He has been charged but never convicted.

15 A. Right.

16 Q. And certainly his defense on that charge at this  
17 point is he's not pleading guilty and hasn't gone to  
18 trial yet. He certainly hasn't admitted on any level  
19 that that was him, or that committed those acts. So  
20 at some point, as I said, he's picked up on the 5<sup>th</sup> of  
21 August, put in jail. I believe you managed to talk  
22 with him --- he talked to you. And the next day he's  
23 brought into court, which is the 5<sup>th</sup>. And that's when  
24 the revocation hearing is.

25 A. Let me tell you my record of it. He was picked up,

## MORRIS HARRINGTON - DIRECT EXAMINATION BY MS. GAY

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1 put in the jail. I went to the jail to see him. I  
2 told him that he would be brought into court the next  
3 day, and if you need an attorney you need to get one,  
4 or an attorney will be available to you. I said, you  
5 can get you an attorney. He said, I didn't do  
6 anything wrong, I don't need an attorney.

7 Q. But he was a public defender client. Did you know  
8 whether or not the had money to hire an attorney in  
9 twenty-four hours notice?

10 A. Well, that's not what we were discussing at the time.  
11 I don't know how much money he had. When he left us  
12 he left to go make money. And apparently we thought  
13 he had made money with all the drugs he allegedly was  
14 selling. I thought he had made money. I don't know.  
15 I didn't know whether he had money or not.

16 Q. Well, certainly you would agree that there was  
17 nothing given to him in writing that said that his  
18 hearing was going to be on the 5<sup>th</sup>?

19 A. He was at the county jail. He and I had a verbal  
20 conversation at the county jail in the conference  
21 room like we normally do when I have somebody out  
22 there.

23 Q. And as far as his appearing in Drug Court we've all  
24 seen the record, the judge heard that he had pending  
25 charges and terminated him at that point. There is a

1 point in the record where Mr. Clyburn tried to say  
2 something and then the judge cuts him off, and says,  
3 you're terminated. That's in the record.

4 A. I don't remember that part, could be but I don't  
5 remember that.

6 Q. And so Mr. Clyburn told the judge, which I know he  
7 did testify also, and you were present at the time,  
8 that he wasn't guilty of the charges, and that he was  
9 --- that the charges weren't charges for him at the  
10 time of the termination hearing.

11 A. That's correct.

12 MS. GAY: I would like to confer with my client one  
13 second, Your Honor.

14 THE COURT: Go ahead.

15 (PAUSE.)

16 MS. GAY: Your Honor, these are the documents that I  
17 talked ---

18 THE COURT: If you have some of the Exhibit, we  
19 don't want them to get away from us. Any more questions?

20 MS. GAY: No, I'm finished with him.

21 THE COURT: Cross examination?

22 MS. RATIGAN: Just very briefly, Your Honor.

23 CROSS EXAMINATION BY MS. RATIGAN

24 Q. Mr. Harrington, Mr. Clyburn, he got arrested on all  
25 four additional distribution charges; that's correct?

1 A. That's correct.

2 Q. And in addition to being arrested, did he have other  
3 violations of the program?

4 A. I think he had several sanctions.

5 **MS. GAY:** Your Honor, I have a copy of what they may  
6 be. I'll give it to her.

7 **THE COURT:** Alright.

8 A. On 11-10-07, he missed a drug screen. He got eight  
9 hours of community service. On 12-2-07, he missed a  
10 group without informing me. We let him make up two  
11 missed meetings. And on 1-3-08, his fees were  
12 delinquent. And, of course, he paid a \$5.00 fee for  
13 that. That's all.

14 Q. Would these sanctions have been sufficient to  
15 terminate him from Drug Court on their own?

16 A. Not at all.

17 Q. Okay. So he had these sanctions but it's only one  
18 that he got arrested that y'all moved to terminate  
19 him.

20 A. Only one.

21 Q. Okay. So you can't be in Drug Court at all if you  
22 pick up an arrest; is that correct?

23 A. If you pick up a charge you can't be in Drug Court.

24 Q. And your testimony is right after he got arrested you  
25 went to see him at jail, and you advised him both

1           that he could have an attorney, and that the  
2           termination hearing was the next day?

3           A.    Yes, that's exactly right.

4           Q.    Okay. Did he indicate to you that he either needed  
5           more time, or needed to talk to somebody, or needed a  
6           lawyer? Did he make any representations like that to  
7           you?

8           A.    His statement to me was that it was not me, I did not  
9           do it, and I don't need thing I'm being treated fair.  
10          Those were his statements.

11          Q.    If he had told you at that time that he wanted to  
12          have an attorney, what would you have done?

13          A.    We would have got him an attorney. What I would have  
14          done was to call Ms. Mary Thomas Williams and said,  
15          what do we do in this situation, this gentleman wants  
16          an attorney, and she would have told us to go ahead  
17          and get him an attorney. We would not have had the  
18          trial until we get him an attorney.

19          Q.    And just for the sake of the record, and to protect  
20          everyone involved, you're testifying here today after  
21          Mr. Clyburn signed a consent to release information;  
22          is that correct?

23          A.    That's correct.

24          Q.    And it's pursuant to this consent that you are both  
25          testifying and provided those documents to his

**MORRIS HARRINGTON - REDIRECT EXAMINATION BY MS. GAY**

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1 lawyer?

2 A. That's correct.

3 Q. Okay.

4 **MS. RATIGAN:** That's all I have, Your Honor.

5 **THE COURT:** All right. redirect on any of those  
6 issues?

7 **MS. GAY:** Yes, Your Honor.

8 **REDIRECT EXAMINATION BY MS. GAY**

9 Q. This is Exhibit 10, written documentation from the  
10 Drug Court file, sanctions.

11 A. I just read that.

12 **MS. GAY:** I would like to admit this, Your Honor.

13 **THE COURT:** Alright.

14 Q. In the record of the actual Drug Court transcript Mr.  
15 Clyburn tried to tell the judge --- defendant I guess  
16 you could say, stated a position. However, ---

17 **MS. RATIGAN:** I'm going to object to this being  
18 outside the scope of redirect, Your Honor.

19 **MS. GAY:** He said that if he said he wanted a lawyer  
20 he could have said it at some point.

21 Q. My question to you is, at the time of the hearing ---

22 **THE COURT:** Counsel, just a moment. Let me make a  
23 decision. Let's go back. You object that's outside the  
24 scope?

25 **MS. RATIGAN:** Of redirect.

1           **THE COURT:** Tell me again why you believe that's  
2 within the scope of ---

3           **MS. GAY:** I can rephrase the question, Your Honor.

4           **Q.** My question is when you said you believe that if he  
5 had said he wanted a lawyer you could have somehow  
6 continued the hearing. My question is if he said he  
7 wanted a lawyer during the hearing, would there have  
8 been any ability to continue it at that point?

9           **A.** If he said he wanted a lawyer just before the officer  
10 brought him up the judge would have stopped and said,  
11 okay, take him back, he wants a lawyer, we're not  
12 going to try him right now.

13           **Q.** But at any point did y'all give him written notice of  
14 other than verbal notice that he could have a lawyer?

15           **A.** There was not written notice, but it was verbal  
16 notice. No written notice, no.

17           **Q.** Alright.

18           **MS. GAY:** Thank you, Your Honor.

19           **THE COURT:** Sir, you are free to leave. Have a good  
20 day.

21           For the benefit of the Court Reporter, I'm going to  
22 overrule the objection that was posed during the redirect.  
23 Any further witnesses now for the applicant?

24           **MS. GAY:** Sir? My next witness is Lenson Clyburn.

25           **THE COURT:** All right. Please come forward and

LENSON CLYBURN, JR. - DIRECT EXAMINATION BY MS. GAY

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1 take the oath of a witness.

2 WHEREUPON, LENSON CLYBURN, JR.

3 FIRST BEING DULY SWORN TESTIFIES AS FOLLOWS

4 MR. CLYBURN: I do.

5 DIRECT EXAMINATION BY MS. GAY

6 Q. Mr. Clyburn, we are here today because you filed an  
7 application for Post Conviction Relief. To state on  
8 the record, your application for Post Conviction  
9 Relief was filed on March 24, 2010, with my  
10 assistant.

11 A. Yes.

12 Q. And during that --- In that application you named as  
13 your counsel, for purposes of discussion, the person  
14 who was the public defender at the time, but not ---  
15 whose name is Jason Turnblad because it was about the  
16 Drug Court failure to have a lawyer. And then later  
17 you amended your application to include Patricia  
18 Rivers also.

19 A. Right.

20 Q. And you're aware that in today's hearing the State  
21 filed a Motion to dismiss part of this, and we're  
22 going forward today with regard to the Drug Court  
23 termination hearing. You're aware of that?

24 A. Yes, yes.

25 Q. And you've listened now to three witnesses that the

1           time frame in 2007 when you pled, and also 2009 at  
2           the termination hearing. Initially, could you tell  
3           the Court what was going on in your world in 2007 on  
4           the day of November 7, 2007, when you showed up to  
5           plead guilty who was talking to you, who wasn't  
6           talking to you. Let the Court know what was going on  
7           that day.

8           A. Well, they said I had a charge --- the Solicitor  
9           talked to me about going to the Solicitor's Office to  
10          sign up for Drug Court.

11          Q. Had you ever discussed with Ms. Rivers this Drug  
12          Court thing?

13          A. No, ma'am.

14          Q. Had she ever explained to you any of the set up about  
15          how Drug Court works?

16          A. No, she didn't.

17          **MS. RATIGAN:** Your Honor, I'm going to object at  
18          this time. This is dealing with the representation and  
19          the events surrounding the guilty plea, which Your Honor  
20          has ruled are untimely, and that we should just be here on  
21          the Drug Court termination issues.

22          **THE COURT:** Sustained. Let's move forward. I have  
23          an understanding of the underlining issues. Please move  
24          to your next issue that has to do with the revocation  
25          hearing.

1 Q. Pursuant to the fact that you were referred to Drug  
2 Court, describe to the Court your participation in  
3 Drug Court, what you did, and how that affected your  
4 life and illness.

5 A. During the Drug Court I had colon surgery done. And  
6 right before I had colon surgery during the time that  
7 they said I missed a day in Drug Court my sister had  
8 passed. I called the Solicitor's Office and they  
9 said they were going to let the Drug Court know. So  
10 evidently they didn't let them know. But I did call.

11 Q. And that was the time listed in your sanctions that  
12 said ---

13 A. Right.

14 Q. What about your illness, what were you doing in terms  
15 of documenting that to the Drug Court personnel?

16 A. I was going back and forth to chemo and radiation.  
17 And far as the fees and everything, I wasn't  
18 delinquent on that just during the time that I was  
19 out with treatment, you know. I just got behind  
20 then, but then I caught it up.

21 Q. So coming into May of 2009, I believe that Mr.  
22 Harrington acknowledged that there was a document,  
23 Drug Court status report that said that you were  
24 excused until graduation. That document is dated May  
25 14, 2009. What was your understanding of what had

1           been said to you about that?

2           A.   My understanding was that I was released from Drug  
3           Court.  Didn't have to come back anymore until they  
4           got enough for a class to graduate.

5           Q.   Did you have any idea how long that may take?

6           A.   They told me anywhere from July to August.  That's  
7           what they told me.

8           Q.   And this was in May.  So was it your understanding  
9           that you had done all of the requirements of Drug  
10          Court required, the fees and participation?

11          A.   Right, yes I have.  Yes, ma'am.

12          Q.   And he said that you had gone off to do the pinestraw  
13          business.  Were you communicating with them still, or  
14          were you --- What were you doing?

15          A.   During the time that they released me from Drug Court  
16          that's the only time that I had talked to them about  
17          that.  I told them I had a little pinestraw business.  
18          I wasn't delinquent on my payments.  I had paid it  
19          up.  I had did eighteen months of Drug Court.  
20          Everything was paid up.  I couldn't pay anymore Drug  
21          Court because I had done paid eighteen months at  
22          \$30.00 a week.  I was going to take the other money  
23          and pay my fine.

24          Q.   So in June, early June of 2009, they arrested you and  
25          they took you to jail.  Were you given a P.R. bond or

1 a low bond?

2 A. Yes, I was given a P.R. bond.

3 Q. And so you were released that the next day?

4 A. The same day.

5 Q. And what happened between then and on August 5<sup>th</sup> when  
6 you were terminated from the program? Tell the Court  
7 from the time you got out of jail in June what  
8 happened in your life.

9 A. I got out June 8<sup>th</sup>. On the 11<sup>th</sup> I think my mother said  
10 the sheriff's department had come by, but I never did  
11 see them, or heard nothing else from them. And I  
12 think --- I talked to Mr. Harrington one time after  
13 that and he said something about asking where was I  
14 at. And I told him. He said he needed to see me. I  
15 asked him did the Drug Court take out a warrant on me  
16 and he said, no. I said, well, my mother said the  
17 sheriff had come by. After that I hadn't been in  
18 contact with him anymore until they picked me up on  
19 August 5<sup>th</sup>.

20 Q. So during the period of time that was discussed with  
21 Mr. Harrington the fact that you had been arrested  
22 and that you thought that they maybe were looking for  
23 you, did he tell you anything at that point about any  
24 type of hearing, or any type of need to come in the  
25 office?

1 A. No, ma'am.

2 Q. And were you ever given anything in writing about the  
3 specific dates that you were supposed to come after  
4 May 14<sup>th</sup> that said that you were excused until  
5 graduation?

6 A. No, ma'am.

7 Q. Did you ever receive anything in the mail from them?

8 A. No, ma'am. They said they would write me or either  
9 call me when they got enough people to graduate.

10 Q. So on May 5<sup>th</sup> --- on August 5<sup>th</sup>, which was the day  
11 before the termination hearing, did the sheriff's  
12 department come pick you up from your house?

13 A. Yes, ma'am.

14 Q. And when they put you in the jail, did you have an  
15 occasion to speak to Mr. Harrington?

16 A. I never seen Mr. Harrington until I went to court  
17 that next day.

18 Q. Was there ever any occasion for you to have written  
19 notice or verbal notice that you were having a  
20 hearing the next day?

21 A. No, ma'am.

22 Q. Did you --- were you ever notified by the Drug Court  
23 or the Solicitor's Office that you a right to counsel  
24 at that hearing?

25 A. No, ma'am.

## LENSON CLYBURN, JR. - DIRECT EXAMINATION BY MS. GAY

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1 Q. So it's your position you never even knew you were  
2 having a hearing?

3 A. No.

4 Q. And at the time of this hearing you tried telling the  
5 judge --- defend yourself, I guess you could say,  
6 about what was going on?

7 A. Yes.

8 Q. What was your general attitude --- general thoughts  
9 about how the Court felt about you trying to say  
10 anything?

11 A. He cut me short on everything I tried to say, you  
12 know. I was trying to let the judge know that the  
13 Drug Court had released me until graduation, but I  
14 was cut short. I couldn't get anything out.  
15 Everything was cut short. I couldn't talk.

16 Q. You were represented --- when you were pleading in  
17 2007 you were given a public defender obviously.

18 A. Yes, ma'am.

19 Q. Did you qualify for a public defender?

20 A. Yes, ma'am.

21 Q. Did you --- so you knew --- had some experience with  
22 talking to an attorney about stuff related to the  
23 Court system. Did you have any concept at all that  
24 you would be represented by an attorney at the  
25 termination hearing?

1 A. No.

2 Q. Did anybody ever tell you that you would be  
3 represented by an attorney?

4 A. No.

5 Q. If you did know that you could have asked for an  
6 attorney what would you have done?

7 A. I would have got one. I would have asked for an  
8 attorney.

9 Q. If you had known you could have asked for an attorney  
10 in the middle of the hearing, what would you have  
11 done?

12 A. I would have asked for one.

13 Q. At what point, or is it fair to say that until about  
14 the middle of the hearing you didn't really realize  
15 they were putting you in jail at the hearing.

16 A. No, not that day.

17 Q. Before that you thought there would be some  
18 opportunity for you to share your thoughts?

19 A. Right, right, yes, ma'am.

20 Q. And do you feel that as if an attorney would have  
21 been assisted --- could have assisted you on that day  
22 and maybe the outcome would have been different?

23 A. Yes, ma'am.

24 Q. I believe that factually you were introduced to the  
25 Department of Corrections on August 7<sup>th</sup>, which was the

1 day after this hearing.

2 A. Yes, ma'am.

3 Q. And is that when your sentence was imposed?

4 A. Yes, ma'am.

5 Q. Did you have any idea at that point what it was to  
6 even file an appeal?

7 A. No.

8 Q. And I believe the Attorney General cited that you  
9 tried to file an appeal at that point, but it was  
10 dismissed because it was untimely.

11 A. Right.

12 Q. Did anyone explained to you what your rights to  
13 appeal at any point in time? The time you were  
14 picked up originally in 2007 to when you were  
15 terminated, did anybody ever tell you what your right  
16 to appeal may have been?

17 A. No, ma'am.

18 Q. Is there anything else that you want to share with  
19 this Court?

20 A. No, that about covers everything.

21 **THE COURT:** Thank you. Is there cross examination?

22 **MS. RATIGAN:** Very briefly, Your Honor.

23 **CROSS EXAMINATION BY MS. RATIGAN**

24 Q. So when you were arrested in June of 2009 that was  
25 because you got picked up on a bench warrant; is that

1 correct?

2 A. 2009?

3 Q. Yes, June of 2009.

4 A. Yes.

5 Q. You got picked up on a bench warrant and that was  
6 because of a violation and that was because of a  
7 violation of the Drug Court program?

8 A. Yes.

9 Q. Okay.

10 **MS. RATIGAN:** Judge may I ---

11 **MS. GAY:** I don't think I've ever seen that  
12 document. Is there a ---

13 **MS. RATIGAN:** Yes. His testimony should be  
14 sufficient.

15 **THE COURT:** I have them all.

16 **(PAUSE.)**

17 A. I wasn't picked up in June of 2009 on a bench  
18 warrant. That was charges that were put on me about  
19 some pictures.

20 **MS. RATIGAN:** May I approach, Judge?

21 **THE COURT:** Yes.

22 Q. Mr. Clyburn, do you remember signing your Exhibit 6,  
23 do you remember signing this before you pled guilty?

24 A. I remember signing it, but I didn't know anything  
25 about it. I didn't get a lawyer --- my lawyer wasn't

LENSON CLYBURN, JR. - CROSS EXAMINATION BY MS. RATIGAN 57

1           there to go through that with me. I just signed it  
2           because the Solicitor talked me into doing that.

3           Q. It says legal agreement. There are these numbered  
4           paragraphs. Are those your initials out beside them?

5           A. Right.

6           Q. Did you read these before you initialed it?

7           A. Yes.

8           Q. And in paragraph twenty it says, I understand that I  
9           can be terminated from the program if I am arrested  
10          on any new charges. Are those your initials right  
11          there?

12          A. Yes.

13          Q. Okay. So you read through this and you initialed it  
14          and you signed it. But your testimony is that no one  
15          ever explained it to you.

16          A. Right.

17          Q. No one ever told you that you could get a lawyer for  
18          this Drug Court termination hearing?

19          A. No, they didn't.

20          Q. And that Mr. Harrington never came to talk to you  
21          prior to ---

22          A. Mr. Harrington never did come see me while I was in  
23          jail. The only time I saw him was when I was coming  
24          to court the next day.

25          Q. Okay. Why didn't you ask the judge that day for a

1 lawyer or more time to get your case together?

2 A. I wasn't thinking. I wasn't thinking. If I had know  
3 I could have got a lawyer during that time I would  
4 have asked them that. They ran through that so fast  
5 I didn't have time to do anything. They wasn't even  
6 listening to me.

7 Q. Okay. But you don't dispute that you got arrested on  
8 four additional distribution charges while you were  
9 in Drug Court, you don't dispute that?

10 A. Right.

11 Q. Okay. And those charges are still pending?

12 A. Right. They had four pictures of me, nothing else.

13 Q. But you did get arrested on those?

14 A. I did get arrested bogus.

15 **MS. RATIGAN:** That's all I have, Your Honor.

16 **THE COURT:** Is there redirect on those issues?

17 **MS. GAY:** Yes, sir.

18 **REDIRECT EXAMINATION BY MS. GAY**

19 Q. She asked you if you had been arrested in June of  
20 2009 on a bench warrant issued by Drug Court. You've  
21 never been arrested on a bench warrant issue by Drug  
22 Court?

23 A. No, ma'am.

24 Q. That June 2009 arrest had to do with these new other  
25 charges.

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1 A. Right.

2 MS. GAY: I would like to look at the document one  
3 more time, Your Honor.

4 THE COURT: Yes.

5 Q. I would like to determine when this document was  
6 signed, this document, Exhibit 6, was signed on 11-6-  
7 07. Do you agree that was the date that was signed?

8 A. Yes.

9 Q. Was your attorney who was appointed to represent you  
10 at the time, Ms. Rivers, in the room, or going over  
11 any of this with you?

12 A. She wasn't.

13 MS. GAY: I have no further questions, Your Honor.

14 THE COURT: All right. Sir, you may step down.  
15 Please watch your step as you exit. Are there further  
16 witnesses for the applicant?

17 MS. GAY: Not at this time, Your Honor.

18 THE COURT: All right. Applicant rests. Are there  
19 witnesses for the State?

20 MS. RATIGAN: No, Your Honor. We would rest on the  
21 record before Your Honor, the Exhibits that have been  
22 entered, and the testimony of the witnesses.

23 THE COURT: All right. Just one moment, please.

24 (PAUSE.)

25

**RULING OF THE COURT**

## LENSON CLYBURN, JR. VERSUS THE STATE

60

1           **THE COURT:** The Court is prepared to rule at this  
2 time. I've had an opportunity to review the Exhibits.  
3 During the course of this trial I've heard the testimony  
4 from the four witnesses who appeared. I've heard  
5 arguments of counsel.

6           And, Mr. Clyburn, you basically alleged that there  
7 have been constitutional violations in a way in which your  
8 Drug Court's revocation occurred. You also have taken the  
9 position, although the Court has by Motion, granting the  
10 Motion of the State, taken the position that your attorney  
11 was not effective at the time you entered your trial. But  
12 I do not find that you have presented any evidence today  
13 that would warrant being granted Post Conviction Relief.

14           The burden of proof is on the applicant. And this is  
15 what the Court finds.

16           First of All, Drug Court is intended to benefit. Ms.  
17 Rivers was able to work that out for you, which would  
18 allow you, after completing the Drug Court, to walk away  
19 with expungement as if the matter never happened.

20           You had two substantial drug charges against you at  
21 the time. And what I find is that you didn't take  
22 advantage of that opportunity.

23           In fact, that you committed several acts for which  
24 you could have been discharged from Drug Court, including  
25 missing a drug screen. And under paragraph number eight,

## LENSON CLYBURN, JR. VERSUS THE STATE

61

1 you could have been discharged for that, but was not.

2 You missed a group session on December 2<sup>nd</sup>. Under  
3 paragraph thirty-two of the agreement you signed for Drug  
4 Court you could have been dismissed, but you were not.

5 And then most importantly you were arrested on four  
6 counts, not one, but four counts of distribution of crack  
7 cocaine. So we're right back into the same type of  
8 charges for which you had been initially entered into Drug  
9 Court.

10 And I find that Mr. Harrington's testimony is  
11 credible that he had gone to you and warned you that there  
12 was evidence, or believed that you were involved in drug  
13 activity again. And you simply failed to heed those  
14 warnings.

15 Thus, you are where you are because of the acts you  
16 have taken.

17 The Court finds no basis whatsoever, neither  
18 constitutional nor factual to grant you any relief. So  
19 for these reasons, I'm going to deny your Post Conviction  
20 Relief.

21 Now, please understand you can appeal this decision.  
22 And here's what is going to happen. I'm going to ask the  
23 Attorney General to within thirty days of today's date to  
24 prepare an Order, which will memorialize what I've just  
25 said, and dismiss your PCR. I will then sign that Order,



CERTIFICATE OF REPORTER

63

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHESTERFIELD	)	
	)	
LENSON CLYBURN, JR.	)	JUNE 9, 2011
	)	
PLAINTIFF,	)	
	)	
VERSUS	)	
	)	
THE STATE OF SOUTH CAROLINA	)	2010-CP-13-00126
	)	
DEFENDANT.	)	
	)	

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the above captioned case, relative to appeal, in The Court of Common Pleas in Chesterfield County, South Carolina, on the 8<sup>th</sup> day of June 2011.

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

October 19, 2011



Pamela Ozment-Cartee  
Circuit Court Reporter

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHESTERFIELD )  
 )  
 Lenson Clyburn, Jr., )  
 S.C.D.C. No. 305094, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2010-CP-13-0126

**ORDER DENYING  
 POST CONVICTION RELIEF**

2011 JUL 26 AM 9  
 A True Copy Attest  
 Jay O. Bullock  
 Clerk of Court

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 29, 2010. The Respondent made its return and partial motion to dismiss on May 14, 2010, and its amended return and partial motion to dismiss on January 5, 2011. An evidentiary hearing into the matter was convened on June 8, 2011, at the Darlington County Courthouse. The Applicant was present at the hearing and represented by Melisa W. Gay, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

*Jas*

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Chesterfield County Drug Court Coordinator Morris Harrington, assistant solicitor Mary Thomas Johnson-Lee, Esquire, and former Chesterfield County Public Defender Patricia C. Rivers, Esquire. The Court had before it the transcripts from both the guilty plea and drug court termination hearings, the records of the Chesterfield County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and Respondent's amended return and partial motion to dismiss.

### PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Chesterfield County Clerk of Court. Applicant was indicted at the October 2007 term of the Chesterfield County Grand Jury for possession with intent to distribute (PWID) marijuana (2007-GS-13-0702) and PWID crack cocaine (2007-GS-13-0703). Patricia C. Rivers, Esquire represented Applicant on both charges.

On November 7, 2007, Applicant pled guilty to the charges. The Honorable Edward B. Cottingham sentenced Applicant to concurrent terms of seven (7) years for PWID marijuana and seven (7) years for PWID crack cocaine. The sentences, however, were suspended upon successful completion of the Chesterfield County drug court program. Applicant did not appeal this referral.

On August 6, 2009, Applicant appeared in Court for a drug court termination hearing. Applicant was not represented by counsel. The Honorable Edwin M. Davis<sup>1</sup> levied the original sentences of seven (7) years imprisonment for each charge. On September 30, 2009, the South Carolina Court of Appeals dismissed the subsequent notice of appeal, finding it was not timely filed.

### ALLEGATIONS

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

1. Ineffective assistance of counsel "which lead [sic] to unconstitutional conviction and confinement":
  - a. Failed to consult about an appeal.
  - b. Failed to review discovery material – specifically the prior criminal record – before the guilty plea.

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<sup>1</sup> Judge Davis is the probate judge for Chesterfield County.

- c. Failed to inform of the consequences of a plea in drug court.
- d. Failed to represent Applicant "at the sentencing phase of my drug court plea."

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### Partial Motion to Dismiss

At the start of the PCR hearing, the Respondent argued its partial motion to dismiss. As Applicant had initially pled guilty and was sentenced on November 7, 2007, and did not file his PCR application until March 29, 2010, Respondent argued all issues related to the Applicant's guilty plea hearing itself were untimely. Respondent conceded the one issue that would survive the expiration of the statute of limitations would be whether the Applicant was entitled to a belated appeal from his guilty plea hearing. This Court agrees that this sole PCR issue remains extant with regard to the guilty plea. South Carolina Code Ann. § 17-27-45(a) reads as follows:

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

Further, the South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. See Pelouquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Accordingly, this Court finds Respondent's partial motion to dismiss must be granted and the Applicant is barred from litigating issues – except for that of a belated appeal – related to his

November 7, 2007 guilty plea.

Belated Appeal from Guilty Plea Hearing

The Applicant stated he was not aware of the right to file an appeal from his guilty plea hearing. Applicant's plea attorney, Patricia C. Rivers, Esquire, testified that she represented Applicant for his guilty plea and sentencing. Attorney Rivers testified that, while the drug court agreement states the Applicant was pro se,<sup>2</sup> this was an error. Plea counsel testified she and Applicant had discussed his appellate rights, but that there was no reason to appeal the guilty plea because Applicant received what he wanted – admission to the drug court program.

This Court finds plea counsel's testimony that she advised Applicant of his appellate rights is credible. Regardless, even assuming arguendo that counsel did not have such a discussion with Applicant, this allegation is without merit. Plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). To make this determination, "courts must take into account all the information counsel knew or should have known." Id. Although not determinative, a highly relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because a plea may indicate the defendant seeks an end to judicial proceedings. Id. There being nothing in the record to indicate that the Applicant reasonably demonstrated to plea counsel that he was interested in appealing, nor proof of the existence of any viable appellate issues, this Court finds he is not entitled to a belated appeal from the guilty plea hearing.

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<sup>2</sup> Applicant's Exhibit 11.

Post-Conviction Relief Issues

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

Applicant testified he had generally complied with the policies of the drug court program and, in May of 2009, had been excused from further participation in the program until graduation.<sup>3</sup> Applicant stated he was then arrested on August 5, 2009, and then contacted the drug court program director, but that the director did not notify him of the pending drug court termination hearing. Applicant stated he was never informed either that the termination hearing would occur the day after his arrest or that he could have counsel appointed for that hearing. Applicant stated he would have requested an attorney to represent him at the termination hearing if he had known he could do so.

*JMB*  
*5*

The director of the Chesterfield County drug court program, Morris Harrington, testified that Applicant had substantially completed the program and confirmed Applicant only needed to attend graduation. Harrington testified, however, that there was still a six (6) month period in which the Applicant could not re-offend. Harrington testified he spoke to Applicant after he had been accused of drug dealing, but had not been charged, but that the Applicant stated he was not involved in any drug dealing. Subsequently, Applicant was arrested on drug distribution charges while still enrolled in drug court. Mr. Harrington testified he also spoke to Applicant at the jail after he was arrested, and told Applicant at this meeting that the drug court termination hearing would take place the next day and that he could have an attorney at that hearing. Mr. Harrington stated Applicant told him he did not want an attorney because he was not guilty, and testified

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<sup>3</sup> Applicant's Exhibit 13.

that, if the Applicant had stated he wanted counsel, he would have contacted Mary Thomas Johnson-Lee at the solicitor's office to have an attorney appointed. Witness Harrington confirmed one could not participate in the drug court program after an arrest, and that in addition to Applicant's arrest on drug charges, there were three (3) other sanctions against him.<sup>4</sup>

Assistant solicitor Mary Thomas Johnson-Lee testified the solicitor's office is in charge of the drug court program in Chesterfield County. Counsel testified that, typically the day before a guilty plea hearing that will result in a drug court sentence, the defendant signs a document called a "waiver and agreement." Mrs. Johnson-Lee testified this document – among other things – notifies the defendant that an arrest while in the drug court program is grounds for termination from the program. The witness testified that Applicant signed the waivers and agreement before he pled guilty.<sup>5</sup> She testified that subsequently, Applicant was arrested for four (4) drug transactions – each recorded on video – while still in the drug court program. Usually, an employee from the drug court program verbally notifies a defendant of the termination hearing, and attorneys are not automatically appointed to represent the defendants at the termination hearing, but that if an attorney is requested, one will be appointed. Counsel testified that Applicant would not have been notified in writing about the termination hearing, violations, or appointment of counsel because he signed away the right to such notice in the waiver and agreement and would have instead received verbal notice.

This Court finds Applicant failed to meet his burden of proving there were constitutional violations in the drug court termination hearing or process. This Court notes Applicant's chief concerns appear to be that he was not provided written notice of either the date of the termination

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<sup>4</sup> Applicant's Exhibit 10.

<sup>5</sup> Applicant's Exhibit 6.

hearing or that he could be appointed counsel to represent him at that hearing. Applicant, however, admitted he signed the waiver and agreement document – Applicant’s Exhibit 6 – prior to his guilty plea hearing and that he initialed each paragraph in that document. Applicant signed the waiver and agreement while represented by counsel and has failed to show he did not knowingly and voluntarily sign this document. As such, Applicant voluntarily agreed to waive certain rights pursuant to the terms of that document. It is clear that one can voluntarily waive various constitutional rights if that waiver is knowing and voluntary. See, e.g., Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding an individual may waive the right to both direct appeal and post-conviction relief); Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003) (holding an individual waives several constitutional rights by entering a guilty plea); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) (holding an individual can waive his Fifth Amendment privilege against self-incrimination); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) (holding an individual can waive his Sixth Amendment confrontation right by his own conduct); State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997) (holding an individual can waive his Sixth Amendment right to counsel); State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007) (holding an individual may waive the right to have his indictment presented to the grand jury). This Court also notes Mr. Harrington’s testimony that he gave Applicant verbal notice that the termination hearing would occur the next day and that counsel could be appointed to represent him at that hearing. This Court finds Mr. Harrington’s testimony on this point is credible. This Court finds Applicant was aware his drug court termination hearing would proceed the day after his arrest and that, while he was advised counsel could be appointed on his behalf, he chose not to exercise that option. As the Applicant’s execution of the waiver and agreement was knowing and voluntary, this Court finds there were no constitutional violations

related to the drug court termination proceedings.

This Court finds Applicant failed to meet his burden of proving that there was a constitutional or procedural violation with regard to his termination from the drug court program, or that there was ineffective assistance of counsel. Notwithstanding Applicant's arrest while still in the drug court program for new drug-related criminal charges, both witnesses Harrington and Johnson-Lee testified the drug court program had issued other sanctions against Applicant. This is corroborated by the solicitor's recitation of the facts at the drug court termination hearing. (Drug court termination transcript, p.2). This Court finds Applicant clearly failed to successfully complete the drug court program, and could have been discharged from the program because of these other violations. Applicant being arrested for four (4) counts of distribution of crack cocaine while in the drug court program is a gross violation of the rules and purposes of drug court. Paragraph 20 of the waiver and agreement document specifically states that a drug court participant will be terminated from the program if they are re-arrested.<sup>6</sup> Applicant admitted he initialed Paragraph 20 of the waiver and agreement. This Court finds Applicant has failed to demonstrate that he was wrongfully terminated from the drug court program.

Accordingly, this Court concludes Applicant has not met his burden of proving he is entitled to post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds that Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant waived

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<sup>6</sup> This Court also notes the Applicant was advised during the guilty plea program that he would receive the initial, suspended seven (7) year sentence if he was termination from the program. (Plea transcript, p.8; p.14).

such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

### CONCLUSION

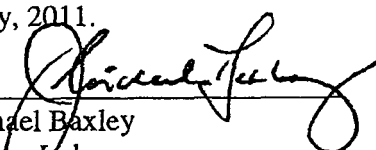
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his drug court termination hearing. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

#### **IT IS THEREFORE ORDERED:**

1. That the Respondent's partial motion to dismiss is granted;
2. That the Applicant's claim that he is entitled to a belated appeal from his guilty plea hearing is denied;
3. That the post-conviction relief issues relating to Applicant's drug court termination proceeding are denied and dismissed with prejudice; and,
4. Applicant must remain in the custody of the Respondent for the completion of his sentence.

IT IS SO ORDERED this 15<sup>th</sup> day of July, 2011.

  
 \_\_\_\_\_  
 J. Michael Baxley  
 Presiding Judge  
 Fourth Judicial Circuit

Darlington, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHESTERFIELD )  
 )  
 )  
 )  
 LENSON CLYBURN, JR., 305094 )  
 )  
 ) Applicant, )  
 )  
 ) vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 ) Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

2010-CP-13-0126

AFFIDAVIT OF SERVICE BY MAIL

2011 JUL 26 PM 4

A True Copy Attest  
*Jay B. Sellers*  
 CLERK OF COURT

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

**Melisa W. Gay, Esquire**  
**Post Office Box 2144**  
**Mt. Pleasant SC 29465-2144**

DATED this 25th day of July, 2011.

*Judy A. Carey*  
 \_\_\_\_\_  
 Judy A. C. Carey, Legal Assistant  
 For Respondent

WITNESSES

T.J. Luther  
Highway Patrol

(3)

ARREST WARRANT #:

K073716

Arrested on August 07, 2007

ACTION OF GRAND JURY

True Bill

9-25-07

Foreman:

Michael S. Brown  
Grand Jury

VERDICT

Foreman:

Petit Jury

Date: \_\_\_\_\_

DOCKET #: 07GS13-0702

THE STATE OF SOUTH CAROLINA  
County of Chesterfield

COURT OF GENERAL SESSIONS

Term: October, 2007

THE STATE

vs.

Lenson Clyburn

I N D I C T M E N T F O R

0188

POSSESSION WITH INTENT TO DISTRIBUTE

MARIJUANA

44-53-370

[Signature]  
SCLH

STATE OF SOUTH CAROLINA )  
 )  
County of Chesterfield )

INDICTMENT #07GS13-0702

At a Court of General Sessions, convened on October 01, 2007  
the Grand Jurors of Chesterfield County present upon their oath:

COUNT: POSSESSION WITH INTENT TO DISTRIBUTE  
MARIJUANA 44-53-370

That Lenson Clyburn in the County of Chesterfield on or about August 07,  
2007, possess with intent to distribute a quantity of Marijuana, (7 Small  
Plastic Bags), a controlled substance, Sec. 44-53-370, et. seq., Code of Laws of  
South Carolina (1976), as amended, such possession with intent to distribute not  
having been authorized by law.

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

SOLICITOR: *Jaybridge*

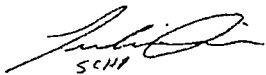
State of South Carolina  
And now comes the  
in open Court  
entered on record  
Attest.

Defendant

C.C.P. & G.S. for  
Chesterfield County

WITNESSES

T.J. Luther  
Highway Patrol



(5)

ARREST WARRANT #:

K073715

Arrested on August 07, 2007

ACTION OF GRAND JURY

True Bill

9-25-07

Foreman:

Michael H. Clow  
Grand Jury

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 07GS13-0703

THE STATE OF SOUTH CAROLINA  
County of Chesterfield

COURT OF GENERAL SESSIONS

Term: October, 2007

THE STATE

vs.

Lenson Clyburn

I N D I C T M E N T F O R

3039

POSSESSION WITH INTENT TO DISTRIBUTE

CRACK COCAINE (44-53-375)

A True Copy Attest

Jaye J. Sellers

CLERK OF COURT C.P. & G.S.  
CHESTERFIELD COUNTY, SC

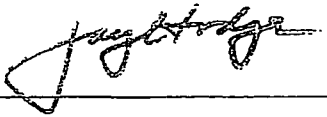
STATE OF SOUTH CAROLINA )  
 ) INDICTMENT #07GS13-0703  
County of Chesterfield )

At a Court of General Sessions, convened on October 01, 2007  
the Grand Jurors of Chesterfield County present upon their oath:

COUNT: POSSESSION WITH INTENT TO DISTRIBUTE  
CRACK COCAINE (44-53-375)

That Lenson Clyburn in the County of Chesterfield on or about August 07,  
2007, did possess with intent to distribute a quantity of Crack Cocaine, (4  
Grams), a controlled substance in violation of Section 44-53-375 of the South  
Carolina Code of Laws(1976), as amended, such possession with intent to  
distribute not having been authorized by law.

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

SOLICITOR: 

A True Copy Attest  
*Faye S. Ballard*  
CLERK OF COURT C.P. & G.S.  
CHESTERFIELD COUNTY, SC