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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Edward W. Miller, Circuit Court Judge

GARY Z. THOMAS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001569

APPENDIX

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State of South Carolina
County of Pickens

Court of General Sessions

State of South Carolina)
)
)
 v.) Transcript of Record
) 2017-GS-39-02623
)
 Gary Zachariah Thomas)
)
)
 Defendant.)

December 1, 2017
Pickens, South Carolina

B E F O R E:

The Honorable Letitia Verdin, Judge.

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

Durham Hill, Assistant Solicitor
Attorney for the State

John Gravlee, Assistant Public Defender
Attorney for the Defendant

Lisa Scott
Circuit Court Reporter

P R O C E E D I N G S

* * * * *

MR. HILL: Gary Thomas.

(The defendant was personally present, together with counsel.)

THE COURT: This is a motion to relieve as counsel; is that correct?

THE DEFENDANT: I'm sorry? I'm really hard of hearing. I really don't hear anything you're saying.

THE COURT: Okay. This is a motion to relieve as counsel. I believe you've made a motion to relieve Mr. Gravlee as your attorney; is that right?

THE DEFENDANT: Yes.

THE COURT: All right. And you are still asking to relieve him as your attorney?

THE DEFENDANT: Well, Your Honor, actually, the only way I can do that is if I'm able to represent myself. I'm not able to do that from the county jail. And I've got a \$15,000 bond. I have no place -- I have no way to make my bail.

THE COURT: Yeah.

THE DEFENDANT: There's -- there's no access to a law library. There's no ---

THE COURT: I gotcha.

1 THE DEFENDANT: --- legal research. There's
2 no -- no way for me to even start researching on my
3 case -- court rules; criminal procedure.

4 THE COURT: I understand. I understand that.
5 I got -- I get where you're going on that. So if
6 I'm understanding you, you're saying you don't want
7 Mr. Gravlee relieved ---

8 THE DEFENDANT: Well, I'm saying ---

9 THE COURT: --- due to your circumstance?

10 THE DEFENDANT: --- I won't have the ability to
11 represent myself if I'm put back in jail. I mean,
12 it's my understanding there was a plea offer today.

13 THE COURT: Okay. You want to talk to
14 Mr. Gravlee ---

15 THE DEFENDANT: Yes, if I can.

16 THE COURT: --- about that?

17 THE DEFENDANT: Yes, if I can.

18 THE COURT: Okay. How about we do it like
19 this. How about we hold off on your motion. We'll
20 hold off on your motion and give you some time for
21 the two of y'all to talk, and we'll see where we go
22 from there. All right.

23 THE DEFENDANT: Thank you.

24 (The proceedings concluded at 10:57 a.m.)

25 * * * * *

C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

I, the undersigned, Lisa Scott, Circuit Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Criminal Court for Pickens County, South Carolina, on the 1st day of December, 2017.

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

June 12, 2019

/s/Lisa Scott

Lisa Scott
Circuit Court Reporter

State of South Carolina
County of Pickens

Court of General Sessions

State of South Carolina	)	
	)	
	)	Transcript of Record
v.	)	2017-GS-39-02623
	)	
Gary Zachariah Thomas	)	
	)	
<u>Defendant.</u>	)	

December 1, 2017
Pickens, South Carolina

B E F O R E:

The Honorable Letitia Verdin, Judge.

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

Durham Hill, Assistant Solicitor
Attorney for the State

John Gravlee, Assistant Public Defender
Attorney for the Defendant

Lisa Scott
Circuit Court Reporter

I N D E XWITNESSPAGE

No Witnesses.

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits.

P R O C E E D I N G S

* * * * *

THE CLERK: 2017-GS-39-2623, the *State v. Gary Thomas*, pleading to domestic violence, second degree.

Raise your right hand, please.

THE DEFENDANT: (Complying.)

THE CLERK: Do you swear to tell the truth, the whole truth, and nothing but the truth so help you God?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Mr. Thomas, you are here today to plead to domestic violence, second degree. That carries up to three years. Is that your understanding?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you discussed these charges with your lawyer?

THE DEFENDANT: Yes, ma'am.

THE COURT: You happy with what he's done for you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you under the influence of drugs or alcohol?

THE DEFENDANT: No, ma'am.

1 THE COURT: Has anybody forced you to plead
2 guilty?

3 THE DEFENDANT: No, ma'am.

4 THE COURT: Has anybody promised you anything
5 to get you to plead guilty?

6 THE DEFENDANT: No, ma'am.

7 THE COURT: When you plead guilty, you give up
8 your right to remain silent and your right to a jury
9 trial on these charges. Do you know that?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: This charge hasn't been indicted by
12 the Grand Jury. You want to give up that right and
13 plead guilty today anyway?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: And how do you plead to this
16 charge, guilty or not guilty?

17 THE DEFENDANT: Guilty.

18 THE COURT: Okay. You've got ten days from
19 today's date to appeal this plea, if you so choose,
20 but you must do so in writing to this Court. Okay?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Okay. Yes, sir.

23 MR. HILL: Thank you, Your Honor. Durham Hill
24 on behalf of the State.

25 As to Mr. Thomas, on April 26, 2017, law

1 enforcement responded to a Pickens County residence
2 where the defendant, Mr. Gary Thomas, had assaulted
3 his live-in girlfriend, [REDACTED]

4 The two had been arguing over a cell phone all
5 day. And once the victim returned home, the
6 defendant assaulted her by throwing her down on the
7 couch and then punched her once she threatened to
8 call law enforcement. She was then able to call
9 9-1-1 from her sister's home.

10 THE COURT: Okay.

11 MR. HILL: There is a recommendation in this
12 case.

13 THE COURT: All right.

14 MR. HILL: And the State would recommend five
15 years probation with absolutely no victim contact
16 with her or her family, direct or indirect, and
17 would also request we hold restitution open for
18 90 days.

19 THE COURT: All right. And I -- I'm happy to
20 go along with that recommendation.

21 MR. GRAVLEE: Thank you, Your Honor.

22 THE COURT: Sounds like y'all worked out a good
23 deal.

24 MR. GRAVLEE: Thank you.

25 MR. HILL: And, Your Honor, I believe he has

1 78 days.

2 THE COURT: Seventy-eight. Okay.

3 All right. Three years suspended with
4 probation for five.

5 Credit for 78 days time served.

6 Hold restitution open for 90 days to determine
7 it.

8 Complete a 26-week batterer's treatment.

9 Random drug and alcohol testing.

10 And no contact with the victim.

11 Okay. Good luck to you.

12 MR. GRAVLEE: Thank you, Your Honor.

13 THE COURT: Thank you.

14 (The proceedings concluded at 12:19 p.m.)

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C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

I, the undersigned, Lisa Scott, Circuit Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Criminal Court for Pickens County, South Carolina, on the 1st day of December, 2017.

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

January 18, 2019

/s/Lisa Scott

Lisa Scott
Circuit Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

Gary Z. Thomas,

Plaintiff,
v.State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

Case No: 2018-~~CR~~-39-1276
POST CONVICTION RELIEF
APPLICATION**I...GROUNDS FOR RELIEF**

1. **Petitioner was denied effective assistance of counsel, within the meaning of the 6th amendment.**
2. **Petitioner was deprived of his right to represent himself adequately.**
3. **Petitioner was prejudiced by the Solicitor's controlling the General Sessions docket.**
4. **Petitioner's sentence of five years probation exceeds the statutory maximum of 3 years.**
5. **Petitioner has entered into a guilty plea involuntarily, being denied effective counsel and the right to adequately represent himself.**

II...STATEMENT OF FACTS

Mr. Thomas was convicted on December 1, 2017 by way of involuntary guilty plea to one count of domestic violence, second degree, and sentenced to three (3) years imprisonment, suspended upon completion of a 5-year probationary term. (See attached Judgment and Sentence)

Mr. Thomas was booked into the Pickens County Law Enforcement Center (LEC) on September 16, 2017 the original charge was first-degree domestic violence, a felony.¹ (Ex.2, Arrest Warrant) Bond was set at \$25,000--that amount unattainable by Mr. Thomas.

Mr. Thomas had a bond revocation hearing set by the solicitor's office for Friday, October 20, 2018.

¹ Mr. Thomas' arrest warrant describes, at best, a second degree domestic violence, the level of injury alleged being "moderate bodily injury" (fracture) as opposed to "great bodily injury".

(Ex.3, Motion) Mr. Thomas was previously released on bond for a charge of second degree domestic violence involving the same woman. Mr Thomas and the "victim" in the case, Diane Phillips, were notified of an October 20, 2018 hearing date.

Mr. Thomas had asked Mr. Gravely to subpoena Diane Phillips, the alleged victim, to the bail revocation hearing for testimony related to the incident for which he was currently in jail and for which bail was to be established. Mr. Thomas informed Mr. Gravely that it could be established, *through Ms. Phillips' own admissions*, that Mr. Thomas was defending his home and girlfriend against the attacking Ms. Phillips, who herself would admit to falsifying the report against Mr. Thomas on April 26, 2017, and acknowledge that she was told repeatedly, by Mr. Thomas and girlfriend to stay away and cease contact. Phillips would also disclose that she fled the scene when told police were en route. Mr. Gravlee refused to subpoena Ms. Phillips.

Mr. Thomas requested that Gravlee file the necessary motions for the reduction of his charge-from 1st degree to 2nd degree. Mr. Gravely stated that that's not how it works and that he would not be filing such motions.

Mr. Thomas asked Mr. Gravlee for the provision of State v. Campbell, 277 S.C. 408, 288 S.E.2d 395 (1992) and SC Code of Laws, §17-23-90 and asked Mr. Gravely to move for his release pursuant to §17-23-90. Friday, October 20, 2018 would have been the last day of the second term of court following Mr. Thomas' arrest and imprisonment for a felony. Mr. Gravely indicated that Mr. Thomas' interpretation of §17-23-90 and Campbell were erroneous. When Mr. Thomas insisted that he would proceed to make the motion himself, Mr. Gravlee became upset and said that Mr. Thomas would be "thrown out of the courtroom" if he tried to argue for release pursuant to Campbell.

Shortly after this discussion with Mr. Gravlee, Mr. Thomas' hearing date for bail revocation was moved from Friday, October 20, 2017 back one day to Thursday, October 19, 2017, no notice being given Diane Phillips.

Mr. Thomas submitted a motion to the court for leave to proceed pro se. (Ex.4 Pro Se Motion)) Mr. Thomas received a response letter from Court Clerk Pat Welborn indicating that Mr. Thomas' attorney had to file the motion for him and that the solicitor would have to schedule the hearing as they control the General Sessions Court docket. (Ex.5, Welborn Letter))

Mr. Gravely, upon Mr. Thomas' request, emailed LEC to inform them of Mr. Thomas' desire to proceed

pro se, to clarify that Mr. Gravlee would cease representation altogether if Mr. Thomas proceeded pro se, and to ask about a law library at the LEC. (Ex.6, Gravlee email)

LEC lieutenant Christie responded that the jail had no law library, it didn't have a secure area where Mr Thomas could sit and study case law and it's officers wouldn't be printing off anything for Mr. Thomas because the LEC didn't have the resources for that. (Ex.7, Christy email)

At Mr. Thomas' rescheduled October 19, 2017 bond revocation hearing, Mr. Gravlee failed to address the issue that Mr. Thomas' charges were more than probable cause permitted. Mr. Gravlee also failed to object to the hearing being moved forward a day, thereby depriving Mr. Thomas of the opportunity to plea for release without bail, according to SC Code of Laws, Ann. §17-23-90, as it is interpreted by the Campbell Court.

Mr. Gravely didn't argue for Mr. Thomas' release on his own recognizance so that he could represent himself adequately. Mr. Gravlee didn't do anything toward ensuring that Mr. Thomas would have adequate access to legal reference materials to prepare his case for trial.

Mr. Gravely indicated, immediately before the December 1, 2017 hearing, that if Mr. Thomas wanted to proceed with representing himself, he would do so in that hearing, without assistance from Gravely as to seeking release.

Mr. Thomas took a suspended sentence of three years imprisonment, for service of a 5-year probation sentence, which would enable him to get out of jail,² consequently enabling him to prepare his defense for these charges and to have a fair trial.

Since his release, Mr.. Thomas has accumulated a substantial amount of evidence that is suggestive of his innocence of the charges. A majority of that evidence is in *CAD Details and audio recordings from calls to dispatch*, all of which mr. Thomas would not be able to acquire from the confines of the LEC, as FOIA disclosures are not permissible for inmates, according to jail lieutenant Christie.

On April 2, 2018, Detective Shannon Ellenburg of the Pickens County Sheriff's Office forwarded Mr. Thomas' complaint "regarding the false report" to the solicitor's office for review. Despite the obvious fabrication of charges and substantial exculpatory evidence, the fact that Mr. Thomas "entered a guilty plea" meant to the solicitor " [the] case can not be reopened against the victim." (Ex.8, Ellenburg Email)

² Mr. Thomas' conditions of confinement were *horribly unconstitutional* and amounted to *punishment*. Housed twenty-four hours each day in the LEC "arraignment room" Mr. Thomas suffered overcrowding so severe that for several weeks, he was actually forced to share bed space with other men (one extending his own mattress length into another's, or vice versa). The arraignment room then had no running water, save the flushing of the community toilet. One gallon of water, for all to share, was dispensed after the evening meal.

On October 19, 2017, Mr.. Thomas was moved into what was called the "arraignment room" and henceforth housed in unconstitutional conditions of confinement. The crowding was so bad that Mr. Thomas feet actually had to lap over onto another man's mattress when the room was at its most vacant. Six mattresses in the room left one inmates mattress overlapping another's. There were no beds, no running water to drink, very poor ventilation, cleaning supplies were rarely offered, and Mr. Thomas might have seen two hours recreation offered to the arraignment room inmates in the forty-plus days he was there.

Mr. Thomas didn't intend to live in those conditions without his counsel speaking up for his right not to live in those kind of conditions. Mr. Gravlee would do nothing regarding Mr. Thomas' inhumane housing.

Mr. Thomas asked Mr. Gravely to contact the Anderson County Sheriff's Office for a detainer that had been put on him for a child support bench warrant out of Anderson. Mr. Thomas wanted to have the child support sentence start running concurrent with his pretrial detention time in Pickens. Mr. Gravely failed to do that.

Mr. Thomas guilty plea was a way for him to get out of jail at that current time, rather than a year or more later, if his case would have went to trial in that time. Mr. Thomas could not count on Mr. Gravlee for an adequate trial presentation when Mr. Gravlee would not acquire evidence for reasons of inconvenience. Mr. Thomas could not count on Mr. Gravely's even accurately and truthfully advising him of proper procedures available in a criminal defense.

Mr. Thomas' chances at trial were so much in his favor, provided evidence would be gathered, his guilty plea would not have been obtained under circumstances other than those described herein. (See, e.g., Ex.8)

Mr. Thomas has since been arrested and jailed for not having a residential address after his probation officer caused his eviction from the apartment in which he was living.³ Mr. Thomas is prevented from working out of state, which limits his income and substantially reduces his ability to find work.

III...ARGUMENT

(As to Grounds 1,2 & 5)

³ Mr. Thomas had previously informed his agent that he was not on the lease but management was allowing him to reside there provided there were no problems from Mr.. Thomas or concerning him. Having displayed his badge and Mr. Thomas' mugshot several times, management gave Mr. Thomas' fiancée two weeks for Mr. Thomas to be gone and all signs of him.

It is a constitutional right to represent oneself in a criminal proceeding. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 45 L.Ed.2d 562 (1975); State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977).

Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 834, 95 S.Ct. at 2541, 45 L.Ed.2d at 581. The right to proceed pro se must be clearly asserted by the defendant prior to trial. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); United States v. Lorick, 753 F.2d 1295 (4th Cir. 1985).

Mr. Thomas expressed his intent and desire to represent himself, by motion, to the General Sessions Court. Mr. Gravlee acknowledged Mr. Thomas' intent to represent himself, and emailed the jail lieutenant to find out that there is no law library, Westlaw, or any other legal reference materials at the jail and there was no intent by the jail to provide any. Aside from getting email confirmation that the jail doesn't have any constitutionally adequate methods for reasonable access to the courts, Mr. Gravlee did nothing to help accommodate Mr. Thomas. Until being formally relieved as counsel, Mr. Gravlee was under obligation to vigorously represent Mr. Thomas. That would include, *inter alia*, arguing Mr.

Mr. Gravlee's failure to

Having lost all confidence in his appointed attorney, with cause, if Mr. Thomas could not represent himself adequately, due to the lack of legal material at the jail, he would take a plea bargain only to get out of the horrific and unconstitutional conditions of confinement at the jail and gather the evidence of his innocence for law enforcement review, and possibly judicial review.

Mr. Thomas could not expect much of a trial at all when he is told that there will be no efforts to gather exculpatory evidence, and there will be no efforts to make motions on his behalf. Mr. Gravlee knew that Mr. Thomas would be in open court on the last day of the second term of General Sessions Court, for a bond revocation hearing and he allowed Mr. Thomas to be rescheduled and advanced a day by the solicitor's office, due to their having control of the General Sessions court docket, thereby cheating Mr. Thomas out of his "day in court" and personal recognizance release.

Mr. Gravlee's performance, or lack thereof, constitutes ineffective assistance of counsel and prompted Mr. Thomas to enter the plea he did.

(As to Ground 3)

It has long been established that the solicitor's control of the General Sessions Court docket is violative of Article I, §8 of the South Carolina Constitution. State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). Reversal would require a showing of prejudice resulting from such a practice. Id., 400 S.C. at 436-437.

Mr. Thomas has shown prejudice: his one opportunity to move for release without bail, allowing him to prepare his defense, pursuant to SC Code of Laws, §17-23-90, being taken away by the solicitor's rescheduling of the October 20, 2017 Bond Revocation Hearing.

Likewise, prejudice due to insufficient performance of counsel shown.

(As to Ground 4)

The statutory maximum for Mr. Thomas' offense is three years. SC Code of Laws, §16-25-20(C). Any sentence beyond 3 years is impermissible.

Again, Mr. Gravlee's deficient performance allowed for the imposition of sentence that exceeds the statutory maximum.

IV...RELIEF

Plaintiff prays for This Honorable Court's issuance of Orders necessary to effectuate

1. Vacation of his conviction and sentence, upon a finding that his guilty plea was entered involuntarily;
2. Vacation of his conviction and sentence, upon a finding that his right to adequate counsel was violated;
3. Vacation of his conviction and sentence, upon a finding that his right to proceed pro se was hindered unnecessarily and unconstitutionally;
4. Vacation of his conviction and sentence, upon a finding that Mr. Thomas was prejudiced by the solicitor's control of the General Sessions Court docket;
5. Vacation of his conviction and sentence, upon a finding that his sentence exceeds the statutory maximum.

2018-CP-39- 1276

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Greenville)

GARY THOMAS

I, GARY THOMAS, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

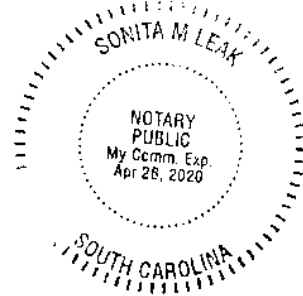
2018 NOV 30 P 4: 21

[Signature]

SWORN to and subscribed before me this 30th
day of November, 2018.

[Signature] (L.S.)
Notary Public

My Commission Expires: April 28, 2020



2018-CP-39- 1276

GARY TITOMAS

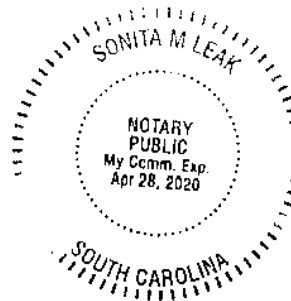
I, JOHN A. CARROLL, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

SWORN or affirmed to and subscribed before me this
30th day of November, 2018.

Notary Public

My Commission Expires: April 28, 2020



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
	)	
Gary Z. Thomas,	)	Case No.: 2018-CP-39-1276
	)	
Applicant,	)	
	)	RETURN AND PARTIAL MOTION
v.	)	TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post-conviction relief filed on November 30, 2018, would respectfully show this Court:

I. Procedural History

On December 1, 2017, Gary Z. Thomas (Applicant) appeared before the Honorable Letitia Verdin with plea counsel, Assistant Public Defender John M. Gravlee, of the Pickens County Public Defender's Office. At the hearing, Applicant waived presentment to the Pickens County Grand Jury for one count of second-degree domestic violence (2014-GS-39-2623) and pled guilty to the same. Judge Verdin accepted the plea and sentenced Applicant to a term of imprisonment of three years, suspended to probation for five years. Applicant did not appeal his plea or sentence.

II. Factual History

On April 26, 2017, Applicant and his live-in girlfriend had been arguing over a cell phone all day. Tr. 6. When she returned home, the victim threatened to call law enforcement. Tr. 6. Upon hearing that, Applicant threw the victim down on the couch and punched her once. Tr. 6.

III. Current Application

In his application for post-conviction relief, Applicant asserts the following grounds for relief:

1. Petitioner was denied effective assistance of counsel, within the meaning of the 6th amendment;
2. Petitioner was deprived of his right to represent himself adequately;
3. Petitioner was prejudiced by the Solicitor's controlling the General Sessions docket;
4. Petitioner's sentence of five years probation exceeds the statutory maximum of 3 years; [and]
5. Petitioner has entered into a guilty plea involuntarily, being denied effective counsel and the right to adequately represent himself.

Attached to this Return and incorporated by reference are the records of the Pickens County Clerk of Court regarding the subject convictions, the transcript from Applicant's guilty plea proceeding, and the post-conviction relief application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

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

IV. Involuntary Guilty Plea

Applicant alleges his plea was not knowingly or intelligently entered. Respondent submits this allegation is without merit. In post-conviction relief cases, a defendant asserting a constitutional

violation must frame the issue as one of ineffective assistance of counsel. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing: (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976).

Respondent submits the record fully supports the knowing and voluntary nature of Applicant's plea. In particular, Applicant indicated to the plea court he had discussed these charges with his plea counsel, and was satisfied with what counsel had done for him. Tr. 4. He further asserted he understood his constitutional rights. Tr. 5. Moreover, Applicant informed the plea court no one had forced him to plead guilty, nor had anyone promised him anything in order to get him to plead guilty. Tr. 5.

Based on the facts set forth above, Respondent submits Applicant's allegation his plea was involuntarily made is without merit. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. *Sharper v. State*, 305 S.E.2d 247.

V. Ineffective Assistance of Counsel

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. In order to satisfy the prejudice prong of this test following a guilty plea, the applicant "must show that there

is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Failure to Call Witnesses

Applicant alleges his counsel was ineffective for failing to call Diane Phillips as a witness. "There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973). "Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client." *Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Moreover, "failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Applicant's bare assertions as to what these witnesses would have testified, without more, do not give rise to the level of proof required for Applicant to meet his burden. *See Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357 ("Failure to conduct an independent investigation does not constitute

ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.”).

Here, Applicant merely speculates as to what the victim would have testified. However, he wholly fails to provide this Court with any sworn testimony from the victim in order to support his allegations. Because counsel is presumed to have rendered adequate assistance and because Applicant has failed to present the testimony of the victim in accordance with the Rules of Evidence, Respondent submits Applicant cannot establish any deficiency on the part of counsel.

Moreover, Applicant cannot establish any prejudice from this alleged deficiency. A guilty plea generally acts as a waiver of all non-jurisdictional defects and defenses.” *State v. Thomason*, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000) (citing *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985)). Through a plea, a defendant admits all of the elements of the offense charged and waives all defenses, except for the sufficiency of the indictment. *Id.* After acknowledging he understood his right to a trial by jury, Applicant indicated to the plea court he wanted to plead guilty. Tr. 5. Based on Applicant’s solemn admission of guilt at the plea, Respondent submits he cannot meet his burden.

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

VI. Failure to Proceed *Pro Se*

Applicant further alleges he was denied his right to represent himself. “The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.” *Faretta v. California*, 422 U.S. 806, 819 (1975).

“To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of the right to counsel; and (2) adequately warned of the dangers of self-representation. *Bridwell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992) (citing *Faretta*, 422 U.S. 806; *Prince v. State*, 301 S.C.2d 575, 576 (1990) (“*Faretta* requires that a defendant ‘be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.’”) (citation omitted).

Here, Applicant wholly failed to make a motion to proceed *pro se* before the plea court. Indeed, when asked if he was satisfied with the services of plea counsel, he indicated he was. Tr. 4. Based on Applicant’s complete failure to make a motion to proceed *pro se*, Respondent submits this allegation is without merit. However, this allegation probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

VII. Illegal Sentence

Applicant also alleges his sentence is illegal. Applicant pled guilty to second-degree domestic violence and was sentenced to a term of imprisonment of three years, suspended to five years’ probation. This sentence is valid under South Carolina law. A person who is convicted of second-degree domestic violence “is guilty of a misdemeanor and, upon conviction, must be fined not less than two thousand five hundred dollars nor more than five thousand dollars or imprisoned for not more than three years, or both.” S.C. Code Ann. § 16-25-20(C). “After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation. Probation is a form of clemency.” S.C. Code Ann. § 24-21-410 (1976). Here, the trial

court sentenced Applicant to three years imprisonment and suspended the service of this sentence upon a term of probation, which is a valid sentence.

Furthermore, to the extent Applicant's allegation is a direct assertion that the sentence itself is improper, the allegation should be summarily dismissed as improper for post-conviction relief, as it raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at the plea or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this Court should summarily dismiss this allegation.

VIII. Prosecutorial Misconduct

Applicant also alleges he was "prejudiced by the Solicitor's controlling the General Sessions docket," which Respondent interprets as an allegation of prosecutorial misconduct. "A state may use any method to select judges so long as it is impartial and not geared towards influencing the trial's outcome." *State v. Langford*, 400 S.C. 421, 437, 735 S.E.2d 471, 479-80 (2012). Here, Applicant has wholly failed to set forth any evidence which would indicate the plea court was not impartial. Furthermore, Applicant has failed to set forth with any specification how he was prejudiced by the solicitor's control of the docket. Respondent submits Applicant's bare assertions, without more, cannot give rise to his burden in this action. However, the allegation of prosecutorial misconduct raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

IX. Denial of All Other Claims

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

X. Request for evidentiary hearing

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of counsel, prosecutorial misconduct, and whether or not Applicant's plea was knowingly and voluntarily made.

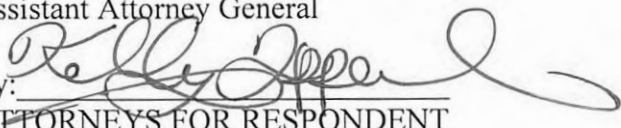
Respectfully submitted,

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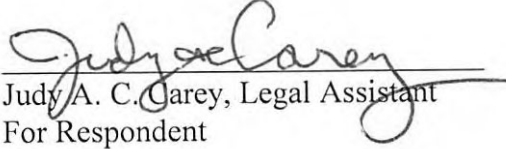
February 8, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	
	)	
	)	2018-CP-39-1276
	)	
GARY Z. THOMAS	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Don A. Thompson, Esquire
107 Smithwood Court
Simpsonville, SC 29681

DATED this 8th day of February, 2019.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF PICKENS)

COURT OF COMMON PLEAS
2018-CP-39-01276

GARY Z. THOMAS,
APPLICANT,)

vs.)

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA,
RESPONDENT.)

ORIGINAL

April 16, 2019
Greenville, South Carolina

B E F O R E:

THE HONORABLE ALEX KINLAW, JR., JUDGE.

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

DON A. THOMPSON, ESQ.
Attorney for the Applicant

TAYLOR Z. SMITH, ESQ.
Assistant Attorney General

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

THE COURT: Okay. Yes, sir.

MR. SMITH: Your Honor, may it please the Court.

This is the case of Gary Z. Thomas v. State. Docket number 2018-CP-39-1276.

And before we begin, Your Honor, it's my understanding that, perhaps, Mr. Thomas wishes to -- to proceed pro se. I'm not sure. So I will let his attorney speak to that.

THE COURT: Yes, sir.

MR. THOMPSON: Your Honor, Mr. Thomas and I haven't totally agreed on every issue in this case. Shortly before lunch, about 45 minutes before lunch, he indicated to me that he might wish to proceed pro se. So I would ask the Court to inquire as to that.

THE COURT: All right. Mr. Thomas, would you raise your right hand for me?

MR. THOMPSON: He is hard of hearing, Judge.

THE COURT: Oh, okay.

MR. THOMAS: I heard right hand.

THE COURT: All right. Can you hear me?

MR. THOMAS: Yes, sir.

THE COURT: Mr. Thompson, your lawyer, has indicated -- you can put your hand down.

MR. THOMAS: Yes, sir.

1 Can I come speak to you? Can I come speak closer?

2 THE COURT: Well, you -- you can come to the bar
3 right here. Come right here to that -- right where that
4 microphone is right there. Right there.

5 MR. THOMAS: We got -- we agreed on --

6 THE COURT: Hold on. Hold on a second. Let me ask
7 you a question first.

8 MR. THOMAS: I'm sorry.

9 THE COURT: All right. Mr. Thompson, indicated that
10 you want to represent yourself; is that correct?

11 MR. THOMAS: Not necessarily.

12 We -- we had some disagreements on some of the issues
13 that -- that I think should have been -- should be
14 addressed. And he thinks -- thinks that some things
15 aren't relevant to some issues and some are. And I
16 don't -- obviously, he's put time into it. I don't want
17 to dismiss him. But I, also, don't want to make a
18 wrong -- wrong accusation against my lawyer doing
19 something wrong if he hadn't done nothing wrong.

20 So I asked him his opinion, Would you do it?

21 And he said, I'd have done it.

22 My -- my lawyer didn't do it, but he would have done
23 it. So that's, you know -- that's what one attorney would
24 do, as opposed to what another attorney would do; right?

25 THE COURT: Let me ask you a question --

1 MR. THOMAS: But my -- my --

2 THE COURT: Hold on a second. Let me ask you a
3 question.

4 MR. THOMAS: Okay.

5 THE COURT: All right. You know, there's two
6 positions. There's the client, which you are, and then
7 there's the lawyer. Okay. Now, if -- if the lawyer is
8 going to represent you, you've got to let the lawyer be
9 the lawyer and you be the client. You can't be both.

10 MR. THOMAS: I understand.

11 THE COURT: So -- which -- which means that you
12 can -- I think it's good for the client and the lawyer to
13 interact with each other. I think that's -- that's a good
14 thing, and it should happen.

15 MR. THOMAS: Yes, sir. And -- and --

16 THE COURT: But you've got to -- there's got to be a
17 level of cooperation between the client and the lawyer.

18 MR. THOMAS: Yes, sir.

19 THE COURT: And my -- you know, when that level of
20 cooperation breaks down, then it's not good for you and
21 it's not good for the lawyer. You see, it's okay to
22 disagree. But you're going to have to cooperate with each
23 other and come up with a plan regardless of what the
24 situation is.

25 My question is -- but there has to be a level of

1 comfort between you and the lawyer. My question to you
2 is, do you still feel comfortable with Mr. Thompson being
3 your lawyer?

4 MR. THOMAS: If he's willing to at least -- my -- my
5 concern is that -- that he doesn't agree with me. That's
6 all. I mean, like, I -- I believe there was ineffective
7 counsel, he doesn't. But, I mean, we both agree on -- on
8 involuntary plea.

9 I mean, I want him to represent me. But I, also,
10 want him to know -- I want the Court to know why I feel
11 that it was ineffective counsel. And he doesn't.

12 That way, you know, like -- let's say I wanted -- I
13 asked my attorney to make a motion based on something that
14 has to do with the statute. You presume the Judge is
15 going to follow up; right? This is what the legislature
16 says. This is what the Judge is going to do. I'm
17 assuming that's what's going to happen.

18 And he -- if my attorney would have made the motion,
19 by the statute, I would have gotten what the statute said.
20 Because we have to assume the Judge is going to do the
21 right thing. And he -- I don't know why -- maybe it's
22 because of the profession, you know. I don't want a
23 fellow attorney -- you know, he doesn't want to maybe
24 label him incompetent, or something, or maybe I'm wrong.
25 But I don't think I am.

1 So if he wouldn't mind allowing -- or you wouldn't
2 mind allowing me to express my -- why I feel that way --
3 maybe I'm wrong.

4 THE COURT: So you just want your lawyer to do what
5 you want him to do.

6 MR. THOMAS: I'm sorry.

7 THE COURT: You just want him to do whatever you want
8 him --

9 MR. THOMAS: I mean, I want him to cover all bases.
10 I want him to cover all bases. And my -- my -- the
11 voluntariness of my plea goes after I met with my
12 attorney, talked to him. He turned down -- I asked him --

13 THE COURT: Well, I don't want to get too much into
14 that. What's -- this is -- this is on the -- on the
15 roster, obviously, for a merits hearing; is that right?

16 MR. THOMPSON: That's correct.

17 THE COURT: Okay. And, Mr. Thompson, I think you
18 chatted briefly with us. Before, you said y'all met a
19 couple of times or so, give or take. He didn't come to
20 your office or there's been a breakdown in communications
21 of some sort.

22 MR. THOMPSON: We've talked. We've talked on the
23 telephone several times. And there's been several e-mails
24 back and forth. He did have an appointment in my office,
25 it'll be two weeks from tomorrow -- two past weeks from

1 tomorrow. He did not keep that appointment. He did not
2 make another one.

3 THE COURT: All right. Sir, let me ask you this.
4 You know --

5 You -- you were appointed to represent him?

6 MR. THOMPSON: Yes, sir.

7 THE COURT: What if -- what if -- what if the Court
8 appoints you another lawyer and you still disagree with
9 whatever that lawyer says?

10 MR. THOMAS: If -- if he told me that my attorney
11 wasn't insufficient by not making a motion that would have
12 guaranteed been -- I would have --

13 THE COURT: Then you'd -- then you'd be back before
14 me again doing the same thing.

15 MR. THOMAS: I'm sorry.

16 THE COURT: Then you would be back up here wanting
17 to -- that you're not getting along with the lawyer.
18 You'd be right back up here.

19 MR. THOMAS: I mean, for the most part, he's been
20 honest with me and been straightforward. We just have a
21 different opinion. And I think my -- the -- the issue
22 we're disagreeing on is what brings us to the actual
23 hearing.

24 THE COURT: All right. Let's -- let's get to this.
25 Let's not try to talk at the same time because it throws

1 the court reporter off.

2 Do you want to represent yourself in this proceeding?
3 That's either a "yes" or a "no."

4 MR. THOMAS: I guess -- I mean, the only way if I can
5 cover that ground and concern as an issue, then I guess,
6 yeah. I guess I would have to. I mean, I -- otherwise,
7 he can -- he can express why I feel the way I do so, at
8 least, the Court knows why I have my opinion that way, so.

9 THE COURT: Who's -- who's --

10 MR. THOMAS: And if he can -- if he's going to
11 adequately represent me, he would -- he would let the
12 Court know my position on something we disagree on.

13 THE COURT: That's not my question. My question at
14 this point and juncture is this, if you want to represent
15 yourself in this proceeding, I'm going to let you do that.

16 MR. THOMAS: Okay.

17 THE COURT: But I'm not going to continue to delay
18 the matter for you to lawyer shop because you disagree
19 with the advice and counsel that the lawyer is giving you,
20 which you have the right to do so. But we've got to move
21 this -- these proceedings along.

22 And if you -- if you don't -- if you can't cooperate
23 with the current lawyer and you -- you disagree with him,
24 then you've got the right to represent yourself.

25 MR. THOMAS: Okay. I'll -- I'll let him -- if I can

1 speak what I think -- what I feel is relevant to why I
2 pled guilty involuntary; right? What I felt --

3 THE COURT: Hold on a second. Hold on a second.

4 I haven't looked at this. This is ineffective
5 assistance of counsel. Do you want to touch upon that?
6 What is he -- what allegations of ineffective assistance
7 of counsel he's raising or wants to raise that you feel
8 shouldn't be raised. That's according to what he just
9 said.

10 MR. THOMPSON: He -- Judge, I think he may have a
11 valid issue with ineffective assistance of counsel, at
12 least, an arguable issue when it comes to -- in fact, one
13 time he wanted to represent himself, also. But he was
14 never taken before a court to do that is my understanding.

15 We do have documentation where he filed with the
16 clerk of court and where he expressed that to his
17 attorney. He, however, wants to go into -- he wanted me
18 to bring the victim in to testify that she had lied. And
19 I told him, well, he pled guilty to the charge. So that
20 really, at this point in time, was water under the bridge.

21 He, also, wants to explain that he -- he -- well, one
22 thing he wanted me to do was get a video of the jail in
23 Pickens. I told him I was not going to do that. He
24 said -- obviously, he pled guilty because his attorney was
25 not doing what he was telling the attorney to do. And he

1 thought that he would go ahead and plead -- he couldn't
2 take the conditions of the Pickens jail. He thought he'd
3 go ahead and plead guilty and then come out and be able to
4 overturn that -- that plea. And I told him that's just
5 not the way the system works.

6 THE COURT: Mr. Thomas, those are the two things that
7 you wanted your lawyer --

8 MR. THOMAS: I think that's a pretty correct
9 assessment of what -- what my opinion was. I mean, my
10 attorney failed me and I can't represent myself. I've got
11 a Sixth Amendment violation -- Sixth Amendment violation.
12 So I can sit in jail for a year and wait for a trial where
13 I have no Sixth Amendment at trial.

14 Do you understand?

15 Either my attorney -- I've got an attorney who's
16 already misrepresented me, forced to plead, or I stay in
17 the jail with no law library, no legal access whatsoever,
18 and sit there in a sardine can where I'm sharing -- I'm
19 literally sharing my bed with another man. You know what
20 I'm saying? A feet [sic] of his overlapping on my bed.
21 It's that packed. I'm going to sit in my room confined
22 like that for 23 hours a day for a year --

23 THE COURT: Hold on one second --

24 MR. THOMAS: -- to -- to prove my innocence.

25 THE COURT: Hold on one second.

1 In his original application -- and do I have that?
2 In his original application, does he list those two things
3 that you just told me?

4 MR. THOMPSON: Yes, sir.

5 THE COURT: As allegations of ineffective assistance
6 of counsel about the Pickens jail and --

7 MR. THOMPSON: Yes, sir, he does.

8 THE COURT: -- bringing the other person in?

9 The only thing I've got in this packet, unless I
10 missed something, is just the transcript.

11 MR. THOMPSON: It -- it's not labeled application for
12 PCR, Judge. At the top, it just begins, Grounds for
13 relief. I can give you my copy.

14 THE COURT: Let me take a look it. It's probably in
15 here. Hold on a minute.

16 MR. THOMPSON: And I believe that the allegations are
17 mostly in -- that's it right there.

18 (Pause.)

19 THE COURT: Who prepared this for you, sir?

20 MR. THOMAS: Sir?

21 THE COURT: Who prepared this document?

22 MR. THOMAS: Me.

23 THE COURT: You typed all this up?

24 MR. THOMAS: Yes, sir.

25 And there's -- there's some things about law I

1 know -- I know off the top of my head while I was in jail.
2 And I know that I'm supposed to have some kind of law
3 library to do -- at least, look and see, you know, if I'm
4 being overcharged, which I was. I was being charged with
5 first degree with -- nothing goes beyond -- even if
6 everything was proved true, it --

7 THE COURT: Okay. Hold on one second.

8 MR. THOMAS: So I --

9 THE COURT: Could you -- could you just --

10 MR. THOMAS: I'm sorry. I'm sorry.

11 THE COURT: In here, you have in the petition that --
12 was deprived of his right to represent himself adequately.
13 And I'm going to address that in just a minute.

14 The Petitioner was prejudiced by the solicitors
15 controlling the general sessions docket. That's not --
16 that's not any relief that you can seek --

17 MR. THOMAS: I'm sorry.

18 THE COURT: Where you said the Petitioner was
19 prejudiced by the solicitors controlling the general
20 sessions docket. That's not a ground that you could
21 pursue by PCR.

22 MR. THOMAS: It's not?

23 THE COURT: That's just the way the system works.

24 MR. THOMAS: I -- under State v. Langford, I believe
25 they said if you were prejudiced by -- by any handling of

1 it -- if you suffered prejudice because of the way they
2 controlled the docket, then -- then it -- it's reversible
3 error.

4 THE COURT: When did you read State v. Langford?

5 MR. THOMAS: It's a 2012 case, Supreme Court.
6 They -- they shot down a statute that -- that mandated
7 that -- that the Solicitor control the docket. They said
8 it violates separation of power. They can't do it. It's
9 exclusively the judiciary, the Judge, the clerks -- the
10 docket clerks are supposed to schedule all the hearings.

11 I've got a hearing scheduled for a day that I can
12 stand in front of the court and ask [inaudible] with no
13 bail. All I had to do was ask.

14 THE COURT: Let me ask --

15 MR. THOMAS: I got scheduled --

16 THE COURT: Hold on. Hold on. Hold on.

17 Mr. Thompson, I'm going to make -- you know, based
18 upon what I have in front of me -- and I'll read the other
19 allegations, Petitioner's sentence of five years probation
20 exceeds the statutory minimum of three years. And
21 Petitioner has entered into a guilty plea involuntarily
22 being denied effective counsel and the right to adequately
23 represent himself.

24 Well, I'm impressed by the -- your knowledge of the
25 law. You -- you, basically, have stood before me and made

1 reference to State v. Langford, which tells me that you
2 are very familiar with the law and you've done adequate
3 research. You've -- you've prepared this application. I
4 looked at it. You prepared it yourself. It's very nicely
5 done. You cite cases in here. You give a good rendition
6 of the facts in here. And you have filed this with the
7 Court. And I think Counsel indicated that even when you
8 went to court, you wanted to represent yourself and you
9 felt that you were prejudiced by not representing
10 yourself.

11 So based upon your conversation with the Court, and
12 based upon the documentation that I have in front of me,
13 and, also, based upon my assessment of your knowledge as
14 to why you're here and why -- and -- and what's the
15 purpose of the application, I am, certainly, more than --
16 more than inclined to allow you to represent yourself. I
17 feel based upon what I have in front of me and based upon
18 your conversation with the Court, I feel like you're
19 more -- more than adequately prepared to represent
20 yourself. And I'll grant you that wish, if you so desire.

21 MR. THOMAS: I believe -- I believe when I testify
22 about the circumstances --

23 THE COURT: That's not what I'm -- what I'm saying
24 is, if you want to -- I'm going to relieve Mr. Thompson of
25 any further representation of you and let you proceed

1 today and represent yourself. And you can present
2 whatever you want to.

3 MR. THOMAS: I mean, do I want to relieve him? No.
4 I just --

5 THE COURT: No. I'm just -- I'm -- you indicated
6 here you were deprived of your right to represent
7 yourself. We're not going to go back and forth on this --

8 MR. THOMAS: But --

9 THE COURT: Hold on a second. Hold on.

10 We're not going to go back and forth on this. I'm
11 going to let you represent yourself in -- in this
12 proceeding today. And I'm going to relieve Mr. Thompson
13 and let you present to the Court anything that you want
14 to, if that's what you want to do.

15 MR. THOMAS: Yes, Your Honor, if you feel like -- if
16 you feel that's what needs to be done.

17 THE COURT: Or you can let Mr. Thompson do it.

18 MR. THOMAS: I mean, you -- see, now, I have a
19 choice. The difference between now and then, I have a
20 choice. I can let him represent me and still go back out
21 here and be -- not be in a sardine can. You know what I'm
22 saying? I can win or lose. But then, I didn't really
23 have a choice.

24 THE COURT: That's not what -- I don't want to go
25 back and forth --

1 MR. THOMAS: It's different -- it's really different
2 circumstances.

3 THE COURT: I'm going to let you represent yourself.

4 MR. THOMAS: Huh?

5 THE COURT: I'm going to let you represent yourself
6 today.

7 MR. THOMAS: Okay.

8 THE COURT: All right. Are y'all ready to proceed?

9 MR. THOMAS: I'm sorry.

10 THE COURT: Is the State ready to proceed?

11 MR. SMITH: Well, Your Honor, we also -- we -- we
12 move for a continuance in this case.

13 THE COURT: All right. Well, I'm going to -- I think
14 there was a transcript issue; isn't that right?

15 MR. SMITH: That's correct, Your Honor.

16 THE COURT: All right. Well, here's the deal. I'm
17 going to grant the continuance based on the transcript --

18 MR. THOMAS: Excuse me, Your Honor --

19 THE COURT: Whoa --

20 MR. THOMAS: -- I don't believe it's necessary --

21 THE COURT: Hold on. Hold on. Hold on a second.

22 You know, the way we do things in here, I talk, you
23 talk --

24 MR. THOMAS: I'm sorry.

25 THE COURT: I talk, you talk. You don't talk when I

1 talk.

2 MR. THOMAS: I'm sorry.

3 THE COURT: All right. That's how it goes.

4 MR. THOMAS: Sorry.

5 THE COURT: You told me about the transcript issue
6 earlier. So I know about that. And I'm willing to grant
7 a continuance for that purpose. But I think we need to
8 clarify representation.

9 But I want Mr. Thomas to know that when this matter
10 is -- is rescheduled, whether it's before me or some other
11 Judge, that you're going to represent yourself.

12 Do you understand that?

13 And be prepared to go forward.

14 MR. THOMAS: To avoid a continuance, can I just
15 abandon the -- can I abandon the -- the Court wouldn't let
16 me represent myself. But I guess -- because -- we can
17 start dealing with -- with counsel, whether at that point,
18 should I even have been there at -- to worry about that
19 point. I -- at that point when the hearing came around --

20 THE COURT: That's -- the thing I'm saying is for
21 purposes of this hearing, you're going to represent
22 yourself next time.

23 MR. THOMAS: I'm sorry.

24 THE COURT: For purposes of this hearing, you'll
25 represent yourself.

1 MR. THOMAS: Yes, sir.

2 THE COURT: That's what I'm saying.

3 MR. THOMAS: Okay. But the -- there's a continuance
4 to get transcripts for that hearing; right? Is that what
5 the request was?

6 THE COURT: Yes.

7 MR. THOMAS: Okay. Well, the transcript really
8 wouldn't be necessary if we can dispose of the case with
9 why I was even in their jail to have to worry about not
10 having legal access. That goes to my ineffective
11 assistance of counsel. I --

12 THE COURT: Hold on. Hold on.

13 Yeah, go ahead.

14 MR. SMITH: Your Honor, I think what he's saying is
15 he wants to deal with some issues today and then others
16 later when the transcript comes in.

17 THE COURT: No.

18 MR. SMITH: The State's position is we want to do
19 them altogether.

20 THE COURT: We're not going to piecemeal. We're
21 going to do it all at the same time.

22 MR. THOMAS: Well, then, I mean, it -- it might
23 save -- it might save the State money and time and --

24 THE COURT: We'll worry about that.

25 MR. THOMAS: I'm sorry.

1 THE COURT: We'll worry about that. We will worry
2 about that. We'll do it all together when we come back.

3 All right. Do me an order of continuance. Put in
4 it -- put in there that I made -- put a -- a detailed
5 finding in that order that I made inquiry of him regarding
6 his ability to represent himself.

7 I find that he's competent. I find that he's
8 knowledgeable about the law. I find that he's -- that
9 he's aware of why he's here, based on my colloquy back and
10 forth with him. He cited several causes. And then as a
11 matter of fact, I think he even cited the Langford case.
12 He probably -- giving an indication he's very familiar
13 with that case.

14 And I'm impressed -- I want to put on the record that
15 I am impressed with the application he filed. Because it
16 was nicely done by him. He indicated that he did it. And
17 he cited several cases.

18 So for purposes of this post-conviction relief
19 hearing, I am going to allow him to represent himself.
20 And, also, put in there, there will be no further
21 continuances. He can't come back in here next time and
22 say, well, I'd rather get another lawyer. That's not
23 going to happen. He's going to represent himself at the
24 next hearing, which will be scheduled at the next -- the
25 June term, I think it is.

1 MR. SMITH: Correct.

2 THE COURT: The June term, whoever the PCR Judge is
3 at that time.

4 And then, also, in that same order relieve
5 Mr. Thompson from any further representation in this
6 matter.

7 MR. SMITH: Okay. And, Your Honor, I would, also,
8 ask for clarification in -- in our continuance if per se
9 we order a transcript and it's not in by that time, will
10 our continuance still apply until it comes in?

11 THE COURT: Yeah. You'll just schedule -- until the
12 transcript comes in, whether it rolls over to the June
13 term or the subsequent term will be fine.

14 MR. SMITH: Okay. Thank you, Judge.

15 THE COURT: All right.

16 MR. THOMAS: Excuse me, Your Honor. I don't -- I'm
17 not really understanding -- but I'm saying can we proceed
18 without the --

19 THE COURT: No.

20 MR. THOMAS: I can't -- I can't -- I can't decline to
21 pursue an issue?

22 THE COURT: Well, we're going to do it all next time.

23 MR. THOMAS: If I just decline to pursue it, period.
24 So I'm not asking can we do just part of it now and part
25 of it later. Can we just do --

1 THE COURT: Mr. --

2 MR. THOMAS: -- and don't worry --

3 THE COURT: Mr. Thomas --

4 MR. THOMAS: -- about the --

5 THE COURT: -- Mr. Thomas, you probably -- you
6 probably -- you probably are before one of the nicest
7 judges that you could ever come before. And I have told
8 you -- you're probably -- I am so nice. And I have told
9 you three times no. I will tell you for the fourth time
10 no.

11 Now, we get up past seven times, then I don't know.
12 But I've already told you we're going to do this all at
13 the same time. Now, just cooperate with me. We're going
14 to -- everything is going to be taken care of.

15 So we'll do it next time. And you'll get a notice.

16 Make sure you get an address.

17 MR. SMITH: Yes, Your Honor.

18 THE COURT: All right. Take care.

19 MR. THOMPSON: I've got it. And I'll give it to him.

20 THE COURT: All right.

21 *****END OF TRANSCRIPT OF RECORD*****
22
23
24
25

CERTIFICATE OF REPORTER

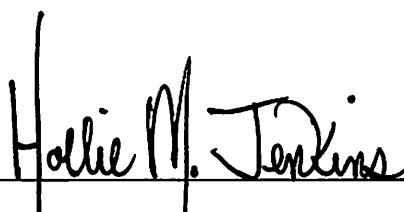
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 16th day of April, 2019.

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

June 17, 2019

A handwritten signature in black ink, reading "Hollie M. Jenkins", is written over a horizontal line.

Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

STATE OF SOUTH)
CAROLINA)

COUNTY OF PICKENS) IN THE COURT OF COMMON PLEAS
2018 JUL 22 P 4:08)

Gary Z. Thomas,

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Case No: 2018-DR-39-1276

MOTION TO SUPPLEMENT AND SUPPLEMENT
APPLICATION FOR POST CONVICTION
RELIEF

Plaintiff,)

v.)

State of South Carolina,)

Respondent.)

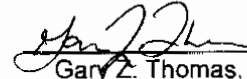
COMES NOW the defendant/applicant in the above entitled case, Gary Thomas, and asserts, as an ADDITIONAL AND/OR CLARIFYING GROUND FOR RELIEF, that the record of Mr. Thomas' plea hearing is void of colloquy indicative of the defendant's understanding of the nature of the charges to which the defendant entered a plea of guilty. The defendant asserts that the absence of any such colloquy is, in and of itself, a fatal defect to any plea of guilty entered in the State of South Carolina.

[T]he Due Process Clause requires that a defendant enter his guilty plea *voluntarily, knowingly and intelligently*.... Thus, prior to receiving a defendant's guilty plea, the court *must advise the defendant of the nature and crucial elements of the charges*, the consequences of the plea, [including any maximum and minimum penalties for the crimes], and the constitutional rights he is waiving by pleading guilty. *State v. Nesbitt*, 411 S.C. 194, 200 (2015); *Rollison v. State*, 346 S.C. 506, 511 (2001).

Without a record from which a reviewing court can affirmatively deduce that a guilty plea was made voluntarily, knowingly and intelligently, a defendant must be permitted to withdraw his guilty plea. This defendant, Gary Thomas, must be permitted to withdraw the plea he entered involuntarily.

Signed this 15th day of July, 2019.

Respectfully submitted,



Gary Z. Thomas, pro se
P.O. Box 1133
Greenville, SC 29602

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
	)	
Gary Z. Thomas,	)	Case No.: 2018-CP-39-1276
	)	
Applicant,	)	
	)	RETURN TO APPLICANT'S
v.	)	AMENDED APPLICATION
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Gary Z. Thomas (Applicant) filed an Application for Post-Conviction Relief on November 30, 2018. The State (Respondent) filed a Return on February 28, 2019. Applicant filed a document titled "Motion to Supplement and Supplement of Application for Post Conviction Relief" on July 22, 2019.¹ Respondent interprets this document as an amended application that asserts an additional grounds for relief, and will refer to it hereafter as an amended application. In response to the amended application, Respondent would respectfully show this Court:

I. Procedural History

Applicant is presently incarcerated in the South Carolina Department of Corrections. On December 1, 2017, he appeared before the Honorable Letitia Verdin, waived presentment for second-degree domestic violence (2014-GS-39-2623), and pleaded guilty to the same. Applicant was represented by Assistant Public Defender John M. Gravlee. Judge Verdin sentenced Applicant to imprisonment for three years, suspended to probation for five years. Applicant did not appeal.

II. Factual History

On April 26, 2017, Applicant and his live-in girlfriend had been arguing over a cell phone all day. Tr. 6. When she returned home, the victim threatened to call law enforcement. Tr. 6. Upon

¹ Respondent did not receive this document from Applicant, but discovered it when checking the public index for the

hearing that, Applicant threw the victim down on the couch and punched her once. Tr. 6.

III. Current Application

In his Application for Post-Conviction Relief, which was filed on November 30, 2018, Applicant asserted the following grounds for relief:

1. Petitioner was denied effective assistance of counsel, within the meaning of the 6th amendment;
2. Petitioner was deprived of his right to represent himself adequately;
3. Petitioner was prejudiced by the Solicitor's controlling the General Sessions docket;
4. Petitioner's sentence of five years probation exceeds the statutory maximum of 3 years; [and]
5. Petitioner has entered into a guilty plea involuntarily, being denied effective counsel and the right to adequately represent himself.

In an amended application, which Applicant filed on July 22, 2019, Applicant asserted an additional ground for relief, alleging that his guilty plea was not entered voluntarily, knowingly, and intelligently due to a supposed defect in Judge Verdin's colloquy. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

IV. Involuntary Guilty Plea

Applicant alleges his plea was not knowingly or intelligently entered. Respondent submits this allegation is without merit. In post-conviction relief cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing: (1) counsel was deficient and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging

that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

Respondent submits the record fully supports the knowing and voluntary nature of Applicant's plea. In particular, Applicant indicated to the plea court he had discussed these charges with his plea counsel, and was satisfied with what counsel had done for him. Tr. 4. He further asserted he understood his constitutional rights. Tr. 5. Moreover, Applicant informed the plea court no one had forced him to plead guilty, nor had anyone promised him anything in order to get him to plead guilty. Tr. 5.

Based on the facts set forth above, Respondent submits Applicant's allegation his plea was involuntarily made is without merit. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. *Sharper v. State*, 305 S.E.2d 247.

V. Ineffective Assistance of Counsel

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and

would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). The “prejudice prong ordinarily requires more than simply a defendant’s assertion that but for counsel’s deficient performance he would not have pled but would have gone to trial.” Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

Failure to Call Witnesses

Applicant alleges his counsel was ineffective for failing to call Diane Phillips as a witness. A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Id. at 691. Thus, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.”

McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. . ." Strickland, 466 U.S. at 691. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. *See* Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997).

Applicant merely speculates as to what the victim would have testified. However, he wholly fails to provide this Court with any sworn testimony from the victim in order to support his allegations. Because counsel is presumed to have rendered adequate assistance and because Applicant has failed to present the testimony of the victim in accordance with the Rules of Evidence, Respondent submits Applicant likely cannot establish any deficiency on the part of counsel.

Moreover, Applicant cannot establish any prejudice from this alleged deficiency. A guilty plea generally acts as a waiver of all non-jurisdictional defects and defenses." State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000) (citing State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985)). Through a plea, a defendant admits all of the elements of the offense charged and waives all defenses, except for the sufficiency of the indictment. *Id.* After acknowledging he

understood his right to a trial by jury, Applicant indicated to the plea court he wanted to plead guilty. Tr. 5. Based on Applicant's solemn admission of guilt at the plea, Respondent submits he cannot meet his burden.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. Respondent requests an evidentiary hearing in order to address the questions of fact raised that the record may not conclusively refute. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (holding that an evidentiary hearing is required when an application for post-conviction relief alleges specific instances of ineffectiveness that are not conclusively refuted by the record) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

VI. Failure to Proceed Pro Se

Applicant further alleges he was denied his right to represent himself. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975). "To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of the right to counsel; and (2) adequately warned of the dangers of self-representation. Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992) (citing Faretta, 422 U.S. 806; Prince v. State, 301 S.C.2d 575, 576 (1990) ("Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'") (citation omitted). Here, Applicant was take before Judge Verdin on December 1, 2017, so that he could move to have Counsel relieved. A plea offer had been extended to Applicant at that time, and he asked Judge Verdin for more time so that he could discuss the plea offer with Counsel rather than continuing with his motion to have Counsel relieved. Tr. 3. Immediately afterwards, Applicant decided to take the plea offer and plead guilty. Tr. 4. When asked if he was

satisfied with the services of plea counsel, he indicated he was. Tr. 4. Applicant was given the opportunity to be heard on a motion to be relieved, but decided to avail himself of a plea deal. His answers to Judge Verdin's questions at the plea hearing indicate that he had abandoned his desire to proceed as a pro se litigant, and undermine his allegation here. Respondent requests an evidentiary hearing in order to address the questions of fact raised that the record may not conclusively refute. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (holding that an evidentiary hearing is required when an application for post-conviction relief alleges specific instances of ineffectiveness that are not conclusively refuted by the record) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

VII. Illegal Sentence

Applicant also alleges his sentence is illegal. Applicant pled guilty to second-degree domestic violence and was sentenced to a term of imprisonment of three years, suspended to five years' probation. This sentence is valid under South Carolina law. A person convicted of second-degree domestic violence must be fined or "imprisoned for not more than three years, or both." S.C. Code Ann. § 16-25-20(C). Judge Verdin also had the authority to "suspend the imposition . . . and place the defendant on probation . . ." S.C. Code Ann. § 24-21-410 (1976). "The period of probation or suspension of sentence shall not exceed a period of five years . . ." S.C. Code Ann. § 24-21-440. Here, the trial court sentenced Applicant to three years imprisonment and suspended the service of this sentence upon a term of probation, which is a valid sentence.

Furthermore, to the extent Applicant's allegation is a direct assertion that the sentence itself is improper, the allegation should be summarily dismissed as improper for post-conviction relief, as it raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d

883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at the plea or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this Court should summarily dismiss this allegation.

VIII. Prosecutorial Misconduct

Applicant also alleges he was “prejudiced by the Solicitor’s controlling the General Sessions docket,” which Respondent interprets as an allegation of prosecutorial misconduct. “A state may use any method to select judges so long as it is impartial and not geared towards influencing the trial’s outcome.” State v. Langford, 400 S.C. 421, 437, 735 S.E.2d 471, 479-80 (2012). Here, Applicant has wholly failed to set forth any evidence which would indicate the plea court was not impartial. Furthermore, Applicant has failed to set forth with any specification how he was prejudiced by the solicitor’s control of the docket. Respondent submits Applicant’s bare assertions, without more, cannot give rise to his burden in this action. Respondent requests an evidentiary hearing in order to address the questions of fact raised that the record may not conclusively refute. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (holding that an evidentiary hearing is required when an application for post-conviction relief alleges specific instances of ineffectiveness that are not conclusively refuted by the record) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IX. Denial of All Other Claims

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

X. Request for evidentiary hearing

WHEREFORE, Respondent requests that an evidentiary hearing be held.

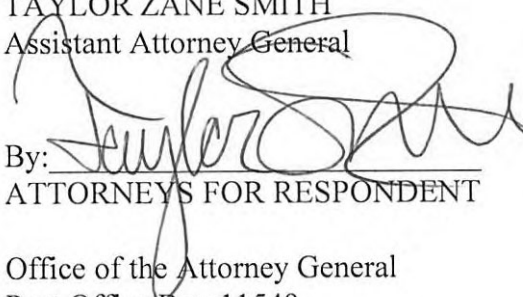
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

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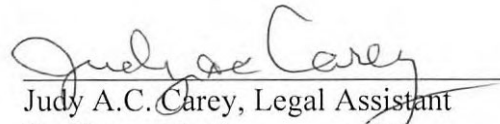
October 8, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	
	)	
	)	2018-CP-39-1276
	)	
GARY Z. THOMAS, 310751	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

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

**Gary Z. Thomas, 310751
Trenton Correctional Institution
84 Greenhouse Road
Trenton SC 29847**

DATED this 8th day of October, 2019.


Judy A.C. Carey, Legal Assistant
For Respondent

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EXHIBITS

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1 **THE COURT:** All right. You want to tell me about this
2 one?

3 **MS. BAILEY:** Your Honor, I'm Terri Bailey with the
4 South Carolina Victims' Assistance Network. I'm a lawyer.

5 **THE COURT:** Okay.

6 **MS. BAILEY:** And I'm here representing the victim in
7 this case, Patricia Diane Phillips.

8 **THE COURT:** Okay.

9 **MR. THOMAS:** Excuse me, Your Honor. I'm extremely hard
10 of hearing. I'm not -- I have to have a microphone or audio
11 system. I can't hear anything she's saying.

12 **THE COURT:** Well, just try to speak up as best you can.
13 There, you ought to be able to ...

14 **MS. BAILEY:** So, Your Honor, I'm here as a lawyer for
15 Patricia Diane Phillips.

16 **THE COURT:** Okay.

17 **MS. BAILEY:** The victim of a brutal beating by Mr.
18 Thomas in April of 2017. He pled guilty. He's been
19 convicted, sentenced. Today's his PCR hearing, and
20 amazingly on Friday he served her with a subpoena to be here
21 today for this hearing.

22 Even though he's behind bars, he's continuing to harass
23 her by bringing her here today. She's terrified of this
24 man. And there is nothing to come out of her coming other
25 than just perpetuating the injuries he's already done to

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1 her.

2 He served her on Friday. The hearing's today. That in
3 itself is enough to quash the subpoena. Requiring her to
4 take a day off work to come here with no possibility of
5 being reimbursed for her travel or her appearance fee. But
6 even -- and that's sufficient.

7 But the real issue here is the damage to her. Why
8 should she be here? His grounds for PCR ---

9 **MR. THOMAS:** I'm sorry. Excuse me, Your Honor. I
10 don't understand what -- how long -- I've only been served
11 with a motion to quash the subpoena for one thing. And I
12 have to prove my case.

13 I have many allegations in my PCR that this victim
14 would have testified in October of 2017 that she falsified
15 charges against me. That's my testimony. And the State
16 responds with I have failed to provide the court with sworn
17 testimony.

18 Since that day I have been under a protection order to
19 not have any contact with the victim whatsoever, through a
20 third party -- the only way I can get that sworn testimony
21 is to subpoena her to court and ask her to testify. She has
22 been served with a subpoena. And her testimony is necessary
23 for my case, Your Honor.

24 And I assure you I have a witness in the courtroom that
25 would assure you that I was the victim in that case, that

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1 this woman fabricated charges against me.

2 **MS. BAILEY:** Your Honor, he pled guilty to beating her
3 up.

4 **THE COURT:** Okay.

5 **MR. THOMAS:** Your Honor, my -- I would point out that
6 in September of 2017 she went to family court and got an
7 order of protection against me, and immediately thereafter,
8 a week later come and visited me at the jail asking who I
9 was having sex with and, you know, a week after that tried
10 to visit me again.

11 She started writing me from an inmate adding ALLC ---

12 **THE COURT:** Okay. Hang on. I don't need to hear the
13 facts of the case.

14 (Pause)

15 **MR. SMITH:** And, Your Honor, I'll just say that the
16 motion to quash is not in the judge's packet. It was just
17 filed ---

18 **MR. THOMAS:** I'm still not hearing -- I'm still not
19 hearing, Your Honor. I didn't hear -- I didn't hear a word
20 he said. I'm sorry. I'm hearing impaired. I don't have
21 hearing aids.

22 **THE COURT:** What he said was the motion to quash is not
23 in the file.

24 (Pause)

25 **MR. THOMAS:** And, Your Honor, yeah, I would respond. I

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1 have no intention ---

2 **THE COURT:** You want to wait a minute? I'll tell you
3 when you can speak.

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

5 (Pause)

6 **THE COURT:** You had your probation revoked?

7 **MR. THOMAS:** I'm sorry?

8 **THE COURT:** Did you have your probation revoked?

9 **MR. THOMAS:** Yes, Your Honor, I did.

10 **THE COURT:** For what?

11 **MR. THOMAS:** I'm sorry?

12 **THE COURT:** Why?

13 **MR. THOMAS:** Well, my agent made some accusations that
14 -- first, one, she said I failed to report for a drug test
15 as instructed on New Year's Eve, and the office was closed.
16 She said -- she stated that she had to pull her weapon on me
17 because of an incident that took place at my residence. And
18 that was contrary to statements she made to dispatch when
19 she radioed in for help.

20 I mean, I was not able to confront my agent at all. I
21 think it was a hearsay report. I wasn't able to call
22 witnesses. I wasn't able to present any evidence. I did
23 offer an email where she confirmed that -- violating me for
24 not reporting and then she confirmed ---

25 **THE COURT:** Okay. All right. Okay.

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1 **MR. THOMAS:** I'm sorry.

2 **THE COURT:** So you're doing a three year sentence, is
3 that right?

4 **MR. THOMAS:** I'm sorry?

5 **THE COURT:** You're doing a three year sentence?

6 **MR. THOMAS:** I'm doing a three year, 19 month sentence,
7 yes, ---

8 **THE COURT:** Okay.

9 **MR. THOMAS:** --- consecutive to the 19 month probation.

10 **THE COURT:** Okay.

11 **MR. THOMAS:** I did the ---

12 **THE COURT:** And your -- the purpose -- you think the
13 purpose of your post-conviction relief hearing is to do
14 what?

15 **MR. THOMAS:** It's to establish that my plea was not
16 voluntarily given from the beginning. My attorney was -- he
17 failed to represent me in at least three or four regards in
18 my PCR. I was charged with -- a first redress ---

19 **THE COURT:** Okay. How is the victim's testimony going
20 to have any impact on that?

21 **MR. THOMAS:** Well, one, she will admit that her voice
22 is on a recording where she called and left on my voicemail.
23 And she says, not exactly word for word, but she says, I'm
24 reading this report and it says you punched me, but we both
25 know if you punched me I'd be in the hospital. She alleged

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1 that I punched her multiple times in the face ---

2 **THE COURT:** Let me explain this to you. You're not
3 going to get to retry your case, okay?

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

5 **THE COURT:** How else was your attorney -- how else did
6 he fall below an objective standard of reasonableness?

7 **MR. THOMAS:** He allowed me to be over-charged. He ---

8 **THE COURT:** He has nothing to do with how you're
9 charged.

10 **MR. THOMAS:** I'm sorry?

11 **THE COURT:** The State makes the charge.

12 **MR. THOMAS:** Yes. Yes, Your Honor. If I'm booked into
13 jail for a felony charge, and the warrant -- the best --
14 assuming all facts in the warrant are true, and it only
15 established probable cause for a misdemeanor charge, my
16 attorney should have at least contacted the solicitor and
17 said, hey, you can't indict on this, so why are you going to
18 hold it over his head for leverage for plea bargaining?

19 I was facing a ten year -- 13 years if I didn't plead
20 guilty ---

21 **THE COURT:** Yeah. And if you win this, that's what
22 you're going to be looking at. You understand?

23 **MR. THOMAS:** Yes, sir. I understand that.

24 **THE COURT:** How does the victim's testimony -- she
25 didn't -- she wasn't even at the guilty plea.

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1 **MR. THOMAS:** She will establish that she was notified
2 of a court date for ---

3 **THE COURT:** And how do you know that?

4 **MR. THOMAS:** Because she wrote me a letter and told me
5 that she was told that she was -- my bond revocation hearing
6 was scheduled for Friday, October 20th of 2017, and it was
7 moved up a day. She was not notified. And she has the
8 right to be notified as the victim. Which she did tell me
9 that she wasn't notified. And I believe my attorney brought
10 the email to the bond revocation hearing.

11 **THE COURT:** And your attorney was Max Gravlee?

12 **MR. THOMAS:** Yes, sir.

13 **THE COURT:** Where is he?

14 **MR. SMITH:** He's not here right now, Your Honor. But
15 he has been subpoenaed for today.

16 **MR. THOMAS:** I'm sorry. I didn't hear that.

17 **THE COURT:** I'm inclined to grant the motion to quash
18 your subpoena.

19 **MR. THOMAS:** If I -- with her testimony I can establish
20 that she fabricated charges on me and ---

21 **THE COURT:** You pled guilty. You were under oath. You
22 were questioned.

23 **MR. THOMAS:** Your Honor, I was being housed in -- if I
24 could proceed with my case I would be able to establish that
25 I was being housed in basically conditions that wouldn't be

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1 fit for a dog. Literally eight men in a room on a floor
2 sharing -- my feet were overlapping another man's bed.

3 And I complained to the clerk of court about it then,
4 told my attorney about it then, he didn't care. There was
5 no running water in the cell. I mean, I'm literally almost
6 in a -- one continuous -- one big large eight by twelve bay
7 with eight men. And I was going to live that way for about
8 the next year waiting for trial.

9 **THE COURT:** What does your victim's testimony have to
10 do with that? Not a thing.

11 **MR. THOMAS:** So, I mean, my understanding is that she
12 doesn't want to be here because she said it's going to be
13 reliving -- reliving the incident? I mean, I see that it's
14 two working days. I don't see that she's missing a job or
15 having to take any time off of a job.

16 You know, and if she can establish, like I said, if
17 she'd been notified of a court date -- it's very important.
18 Friday, October the 20th, that's a very, very important date
19 in my case. Very important date because that day, my
20 attorney should have had me out of jail.

21 Instead, he allowed the solicitor to move my hearing up
22 a day to a Thursday, October 19th, with no notice to the
23 victim. And as a result I wound up staying in jail with a
24 fifteen thousand dollar (\$15,000.00) bond.

25 And my bond, by the way, was reduced from 25 to 15 in

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1 the face of a bond revocation motion. You know, I mean,
2 move to revoke my bond and it was reduced because the judge
3 was presented with some letters from the victim which pretty
4 much showed that she was -- she was the one attacking me.
5 She was stalking me.

6 I have police reports contacting law enforcement asking
7 to make her stop contacting me. She's got -- I have
8 threatening text messages where she's trying to get this
9 woman kicked out of her home for letting me live there.
10 This was months after I got out of jail, months after I made
11 bond. She tried to ---

12 **THE COURT:** And before you pled guilty.

13 **MR. THOMAS:** I was in jail facing at least another year
14 in jail waiting for trial if I didn't plead guilty and get
15 out and gather my evidence.

16 **THE COURT:** Well, you pled guilty. I've read the
17 transcript. There's nothing in there to show that it was
18 under duress or force. In fact, under your oath you said it
19 was not, it was voluntary.

20 **MR. THOMAS:** Yes. Yes, -- no ---

21 **THE COURT:** And now you want to change your mind
22 because you violated your probation and got sent back to
23 prison.

24 **MR. THOMAS:** No. I filed long before I violated my
25 probation. It was filed November of 2018. I had the one

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1 year deadline. I mean, the day before. I didn't get
2 violated until July of this year.

3 I got out so that I could go back to the sheriff's
4 office, file for FOIA disclosures. Had CAD (ph.) details
5 where this woman repeatedly called the police and told them
6 lies. She would tell them one day that I'm threatening ---

7 **THE COURT:** When did you get notice that your case was
8 coming up today?

9 **MR. THOMAS:** I'm sorry?

10 **THE COURT:** When did you get notice that your case was
11 scheduled for today?

12 **MR. THOMAS:** I don't know, maybe a week ago. Maybe a
13 week ago, two weeks, week and a half.

14 **THE COURT:** When did you notice him?

15 **MR. SMITH:** Your Honor, I believe it was either the
16 same day or the day after we sent out the email with the
17 rosters to all attorneys. I could look up the exact date if
18 ---

19 **THE COURT:** Yeah, give me -- get me a date. You can
20 sit down if you want to, Mr. Thomas.

21 (Pause)

22 **MR. SMITH:** Well, Your Honor, we did send out the
23 roster by email on September 20th. I can't lay my hands on
24 it at the moment, but I believe we sent out the letter to
25 Mr. Thomas with a copy of the roster either one or two days

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1 after that.

2 **THE COURT:** Okay. So a month ago. You got noticed a
3 month ago. And you wait til two days before the hearing to
4 file a subpoena. What's the reason for that?

5 **MR. THOMAS:** I'm sorry. For the hearing to file what?

6 **THE COURT:** Your subpoena to the victim, who you are by
7 law, by sentence, not supposed to have any contact with.

8 **MR. THOMAS:** Well, Your Honor, I had to have another
9 party serve the subpoena because I cannot contact her. I
10 knew her address. I know how to write her, but I would be
11 violating the order for revoktion [sic].

12 But, I mean, I don't want to have any contact with her.
13 I really don't. I mean, I have a lot of police reports
14 where I've gone to the police and asked them to make her
15 stop contacting me when I bonded out. I mean, I want no
16 contact with her. I want her to not contact me, not at all.

17 But there's some truth that needs to come out to show
18 that she was not notified of the court hearing and that she
19 actually lied about the original charge. And my attorney
20 had proof of that or had the ability to give proof of that
21 or hear proof of that, and he didn't do it, didn't make any
22 -- he had a flash drive with her admission that she lied in
23 discovery.

24 **THE COURT:** Well, I tell you what, Mr. Gravlee has been
25 summoned up here. He should have been here now.

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1 **MR. THOMAS:** I'm sorry?

2 **THE COURT:** We're going to find out. Just take him
3 back. We'll just hold him. When Gravlee gets up here we'll
4 see what he's got to say.

5 **MR. THOMAS:** Okay.

6 **THE COURT:** Well, hang on, here he is. Gravlee, why
7 aren't you up here? Gary Thomas. State versus Thomas or
8 Thomas versus the State.

9 **MR. GRAVLEE:** Yes, sir, Your Honor. Sorry, I had M&M
10 court downstairs and was doing that. And I was told by the
11 State ---

12 **THE COURT:** It was going to be this afternoon.

13 **MR. GRAVLEE:** --- that it was going to be the last
14 thing, yeah. Are you ready to proceed now?

15 **THE COURT:** Well, right now what we're doing is a
16 motion to quash a subpoena issued by your former client to
17 the victim. He claims -- he's claiming that you had a flash
18 drive where she admitted that she was lying and ---

19 **MR. GRAVLEE:** There was a flash drive. And I have this
20 flash drive, actually, that he gave me. I plugged it in, it
21 didn't work. There wasn't anything that ever came up on it.
22 And I asked him what -- if there was any program to open it.
23 He couldn't tell me. But I still have that flash drive in
24 my file, Your Honor.

25 **THE COURT:** Okay. He's claiming that the victim would

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1 have some relevant testimony in this -- and I've got to
2 decide. He served her on Friday with a subpoena. There is
3 a motion to quash that subpoena before the Court. Are you
4 aware of any relevant testimony that the victim could give
5 in a post-conviction relief hearing with respect to what he
6 claims to be an involuntary guilty plea?

7 **MR. GRAVLEE:** Regarding his guilty plea, I'm not, Your
8 Honor. I don't know -- I don't believe, to my knowledge,
9 that she was present during that hearing.

10 **THE COURT:** There's no indication she was at the guilty
11 plea.

12 **MR. GRAVLEE:** I don't believe so, Your Honor. And I
13 don't know that I ever spoke to her in person. I might have
14 spoken with her on the phone, but certainly not that day in
15 court during the guilty plea that we're here on.

16 **THE COURT:** Okay.

17 **MR. THOMAS:** Excuse me, Your Honor. What led up to the
18 guilty plea was my attorney not talking to her, not asking
19 her why or to bring her to court to explain why she got an
20 order of protection issued against me and then turned around
21 and right after the judge told her don't undermine the
22 court's authority by getting an order of protection and
23 contacting him.

24 She came and visited me in jail. She wrote me through
25 a mail rerouting service using aliases, Your Honor. She is

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1 continuing to contact me in violation of the court order.

2 She did that.

3 She tried -- when I made bond she tried to get me
4 locked up for violating the condition of bond. She came to
5 my storage unit. And I asked him to subpoena her to explain
6 all this, why is she coming at me? Why is she at my
7 apartment on the day I get arrested? Why is she forcing her
8 way into the apartment? She's never lived there. Never had
9 any business being on the property.

10 I asked to explain why was she -- why would she flee
11 the scene and go to the police the next day and make up a
12 story? Why did she do these things? You know, she says I
13 beat her up, punched her multiple times and broke her phone
14 in April.

15 And I've got emails that she was sending me through her
16 Android phone for days after that knowing that I was in a
17 motel room, knowing that I had a warrant against me, asking
18 me if she could spend the night with me. I said, no.

19 She called the sheriff's office and started making
20 threats back and forth, back and forth to show -- a Pickens
21 County detective, a female detective, Shannon Ellenburg, at
22 that -- took my evidence back to the solicitor because she
23 believed in my innocence after I got out and gathered the
24 evidence he would not gather ---

25 **THE COURT:** You got a -- you got a police investigator

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1 from Pickens County who believes your story?

2 **MR. THOMAS:** Yes, ma'am [sic]. I ---

3 **THE COURT:** Are they subpoenaed?

4 **MR. THOMAS:** No. No. No, sir. I have an emailed -- I

5 can confirm that I received this email from Shannon

6 Ellenburg. And Mr. Hill is here today. I believe he can

7 testify that he received email communications from Shannon

8 Ellenburg concerning my charges regarding the ---

9 **THE COURT:** Well, that's all for another day -- another
10 ...

11 **MR. THOMAS:** Yes, sir. And the chief deputy at Pickens
12 County, he, himself, assured me that if my charge -- my plea
13 ---

14 **THE COURT:** Well, why did you plead guilty?

15 **MR. THOMAS:** Because my attorney was not going to do
16 his job for me. He wouldn't -- he could contact the
17 solicitor and say, hey, man, you're charging this guy with a
18 ten year felony when you can't do that. The best you can
19 do, the best you can indict for is a three year misdemeanor.
20 He wouldn't even do that.

21 He didn't subpoena her. He had an appointment
22 scheduled with her so she can get -- she had a lot of the
23 emails. And all the evidence I had to get out ---

24 **THE COURT:** And all this evidence that you claim to
25 have at this juncture, why did you plead guilty?

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1 **MR. THOMAS:** Because my attorney was not gathering the
2 evidence for me. I had to get out of jail because FOIA
3 disclosures are not available to inmates. There's no law
4 library at the jail. And that's all in my motion to relieve
5 counsel.

6 In fact, at my motion to relieve counsel, my motion to
7 represent myself, he stood by me and heard me confirm that
8 there's no law library, no way for me to do research, no way
9 for me to look up court rules. I can't prepare my case from
10 jail without a law library.

11 And he said not one word to advocate for my right to
12 represent myself. Not one word. And he's still my
13 attorney, still under the obligation of advocating for my
14 rights and did not subpoena ---

15 **THE COURT:** Not anymore.

16 **MR. THOMAS:** I'm sorry?

17 **THE COURT:** Mr. Gravlee's representing you? Is that
18 what you claim?

19 **MR. THOMAS:** He's supposed to be.

20 **THE COURT:** Not now.

21 **MR. THOMAS:** Huh?

22 **THE COURT:** Representation is terminated.

23 **MR. THOMAS:** Then. Then. He was supposed to be
24 representing me and telling the judge, Your Honor, that he
25 can't -- I couldn't -- as an attorney he couldn't prepare a

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1 case for trial without looking at Westlaw and having some
2 kind of legal research ---

3 **THE COURT:** Well, he didn't need to because you pled
4 guilty. All right. I'm going to ---

5 **MR. THOMAS:** Because he ---

6 **THE COURT:** I'm going to think about this. Y'all just
7 hold him.

8 **MS. BAILEY:** Your Honor, I just want to point out ---

9 **MR. THOMAS:** I mean, ---

10 **THE COURT:** Well, wait. Be quiet. Yes.

11 **MS. BAILEY:** Somebody beat Ms. Phillips up.

12 **THE COURT:** Okay. I don't think there's much doubt
13 about that. We're not talking about ---

14 **MS. BAILEY:** She was injured.

15 **THE COURT:** Yeah. Okay. All right. Thanks.

16 **MR. GRAVLEE:** Your Honor, as far as scheduling goes, is
17 this coming back later today?

18 **THE COURT:** I'm not sure, Mr. Gravlee. You just make
19 sure you're available with your file.

20 **MR. GRAVLEE:** Yes, sir, Your Honor.

21 (Whereupon court was in recess at 10:50 am)

22 (Whereupon court reconvened at 11:00 am)

23 **THE COURT:** All right. What I'm going to do with
24 respect to this subpoena, I'm not going to quash it at this
25 time. I'm going to require the witness to be in the

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1 courthouse available this afternoon. And the Applicant,
2 Petitioner is going to have to put up enough evidence to
3 make a prima facie showing to my satisfaction that the
4 testimony of the victim is necessary with respect to the
5 issues in a post-conviction relief hearing. Okay.

6 **MR. THOMAS:** Okay. I'm sorry. Then? Later this
7 afternoon? And one of the witnesses I need to call to make
8 that prima facie showing, am I questioning her regarding the
9 whole case or just regarding what ---

10 **THE COURT:** You're going to put your case up, and if
11 you don't make a prima facie showing that the testimony of
12 the victim is necessary, then I'm quashing the subpoena.

13 **MR. THOMAS:** Okay.

14 **THE COURT:** Okay.

15 **MR. THOMAS:** Thank you.

16 (Whereupon court was in recess at 11:01 am)

17 (Whereupon court reconvened at 1:52 pm)

18 **THE COURT:** Okay. Thomas v. State.

19 **MR. SMITH:** Your Honor, Mr. Thomas is presently
20 incarcerated. He was ---

21 **MR. THOMAS:** I'm sorry, Your Honor. I can't hear. I'm
22 really, really hard of hearing. I mean, SCDC fitted me out
23 for hearing aids, but I haven't gotten them yet.

24 **THE COURT:** All right. Go ahead.

25 **MR. SMITH:** Okay. In 2000 -- I believe it was 2017 Mr.

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1 Thomas was indicted for CDV in the first degree. In
2 December of 2017 he appeared before Judge Verdin and waived
3 presentment for second degree CDV and pleaded guilty to
4 that. And later the first degree CDV was dismissed.

5 He was represented by Mr. Max Gravlee. Judge Verdin
6 sentenced him to three years imprisonment suspended to
7 probation for five years. And Mr. Thomas did not appeal.
8 He has filed his PCR application.

9 And the State has interpreted the grounds to be the
10 following; that he was provided ineffective assistance of
11 counsel, he was deprived of the right to represent himself,
12 he was prejudiced by the solicitor's controlling of the
13 general sessions docket, his sentence of five years
14 probation exceeds the statutory maximum for CDV, second, and
15 that his guilty plea was entered involuntarily.

16 And on July 22nd, 2019 Mr. Thomas did file an amended
17 application. And he also alleged the new ground that his
18 guilty plea was involuntary because there was a defect in
19 Judge Verdin's colloquy. In response to that the State
20 filed an amended return as well, Your Honor.

21 And before we get into it there are a couple of issues
22 in this case. One is Mr. Thomas sent a letter to our office
23 about a month ago saying he was going to amend his
24 application to raise a claim of ineffective assistance of
25 probation revocation counsel dealing with a probation

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1 revocation hearing that occurred, I believe, in July of this
2 year, which was -- and it's the State's position that --
3 well, we would say number one, we haven't been served with
4 any kind of amendment related to that. We've only gotten a
5 letter. So I'm not sure if it's even properly before the
6 Court. I just wanted to bring it up. But if it is, that's
7 a separate issue for a different PCR action that wouldn't be
8 properly addressed in this one.

9 And that also, Your Honor, Mr. Thomas has filed a
10 motion for sanctions against me. And so I would like the
11 Court to address that motion as well.

12 And so if we could just clear up the issue to confirm
13 that the probation revocation issue from July of 2019 is not
14 part of this action, and if we could address the motion for
15 sanctions, and if Mr. Thomas would just clarify his grounds
16 today. And other than that, the State's ready.

17 **THE COURT:** I don't have a copy of your -- the motion
18 you're referring to.

19 **MR. THOMAS:** I'm sorry?

20 **THE COURT:** Do you have a motion for sanctions?

21 **MR. SMITH:** Mr. Thomas has filed that, Your Honor.

22 **THE COURT:** I don't have a copy.

23 **MR. SMITH:** I don't either.

24 **THE COURT:** Well, how do you know about it?

25 **MR. SMITH:** Well, he did serve it on our office, Your

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1 Honor. I don't believe I brought a copy of it. Let me
2 check. I spoke too soon. I actually do have the copy we
3 were given.

4 (Copy being made by the clerk)

5 **MR. THOMAS:** And I also had filed a motion for summary
6 judgment, a judgment on the pleadings based on the length of
7 the sentence and the plea hearing itself. I have not --
8 trying to switch -- jump tracks here.

9 We were discussing the victim testifying and if I could
10 make a prima facie case that her testimony would have been
11 relevant then to -- would have changed the outcome of
12 things. I would like to testify about that now if I can.

13 I've got several -- several exhibits including police
14 reports, emails dating back way before I got charged with
15 anything. And these are all printed from my Google photo --
16 my Google photo, my Google Drive.

17 And I gave my attorney my email address and my password
18 for him to go into my Google and get this. After he had
19 made an appointment with or, I'm sorry, Ferris Harvley, made
20 appointment with him to bring him this evidence for him to
21 take to the solicitor and let the solicitor know who the
22 victim really is. And this is falsifying reports going back
23 before my charge.

24 And I was contacting police ---

25 **THE COURT:** I tell you what, sit down, we're not ready

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1 to talk about that.

2 (Pause)

3 **THE COURT:** All right. I've just reviewed your motion
4 for sanctions. Is there anything you want to tell me about
5 it?

6 **MR. THOMAS:** I'm sorry?

7 **THE COURT:** I have just reviewed your motion for
8 sanctions against Mr. Smith. Is there anything you would
9 like me to -- like to tell me about it?

10 **MR. THOMAS:** Yes. The statute or the case I cited was
11 Thompson versus Department of Public Safety. And it is
12 actually construing -- yes, it was. The case -- Thompson
13 actually dealt with a DUI conviction, a DUI and a license
14 suspension extension after the term of imprisonment. But
15 what -- the Supreme Court defined term of imprisonment to
16 include probation, parole periods, suspended portions.

17 And that's -- and the court actually said -- they said
18 the term imprisonment means the non-fine part of criminal
19 sentence, and includes suspended portions, probation or
20 parole periods, and supervised furlough. And if probation
21 has been extended as has been by State versus Ellis in 2012
22 ---

23 **THE COURT:** You've made a motion for sanctions against
24 Mr. Smith.

25 **MR. THOMAS:** Yes, Your Honor. I had written him a

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1 letter and asking him if he would just concede the issue on
2 the sentencing. And I sent him Thompson -- I believe I
3 cited Thompson and quoted from the case and illustrated that
4 my five years probation sentence on a three year statutory
5 maximum was two years beyond that.

6 If he could concede that, then I would have my credits
7 and go home and then we could get on with this PCR. I could
8 just dismiss it or whatever. You know what I mean? I
9 wouldn't even need to be doing my PCR once probation's done
10 and my sentence is over with.

11 And he responded with -- that he -- I asked him is it
12 an action that he's either prohibited from doing or not
13 required to do as opposing counsel. And if he'd concede
14 that there's a good argument, I mean, my five year sentence
15 exceeded the statutory maximum, he shouldn't argue against
16 it.

17 And I noticed in his -- in the return and the amended
18 return he cites not authorities other than the statute says
19 that the judge can give you probation. But it also says for
20 any offense that he could give me five years probation for a
21 three year charge, and he could also give me five --
22 probation for a 30 day charge, the statute doesn't
23 discriminate either way. It's any offense not punishable by
24 death -- life imprisonment, excuse me, but even a
25 misdemeanor.

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1 I got a five year probationary sentence with 78 days in
2 jail. And I should be -- I should not be under the
3 jurisdiction of the State for no more than three years.
4 Well, when they gave me my full revocation back, they
5 counted none of the 19 months I did on probation as if it
6 never happened.

7 I have -- I have my SCDC inmate detailed printout
8 showing that my sentence started ---

9 **THE COURT:** And your complaint against opposing counsel
10 is exactly what?

11 **MR. THOMAS:** That he's continuing to maintain that my
12 sentence is legitimate, it is lawful, a five year sentence
13 on a three year statutory maximum ---

14 **THE COURT:** And that's the basis for your motion for
15 sanctions?

16 **MR. THOMAS:** And -- yes. And ---

17 **THE COURT:** Any other basis?

18 **MR. THOMAS:** And -- yes. And I had filed a notice of
19 -- I waived objections to Judge Verdin hearing my case. And
20 then he said he wrote me a letter and said that he -- he
21 anticipates it will be continued til October. And I waived
22 objections to her hearing my case. I didn't see why she
23 shouldn't.

24 And he never filed -- he never served me with a motion
25 for extension. I wasn't given an opportunity to respond at

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1 all. It was just ---

2 **THE COURT:** Any other -- any other basis for your
3 motion for sanctions? Any other?

4 **MR. THOMAS:** That's all. That's all, Your Honor.

5 **THE COURT:** Denied.

6 Okay. Now, tell me what issues you intend to present
7 today.

8 **MR. THOMAS:** That my sentence exceeds the statutory
9 maximum and that term of imprisonment includes probation,
10 which means my probation should have never gone beyond three
11 years -- three years suspended to three years probation. I
12 can understand -- that would have been legitimate. And my
13 attorney, of course, he didn't object to it.

14 And I didn't even -- I wasn't even told that five years
15 was on the table until after I pled guilty and the judge
16 accepted my plea. She actually said that -- she warned me.
17 She said that it carries up to three years. And so I pled
18 guilty. And then she said, you know, you can appeal the
19 plea if you want to. And then I got sentenced to five years
20 probation.

21 And since I've been released I've been -- I was
22 sentenced to standard conditions of probation also. And
23 since I've been released the probation officer made me sign
24 additional conditions of release. And that's not -- they
25 weren't part of my sentence. They actually had me reporting

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1 twice a month ---

2 **THE COURT:** Okay. I'm talking about what issues you're
3 going to present today to substantiate your application for
4 post-conviction relief. Enumerate them, please, now.

5 **MR. THOMAS:** Okay. My attorney was ineffective.

6 **THE COURT:** On what -- for what reasons?

7 **MR. THOMAS:** He allowed me to be rescheduled from a
8 bond -- a bond revocation hearing on the day that if I would
9 have been in front of a judge on that day, and he would have
10 made a motion for me to be released, I could have been
11 released. And that was under statute 17 ---

12 **THE COURT:** What's your next reason?

13 **MR. THOMAS:** He failed to contact one of my witnesses
14 to gather evidence for me, which is ---

15 **THE COURT:** What witness?

16 **MR. THOMAS:** I'm sorry?

17 **THE COURT:** Name the witness that you claim he did not
18 talk to.

19 **MR. THOMAS:** Ferris Harvley. And she had scheduled an
20 appointment with him, and she missed her appointment. And I
21 asked him to just go -- see, that's where I was living,
22 actually be at my residence. I asked him to just go get my
23 evidence.

24 **THE COURT:** Okay. What's your next basis?

25 **MR. THOMAS:** That my plea was not -- my plea was only

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1 entered because I felt like my attorney was bailing out on
2 me. He was not -- not pushing for me to get out on bond.
3 He was not advocating for me to represent myself. He knew
4 that I didn't have access to a law library.

5 **THE COURT:** Okay. What's your next basis? I've got
6 failure to contact a witness and an involuntary guilty plea.
7 What else?

8 **MR. THOMAS:** Like I said, according to the 17-23-90 I
9 was booked in on a felony charge and had been two -- two
10 terms of court had gone by. And at the last day of the
11 second term of court I was scheduled for a bond hearing, a
12 bond revocation hearing. And then it was moved up a day
13 with no notice to me or the victim at the time. I was
14 brought in on Thursday, and I couldn't make the motion
15 pursuant to 17-23-90. And he didn't object to that.

16 And he hadn't filed no motion according to 17-23-90 or
17 for any speedy trial motions to try to get my case brought
18 along so I wouldn't be sitting in jail for the next year
19 waiting for court. And I was being housed in ---

20 **THE COURT:** Next basis. Any other basis?

21 **MR. THOMAS:** I wasn't warned of -- I wasn't warned of
22 the possibility I was going to get five years probations.
23 And I wasn't advised of the elements of my offense, second
24 degree, domestic violence. I wasn't advised of any of the
25 elements.

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1 And I was under the impression that -- I actually had
2 to be -- I later learned that -- I just -- we didn't discuss
3 really the charges except for I asked him to get the first
4 degree reduced. And he made no effort to do that.

5 And after that I wanted to represent myself. And he
6 contacted the jail. The jail confirmed there was no law
7 library, got an email confirming there was no law library.
8 And then he didn't really push it to -- address it to the
9 judge that I would not be able to represent myself if I was
10 in the jail with no library.

11 He didn't ask for a PR bond. He didn't ask -- he
12 didn't say anything during the hearing at all. He didn't
13 try to advocate for my right to represent myself. He stood
14 by and knew that I ---

15 **THE COURT:** All right. Any other grounds?

16 **MR. THOMAS:** Those are the grounds, Your Honor.

17 **THE COURT:** All right. Anything else? We ready to
18 proceed?

19 **MR. SMITH:** Yes, Your Honor.

20 **THE COURT:** Okay. Put up your evidence.

21 **MR. THOMAS:** Am I addressing the issue of the subpoena
22 from earlier first?

23 **THE COURT:** No, sir. I've ruled on that.

24 **MR. THOMAS:** I'm sorry?

25 **THE COURT:** I have ruled on that.

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1 **MR. THOMAS:** I -- I ---

2 **THE COURT:** You were here when I said you're going to
3 have to put up evidence to show that it is appropriate to
4 call that witness.

5 **MR. THOMAS:** Oh -- oh, okay.

6 **THE COURT:** And I would put on the record that this is
7 highly unusual that someone who has been ordered to have no
8 victim contact that you would wait til the very last minute
9 to file a subpoena to drag that victim up to court,
10 particularly in light of the fact that there was a
11 previously scheduled hearing and she was not subpoenaed.
12 All right. Put up your evidence.

13 **MR. THOMAS:** I apologize for that, Your Honor. I had
14 been in SCDC since July. And I -- I had no control of the
15 ---

16 **THE COURT:** Put up your evidence.

17 **MR. THOMAS:** I have an audio recording I would like to
18 play. I don't have any way to plug the flash drive in.
19 It's -- there's a link to my Google Drive I sent to Mr.
20 Smith, which it's got an audio recording on it that I would
21 like to play that was left on my voicemail, the message that
22 was left on my voicemail in early May.

23 **THE COURT:** What does that have to do with the grounds
24 that you've enumerated?

25 **MR. THOMAS:** If I present evidence that there would be

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 a reason for the victim to be here, I mean, you said if I
2 present -- if I made a prima facie showing that her ---

3 **THE COURT:** This is not -- this is about what has
4 happened prior to your guilty plea.

5 **MR. THOMAS:** Prior to my guilty plea?

6 **THE COURT:** Yeah, what led up to your guilty plea.

7 **MR. THOMAS:** Oh, well, I mean, okay.

8 **THE COURT:** It is time for you to -- yes, Mr. Smith,
9 what do you want ---

10 **MR. SMITH:** I'm sorry to interrupt, Your Honor. I just
11 wanted to clarify a point. I checked back through my notes.
12 The letter we sent to Mr. Thomas notifying him of today's
13 hearing date, we actually mailed it on the -- September
14 30th, not the 21st.

15 **THE COURT:** Okay.

16 **MR. SMITH:** I wanted to clarify because ---

17 **THE COURT:** All right. Thank you. All right. Put up
18 your evidence.

19 **MR. THOMAS:** Can I call -- can I call my witness ---

20 **THE COURT:** Yeah, call your witness, whoever they are.
21 This is the time to do it.

22 **MADAM CLERK:** Please place your left hand on the Bible
23 and raise your right hand.

24 **Ferris Harvley, being**
25 duly sworn testified as follows;

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 **MADAM CLERK:** Please state your name for the record.

2 **MS. HARVLEY:** Ferris Harvley.

3 **MADAM CLERK:** Can you spell that?

4 **MS. HARVLEY:** F-e-r-r-i-s H-a-r-v-l-e-y.

5 **MADAM CLERK:** Thank you.

6 **Direct Examination by Mr. Thomas:**

7 Q. Okay. I want to ask you were you able to bring some
8 paperwork to me today?

9 A. Yes.

10 Q. Did we live together?

11 A. Yes.

12 Q. Can you tell when we lived together? From what time to
13 what time?

14 A. From the early part of May -- May the 6th of 2017 til
15 you were arrested in September, I think it was the 15th, of
16 2017.

17 Q. And where did we live?

18 A. You want the address?

19 Q. Yes.

20 A. 107 India Drive, apartment 7, Pickens.

21 Q. And how far is that from the Pickens County Courthouse?
22 Roughly? I'm sorry.

23 A. Two to three minute drive.

24 Q. What?

25 A. Two or three minute drive.

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 Q. Okay. And have you had contact with my public
2 defender, Mr. Gravlee, during that time?

3 A. Yes.

4 Q. Or when I was in jail, I mean. I'm sorry.

5 A. Yes.

6 Q. Okay. Did you schedule an appointment with him or did
7 you have an appointment scheduled with him?

8 A. I did.

9 Q. Did you arrive at that appointment?

10 A. No.

11 Q. What was the appointment for?

12 A. It was for me to take the emails, all the evidence that
13 you had that she had been stalking us.

14 Q. The stuff you brought today?

15 A. Yes.

16 Q. Okay. Can I have you look at a couple of things?

17 **MR. SMITH:** And, Your Honor, I would just ask to be
18 able to view these, too. I haven't seen these.

19 **THE COURT:** Show them to him first.

20 **MR. THOMAS:** I'm sorry, I wasn't able to make photo
21 copies. I'm sorry.

22 (Pause)

23 **MR. SMITH:** Your Honor, I would have an objection to
24 one of these two. But ---

25 **THE COURT:** What is it?

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 **MR. SMITH:** Well, one of these I don't think -- I'm
2 going to have to object because I don't see how she can lay
3 a foundation to authenticate it.

4 **THE COURT:** What is it? I don't have any idea what
5 you're looking at.

6 **MR. SMITH:** Well, maybe I should let her try to explain
7 what it is.

8 **THE COURT:** Okay. All right.

9 **MR. SMITH:** Thank you.

10 **THE COURT:** They're not admitted just yet.

11 **Direct Examination by Mr. Thomas Continued:**

12 Q. Is that -- text message conversation -- the text
13 message conversation, who is -- could you read the last --
14 the very last of the three, please?

15 A. Do I read the ugly words?

16 **THE COURT:** I don't know what he's asking you to read.

17 A. It says you are a F-ing A-hole. You take Ferris' ugly
18 fat A to go see Sara when she gets out and put it on
19 Facebook. F you, F you.

20 Q. Who is that message from?

21 A. Dianne. Dianne Phillips.

22 Q. Okay. And what's the date on that?

23 A. 7/28/17.

24 Q. July of 2017?

25 A. Um-hum (affirmative).

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 Q. Who is she referring to?

2 A. She was calling you bad words.

3 Q. Did you do anything to provoke that kind of mood?

4 A. No. She was -- she was complaining because I went to
5 see -- I went to visit your daughter Sara.

6 Q. Okay. And the next -- the next one.

7 MR. THOMAS: Your Honor, can I have these marked for, I
8 mean, ---

9 THE COURT: Identification at this point.

10 MR. THOMAS: I'm sorry?

11 THE COURT: Where are they? Mark them for
12 identification, please. Applicant's 1 and 2.

13 (Whereupon Applicant's exhibits 1 and 2 were marked for
14 identification)

15 MR. SMITH: And just for the record, Your Honor, I
16 object to, I guess, exhibits -- the one she just read, but I
17 don't believe it's properly authenticated.

18 THE COURT: Okay.

19 MR. THOMAS: I'm sorry, I missed it. I didn't hear
20 what he said.

21 THE COURT: He objects to the admission of the first
22 one.

23 MR. THOMAS: What?

24 A. May I talk?

25 THE COURT: He objects to the admission of the first

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 exhibit.

2 **MR. THOMAS:** Your Honor, I have a -- I have a -- I
3 don't know what -- pitch deafness. The room absorbs all
4 sounds. And if nobody's talking into the microphone, I
5 really can't hear what's being said. I just -- it comes to
6 me as drone.

7 **THE COURT:** He objects to the admission of your first
8 exhibit.

9 **MR. THOMAS:** On what grounds?

10 **THE COURT:** It is not authenticated. She is not the
11 proper party to have this admitted.

12 **MR. THOMAS:** Well, could I have it marked for -- can I
13 have it marked for the ---

14 **THE COURT:** It is marked for identification.

15 **MR. THOMAS:** Okay. I will authenticate it with my
16 testimony, if that's okay.

17 **Direct Examination by Mr. Thomas Continued:**

18 Q. The second Facebook message, who is that from?

19 A. It's from Dianne Phillips.

20 Q. And who is it addressed to?

21 A. Tiffany Thomas.

22 Q. And how did you come to be in possession of that?

23 A. I went on to Tiffany Thomas' Facebook page and found
24 it, a comment to Tiffany threatening that she ---

25 **MR. SMITH:** Objection, Your Honor.

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 Q. And who's identified in it?

2 THE COURT: Sustained.

3 A. Say it again. What did you say?

4 Q. Who was identified in it? Who does it say I told you

5 ...

6 A. She identifies Tiffany and you.

7 MR. SMITH: Objection, Your Honor. I'm objecting to
8 the reading of it into the record. This has not been
9 authenticated.

10 THE COURT: Okay.

11 MR. THOMAS: Your Honor, in that statement -- in that
12 statement she's talking to my ex-wife and she says, I told
13 you Zack didn't beat me up or anything. And that's -- I'm
14 Zack ---

15 THE COURT: This woman is not the proper party to have
16 this document admitted. I sustain that.

17 MR. THOMAS: Okay.

18 Q. During the period that I lived in Pickens with you were
19 you friends with Dianne?

20 A. No.

21 Q. Okay. Did she -- did you invite her to the house?

22 A. No.

23 Q. Did you -- did you ever have -- did you communicate
24 with her through text messages or emails?

25 A. I did.

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 Q. Were they friendly communications?

2 A. No.

3 Q. Were they -- were they prompted by you or prompted by
4 her or ...

5 A. By me.

6 Q. I'm sorry?

7 A. By me.

8 Q. They were prompted by you? Did you initiate them?

9 A. Well, she was ---

10 Q. I'm sorry ---

11 A. --- the cause of them. She caused me to send them to
12 her.

13 Q. Were there -- were they threatening?

14 A. No. I asked her to leave me alone, stop contacting me
15 and stop coming to my house.

16 Q. I'm sorry?

17 A. I asked her to leave me alone and stop coming to my
18 house.

19 Q. And did she stop?

20 A. No.

21 Q. Did she ever make any threats to have you kicked out?

22 A. Yes.

23 Q. Why?

24 A. Because I was letting you live with me, and she was
25 mad.

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 Q. Okay.

2 MR. SMITH: Objection, Your Honor, to hearsay.

3 THE COURT: And she doesn't know the state of mind.

4 MR. THOMAS: I'm sorry?

5 THE COURT: She can't testify to this other woman's
6 state of mind.

7 Q. Did she -- I'm sorry. Did she -- did she send you text
8 messages implying that she was going to contact your
9 landlord?

10 A. She did.

11 Q. Okay. What did she say in the text messages?

12 A. She said I ---

13 MR. SMITH: Objection

14 A. I'm sorry?

15 MR. SMITH: Your Honor, to hearsay again.

16 THE COURT: Yes. Sustained. What does this have to do
17 with ineffective assistance of counsel?

18 MR. THOMAS: Well, my witness had a lot of information
19 available to her. And this is a lot of it. Some of it she
20 can -- she can say that she was there, she witnessed, she
21 heard. Okay. She also accompanied me to the sheriff's
22 department between May and -- can I ask her about that? Was
23 she with me? Yes?

24 THE COURT: I don't know. You ask and we'll see if
25 there's an objection.

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 Q. Have you ever -- have you ever -- during the time I
2 lived in Pickens apartments have you ever accompanied me to
3 police or to contact police?

4 A. Yes.

5 Q. What was the purpose in contacting police?

6 A. To complain about harassment.

7 Q. About what?

8 A. Harassment.

9 Q. From?

10 A. Dianne.

11 Q. Did we -- did I have -- when I went to the police did I
12 have anything to offer the police?

13 A. Yes.

14 Q. What did I have?

15 A. You had basically a stack of paper, the emails and text
16 messages that she was sending.

17 Q. Okay. Were you with me on May 17th when I went to the
18 ---

19 A. Yes.

20 Q. Okay. And I made a complaint.

21 **MR. THOMAS:** I have -- I don't know if I should admit
22 this now. Can I have this marked for identification?

23 **THE COURT:** Show it to the opposing counsel.

24 **MR. THOMAS:** It's a police report dated May -- it's an
25 addendum to a police report that was originally dated May

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 12th. That is May 17th of 2017 visit to the Pickens County
2 Sheriff's Office.

3 **THE COURT:** Just give him a minute to look at it.

4 **MR. THOMAS:** Okay.

5 (Pause)

6 **MR. SMITH:** And, Your Honor, I am going to have an
7 objection to this exhibit.

8 **THE COURT:** Okay. What is it?

9 **MR. SMITH:** Well, I don't believe this witness can
10 properly authenticate this document. And it also contains
11 hearsay. And I also object on the grounds of relevance.

12 **THE COURT:** Let me look at it.

13 Q. Do you know if anything was done ---

14 **THE COURT:** Hey, wait.

15 **MR. THOMAS:** Sorry.

16 (Whereupon Applicant's exhibit 3 was marked for
17 identification)

18 (Pause)

19 **THE COURT:** I sustain the State's objection. It's not
20 relevant.

21 **MR. THOMAS:** Okay.

22 Q. You stated you had all this paperwork in your
23 possession in 2017 when I went to jail, and you had an
24 appointment with my attorney. When you didn't make it to
25 the appointment did he attempt to contact you?

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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- 1 A. Yes.
- 2 Q. Huh?
- 3 A. He left a voicemail.
- 4 Q. Did he attempt to contact you?
- 5 A. Yeah, he left a voicemail telling me that he ---
- 6 Q. Did you return the call?
- 7 A. I did.
- 8 Q. Well, what was the result of that?
- 9 A. Nothing. I asked him to come and get it.
- 10 Q. What?
- 11 A. I asked him to come and get it, and he didn't.
- 12 Q. He had to come?
- 13 A. To my apartment.
- 14 Q. You asked him to come and get it, the paperwork?
- 15 A. Yes.
- 16 Q. From you?
- 17 A. Yes.
- 18 Q. Okay. And that was when?
- 19 A. It was late September sometime. It was after you were
- 20 arrested. You were in jail.
- 21 Q. Well, I was in jail. Okay. Did he?
- 22 A. No.
- 23 Q. Did anybody else?
- 24 A. No.
- 25 Q. Did you bring it to the jail?

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 A. No.

2 Q. Did you take it to him, to his office?

3 A. I took a little bit of it. I didn't take all of it
4 because I know I didn't have all of it. I had some of it.

5 Q. But you had -- you did have all this with you at the
6 apartment?

7 A. Yes.

8 Q. Okay. After you took it up there did he contact you?

9 What you did take up there, did he contact you after that?

10 A. No.

11 Q. Did he ask you anymore questions?

12 A. No.

13 Q. Did he try and gather anything else from you?

14 A. No.

15 Q. Do you -- can you tell -- can you -- are you a witness
16 to my second arrest, the incident that led to my second
17 arrest?

18 A. Yes.

19 Q. What took place? Could you describe it from start to
20 finish in your own words what took place?

21 A. She came to my apartment, and I went outside. I
22 actually went outside to smoke a cigarette and I found her
23 there. She was in the parking lot in her car.

24 And she got out and she came and started talking to me
25 and accusing you of all kinds of stuff. And I asked her to

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 leave, and she didn't. I went to go back into the house to
2 get away from her, and she began shoving on the door and
3 pushing me trying to force her way into the front door.

4 And I started yelling and trying to keep her, you know,
5 pushing back trying to keep her out of the house. And she
6 was yelling that she was going to come up and find out if
7 you were in my bed. And ---

8 **MR. SMITH:** Objection to hearsay, Your Honor.

9 A. I'm sorry. That's what she said.

10 And you heard or some -- for some reason woke up and
11 came downstairs. And when you came downstairs I saw you and
12 I stepped out of the way. And the door flew open because
13 she was still shoving it. And she -- and you just basically
14 walked through her and knocked her out onto the front porch.

15 Q. Was there a no contact conditions? Was I out on bail?
16 Was that when I was out on bail from an April charge?

17 A. Yes.

18 Q. There was a no contact order?

19 A. Yeah.

20 Q. Did she ---

21 **THE COURT:** Let me interrupt for a second. Ma'am, did
22 you just say that he walked and knocked her out onto the
23 front porch?

24 A. Yes.

25 **THE COURT:** Okay. Thank you.

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 A. Just basically ---

2 Q. And during the time ---

3 A. --- stopped moving.

4 Q. --- before I -- I pushed her or whatever, hit her, was
5 somebody -- was the police being called?

6 A. Yes. The maintenance man for the complex was down at
7 the -- on the sidewalk at the bottom of the steps. And he
8 was calling the police as she was trying to shove her way
9 into the door.

10 Q. And what happened then?

11 A. After she fell on the porch, she sat up. And she asked
12 him if he was calling the police. And he told her yes. And
13 she got in her car and left.

14 **THE COURT:** Okay. I'm going to interrupt this right
15 now. You have stated that you were concerned that your
16 attorney did not talk to this witness or attempt to talk to
17 the witness. Well, she's already dispelled that claim
18 because he called and left a voice message.

19 Your other -- the next one was you've said it was an
20 involuntary guilty plea. And you have just acknowledged and
21 admitted that you did assault this victim. And then you say
22 he failed to advise you about the five year -- the
23 possibility of having five years probation. And he failed
24 to apprise you of the elements of the offense. So we're
25 going to -- we're confining this hearing to those issues.

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 **MR. THOMAS:** Okay.

2 Q. Just for the record, can you confirm that she was
3 specifically told not to come near me or around me, and not
4 to come to the apartment, and to leave me alone, and to not
5 make me violate the no contact order, is that correct?

6 **THE COURT:** No. She is not qualified to answer that
7 question. That is outside the scope of what you have
8 enumerated as your complaints to substantiate your
9 application.

10 **MR. THOMAS:** I was -- okay.

11 Q. I was living there at the time?

12 A. Yes.

13 Q. That was technically my home at the time?

14 A. Yes.

15 Q. And she was invading the home without consent?

16 A. Yes.

17 Q. Okay. And so -- assaulting you in the process?

18 A. Yes.

19 Q. Okay. And I was asleep at the time?

20 A. Yes.

21 Q. And I woke up?

22 A. Yes.

23 Q. To a home invasion?

24 A. Yes.

25 Q. And I hit her?

FERRIS HARVLEY - DIRECT EXAMINATION BY MR. THOMAS

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1 A. Yes.

2 Q. And police were being called?

3 A. Yes.

4 Q. And she fled the scene?

5 A. Yes.

6 Q. Okay. Thank you.

7 **MR. THOMAS:** Okay. I guess, Your Honor, I guess I need
8 to testify about the paperwork that she ---

9 **THE COURT:** Well, before -- are you done with your
10 examination of this witness?

11 **MR. THOMAS:** For the moment, yes. I mean, it's ---

12 **THE COURT:** No, it's all -- it's now or not at all.
13 Finish your examination on relevant matters.

14 Q. Are you aware of any -- are you aware of any threats
15 that were being made against me prior to April 26th, the
16 first domestic violence charge?

17 A. Yes.

18 Q. Were there continued threats from then on out?

19 A. Yes.

20 Q. Do you recall -- do you recall -- I'm sorry. Do you
21 recall ever hearing her comment on the April charge?

22 **MR. SMITH:** Objection to hearsay, Your Honor.

23 **THE COURT:** Yeah. Sustained.

24 Q. Do you believe that I was -- from based on what you
25 knew between the time I moved in with you and the time I

1 went to jail, do you -- do you believe that I desired any
2 kind of contact with Dianne Phillips?

3 A. No.

4 **MR. SMITH:** Objection, Your Honor. This calls for
5 witness opinion as to the Applicant's mental state.

6 **THE COURT:** Sustained.

7 **MR. THOMAS:** No more witnesses right now. No more
8 witness, I mean, ---

9 **THE COURT:** All right. Cross-examination.

10 **MR. THOMAS:** --- no more questions.

11 **MR. SMITH:** No questions, Your Honor.

12 **THE COURT:** All right. You can step down.

13 **MR. THOMAS:** Mr. Gravlee -- can I call Mr. Gravlee?

14 **THE COURT:** Yeah. He's a relevant witness. Come on
15 around and be sworn.

16 **MR. THOMAS:** Sir?

17 **MADAM CLERK:** Please place your left hand on the Bible
18 and raise your right hand.

19 **John M. Gravlee,** being
20 duly sworn testified as follows;

21 **MADAM CLERK:** Thank you. You may be seated.

22 **THE COURT:** State your name for the record, please,
23 sir.

24 **MR. GRAVLEE:** Max Gravlee.

25 **Direct Examination by Mr. Thomas:**

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1 Q. Mr. Gravlee, did you have -- you still have copies of
2 everything that was brought to you or left at the public
3 defender's office by Ferris Harvley?

4 A. I have copies of some things that she had brought up to
5 the Picken's Courthouse, yes.

6 Q. Do you have -- you said you have a copy of the flash
7 drive?

8 A. I do.

9 Q. Okay. Is there any way to plug that device in -- can
10 you plug it into a device and ---

11 A. When you had given me that thumb drive -- originally I
12 believe you had given it to the prosecutor in your case.
13 And he handed it to me since you were represented. I
14 plugged it into my computer, attempted to open the file, and
15 had no program that would open any file that was in there,
16 didn't see that it had anything on it. So I was unable to
17 -- and I've explained that to you that ---

18 Q. Is there any way you can plug it in and identify what
19 kind of files they are?

20 A. I don't -- I have the thumb drive still taped to my
21 file.

22 Q. Are they html files? Are they wave files? Are they --
23 what kind of files are they?

24 A. It was one single file as far as I can remember. I
25 don't believe it was an html or a wave file. I think I

1 could have opened those. It was some unopenable in some
2 unopenable format.

3 Q. Can you identify what kind of file it was, please?

4 A. I don't know off the top of my head.

5 Q. You don't know. So -- okay. So you -- you came into
6 possession of a thumb drive that the solicitor gave to you
7 and he told you that I gave it to him?

8 A. Correct.

9 Q. Do you have any idea when I gave this thumb drive to
10 the solicitor?

11 A. Sometime during the course of my representation of you
12 initially.

13 Q. Would that have been like between the April charge and
14 the September charge?

15 A. My notes indicate that on September 28th, 2017 I had a
16 phone call with you at which time I told you I was unable to
17 retrieve anything off of your USB drive. So I would imagine
18 it was sometime around late September of 2017.

19 Q. Obviously it would have been sometime when I was out of
20 jail and not -- where I could not access the flash drive?

21 A. I think you were in jail because it says that you
22 wanted a PR bond at the time. So I imagine you were
23 incarcerated in Pickens.

24 Q. When did you receive discovery?

25 A. Which charge are you talking about?

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1 Q. From the first charge, the charge I was out on bond
2 for.

3 A. Looks like we received discovery on your domestic
4 violence second degree charge on August 1st of 2017.

5 Q. Did the flash drive come with that discovery?

6 A. No, it did not. I think you brought it up at some
7 point in time earlier. I couldn't tell you the exact date.

8 Q. Okay. So you have the thumb drive and there's a file
9 on it, and you don't know -- you said you plugged it in and
10 you couldn't identify what it was and you couldn't get it to
11 load, but you can't identify what type of file it was. I
12 mean, if it was possibly an audio file, a picture file, a
13 png, I mean, you ---

14 A. I couldn't tell you.

15 Q. Can you plug it now and tell me what it is?

16 A. I'm without a computer right now, Mr. Thomas.

17 Q. Okay. So with the flash drive in your possession with
18 a file on it that you haven't identified, haven't
19 investigated, did you advise me to plead guilty or not
20 guilty to the charge?

21 A. Are we talking about to the domestic violence, second
22 degree?

23 Q. Mr. Gravlee, I've only pled guilty to one charge. Did
24 you advise for or against the guilty plea?

25 A. I think when we talked about it you had mentioned that

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1 -- we had a hearing on December 1st as well as the plea was
2 that day where you indicated that you wanted to at one point
3 proceed pro se and then the, I believe, withdrew that.

4 We had a conversation where I shared with you that the
5 plea offer I negotiated out any additional active time or
6 additional jail time for you because I believe that it
7 originally included 90 days and five years probation. And
8 that changed and I was able to negotiate it to straight
9 probation on the five years -- of five years probation and
10 time served for you to be released that day. And you wished
11 to proceed in that plea that day, and -- and that is what we
12 did.

13 Q. And I had -- you said I had filed a motion to represent
14 myself?

15 A. I'm not sure if it was a motion that you filed or if
16 you just brought it up to the court at the time. Couldn't
17 tell you.

18 Q. Do you receive copies of filings? If I was to file
19 something would the clerk of court send it to you? Would
20 you receive a copy of that?

21 A. I'm not sure, Mr. Thomas.

22 Q. You're not sure if the clerk of court or the solicitor
23 would give you the motion I filed?

24 A. Generally when clients of mine want to file a motion,
25 they ask me to file it for them, and I do so. So if you had

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1 filed something without my knowledge, I'm not sure that the
2 clerk of court would have automatically have forwarded your
3 motions to me.

4 Q. Did you -- did you ever -- did you print State versus
5 Campbell for me?

6 A. I believe -- you asked me to print lots of stuff for
7 you. I know that I did take some things down to you. I
8 took a South Carolina case on indictments and some domestic
9 violence statutes to you September 29th.

10 Q. Yes, September 29th. State versus Campbell, is that
11 correct?

12 A. If that's what -- the case that you requested and I
13 brought you, then, sure, that might have been the case.

14 Q. What is -- what does that case pertain to?

15 A. I'm sorry?

16 Q. The case, State versus Campbell, what does it pertain
17 to?

18 A. I couldn't tell you.

19 Q. Could I read it for you? Would you remember? Do you
20 not have a copy of it?

21 A. Not in front of me right now.

22 Q. Okay. Well, would you like -- could you read the
23 highlighted portions of this, please? State versus

24 Campbell. I believe that's what you printed on September
25 29th, 2017 with your name on the bottom of it.

1 (Pause)

2 Q. Could you read the highlighted portion, please?

3 A. Section 17-23-90 provides for discharge from
4 imprisonment when a person is committed for a felony demands
5 to be brought to it -- brought to trial and is not indicted
6 or tried by the second term following his commitment.

7 Q. And when was I booked into jail on the second domestic
8 violence charge?

9 A. The second or the second degree?

10 Q. The first degree. The first degree. Felony, first
11 degree.

12 A. Maybe around September 16th of 2017.

13 Q. And when was my bond revocation hearing originally
14 scheduled for?

15 A. I don't know.

16 Q. Would you like to consult with the ---

17 A. I know you had a bond hearing on October 19th, 2017. I
18 think we'd gone in and probably asked for a PR bond or
19 something reasonable under the circumstances. The judge
20 disagreed and set a fifteen thousand dollar (\$15,000.00)
21 surety bond with GPS monitoring against you. And that was
22 before Judge Verdin.

23 Q. As to the question, I was booked in on a felony,
24 correct? I was in jail in September on a felony?

25 A. I'm not sure.

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1 Q. Okay. Could you -- could you find out whether or not
2 that term of court was actually the second term of court
3 since my indictment, since my arrest and placed in jail?

4 A. Well, in Pickens generally there's only one term of
5 court per month. That would have been the first term
6 following your arrest.

7 Q. Okay. So the 19th, if I was in jail on a felony and
8 then on the 19th would have been the first term, then the
9 next term would have been when?

10 A. Possibly November.

11 Q. Possibly November. And when did I plead guilty?

12 A. In December.

13 Q. When did I file my motion to represent myself?

14 A. I don't know. If you've got that motion I'll rely on
15 your motion.

16 Q. Okay. So ---

17 **MR. THOMAS:** Yeah, could I have that marked -- could I
18 have that marked for identification? I'd like to have it as
19 an exhibit, please, that case, State versus Campbell,
20 printed from Mr. Campbell -- Mr. Gravlee.

21 Q. So the second term of court ---

22 **THE COURT:** No.

23 Q. --- from my arrest would have been in ---

24 **THE COURT:** Mr. Gravlee, would you please just read the
25 cite into the record. We're not going to admit that ---

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1 A. Yes, sir, Your Honor.

2 THE COURT: --- as an exhibit.

3 A. That is 277 S.C. Reporter 408. And 288 S.E. 2d 395.

4 THE COURT: And the year of that decision?

5 A. That decision was in 1982.

6 THE COURT: Okay.

7 A. The Supreme Court of South Carolina.

8 THE COURT: Would you hand it to me, please?

9 A. Yes, sir.

10 THE COURT: Thank you.

11 Q. As of the end of September, the end of the second term
12 of court for my first degree domestic violence arrest had I
13 been indicted or tried?

14 A. I couldn't tell you off the top of my head when you
15 were indicted.

16 Q. Do you have a copy of the indictment in your file?

17 A. I may or may not. I'm not sure. Regarding the first
18 degree charge, the domestic violence, first degree,
19 ultimately I was able to get that one dismissed. The one
20 that you were talking about when you ran down the stairs.

21 Q. I'm asking about in November or the last term of court,
22 not December. I'm talking about ---

23 THE COURT: Just so I'm clear, Mr. Gravlee, the one --
24 the one you got dismissed was the one that he admitted to --

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1 where he ran down the ---

2 A. I believe so, Your Honor.

3 **THE COURT:** And knocked the woman down?

4 A. That's correct.

5 **THE COURT:** Okay.

6 A. That one was dismissed. And I think that was -- it was
7 dismissed and you ended up pleading to domestic violence,
8 second degree, charge.

9 Q. And it was dismissed. I was out on bond originally on
10 the second degree, is that correct?

11 A. Correct.

12 Q. Okay. So -- and I go back to jail on the first degree
13 and two terms of court had gone by on my felony charge. And
14 can you tell me whether I was indicted before I pled guilty
15 on the first degree? I mean, if I remember right, my
16 sentencing sheet says I was unindicted on the April charge.
17 I was not -- I waived presentment and was unindicted on the
18 April charge. I mean, is that safe to assume that maybe I
19 wasn't indicted on the September charge either?

20 A. Mr. Thomas, I couldn't tell you in all honesty when --
21 the exact date that you were indicted.

22 Q. Okay. If I had not been indicted as of November before
23 my guilty plea, before my sentencing during my plea hearing,
24 is it not -- is it not a correct assessment that a judge
25 would know the law and follow the law?

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1 **THE COURT:** You know, I've been giving you wide
2 latitude. We're not -- you have enumerated to the Court
3 four things that you thought were wrong. One was the
4 witness, ---

5 **MR. THOMAS:** Um-hum (affirmative).

6 **THE COURT:** --- his failure to contact the witness.
7 The second was an involuntary guilty plea because you said
8 you didn't like the conditions at the Pickens County
9 Detention Center. And ---

10 **MR. THOMAS:** Yes, Your Honor, ---

11 **THE COURT:** --- the other was his failure to advise
12 about the five year probation and the elements of the
13 offense. He's already responded that he did advise you
14 about five years probation. And I believe he's responded
15 about the witness contact. If not, I want you to confine
16 your examination of this attorney to those topics.

17 **MR. THOMAS:** On my PCR, Your Honor, in my PCR I
18 actually did cite ineffective counsel for him not filing a
19 motion to try to get me released without bail so that I
20 could go out and adequately represent myself. That was the
21 issue in the jail is that I was not able to represent myself
22 from the jail. So I was asking why he did not file a motion
23 to get me out of jail without bail since I ---

24 **THE COURT:** Mr. Gravlee, did you make a request for a
25 bond reduction?

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1 A. I did, Your Honor.

2 Q. Did you make a motion for discharge without bail?

3 A. I believe -- I can't say for sure, but I believe I
4 would have asked for a PR bond if that is what you had
5 requested. And ultimately that was denied and a fifteen
6 thousand dollar (\$15,000.00) surety was set.

7 During that hearing the State had also moved to revoke
8 your bond on the domestic violence, second degree, and the
9 judge -- we were able to convince the judge, fortunately,
10 that they did not revoke your bond on the initial charge,
11 and you were given a bond on the domestic violence, first
12 degree.

13 Q. Did you -- did you cite State versus Campbell for the
14 judge at the hearing?

15 A. I did not -- I don't -- I doubt that I would have. I
16 don't think that I thought that it was relevant.

17 Q. Did you cite the statute, 17-23-90, that I've been in
18 jail for how long, a month and a half, two months at that
19 time, hadn't been able to make bond?

20 A. I probably didn't cite the statute to the bond hearing.

21 Q. If you would have cited the statute, would the judge
22 have followed it? Would ---

23 A. I don't think that citing the statute would have had
24 any determination to the outcome of your bond hearing.

25 Q. And not the last day of the second term of court

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1 either? In November -- if you would have filed a separate
2 motion in November?

3 A. All I know is that I would have filed -- once we filed
4 for the bond hearing, once we filed for a bond reduction
5 your bond hearing was held October 19th of 2017.

6 Q. So -- and the charge I was booked in on, that was a
7 first degree domestic violence. Do you have a copy of the
8 warrant?

9 A. Probably somewhere.

10 **MR. THOMAS:** Your Honor, is it possible for me to have
11 one of my hands free so I can -- I have a mess here. I
12 don't have much of any way ---

13 **THE COURT:** What is it you want?

14 **MR. THOMAS:** I'm sorry?

15 **THE COURT:** What is it that you are looking for?

16 **MR. THOMAS:** The ability to move my hands and I -- the
17 two -- I wanted him to read the warrant and the proposed
18 indictment if -- or the indictment, if there is one, for the
19 first degree domestic violence.

20 A. The one that was dismissed?

21 **MR. THOMAS:** It wasn't dismissed before I pled guilty,
22 Your Honor. So, yes, I believe that it's relevant -- what
23 the warrant said, what the allegations were, whether I was
24 being charged with a ten year felony and it being used as
25 leverage over my head for plea bargaining. I mean, if the

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1 warrant reads second degree, but it ---

2 **THE COURT:** I will tell you, Mr. Thomas, you've just
3 admitted on the record that you committed that offense. So
4 I am not going to -- that is irrelevant. And if you had not
5 done it, that would be one thing, but you admitted to it.

6 **MR. THOMAS:** Admitted to -- I'm sorry? Admitted to
7 what?

8 **THE COURT:** Admitted to the offense that led to the
9 first degree CDV charge.

10 **MR. THOMAS:** Well, I mean, ---

11 **THE COURT:** So I am denying that -- I'm prohibiting you
12 from pursuing that.

13 **MR. THOMAS:** Okay. I understand that. I'm not
14 challenging the legitimacy of whether or not I was properly
15 charged, it was the degree I'm going for. I was wondering
16 whether I should have been charged with a second degree or a
17 first degree if, in fact, I did hit her ---

18 **THE COURT:** Well, let me just tell you this. It's not
19 up to a defense attorney to decide what degree that a
20 warrant should be issued for. So this is beyond his
21 purview. Move on.

22 **MR. THOMAS:** Okay.

23 **Direct Examination by Mr. Thomas Continued:**

24 Q. Well, could you -- is there any procedure you could
25 follow to have the charge reduced if you believed that I had

1 not committed a first degree, if there was not probable
2 cause for a first degree?

3 A. Yeah. I asked the prosecutor to dismiss it as a part
4 of the plea agreement, and he -- and he did.

5 Q. What about before that?

6 A. We had discussed that too. I asked him that -- if you
7 would dismiss it. You also asked if he would consider time
8 served, and he said no. So ...

9 Q. So are you saying that when I went in front of the
10 judge I was looking at, with both charges, I was looking at
11 -- I was possibly looking at 13 years? I was being -- I'm
12 pleading guilty based on 13 years hanging over my head,
13 correct?

14 A. No. You were never pleading to the domestic violence,
15 first degree. You didn't sign the sentencing sheet on that
16 charge. And only to the second degree charge.

17 Q. Hypothetically if I had not pled guilty to the second
18 degree what would have been the result?

19 **THE COURT:** We're not -- we're not talking about
20 hypotheticals.

21 **MR. THOMAS:** Your Honor, I ---

22 **THE COURT:** We are not going into hypotheticals. We
23 are not here to speculate.

24 **MR. THOMAS:** Your Honor, I have been appointed an
25 attorney in my criminal case that has -- actually has a lot

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1 to do with this right here. And I was expecting him to be
2 here. In fact, I was given a promise that if he wasn't able
3 to call -- pull me out for a phone call ---

4 **THE COURT:** Are you asserting that you have an attorney
5 representing you in this matter?

6 **MR. THOMAS:** I have an attorney, yes, ---

7 **THE COURT:** Who?

8 **MR. THOMAS:** Bruce -- DeBruin. Aaron DeBruin, I'm
9 sorry. He was appointed October 4th. Not this ---

10 **THE COURT:** Appointed ---

11 **MR. THOMAS:** Not on this, but it's a related case.

12 It's actually a charge and -- my confinement right now. I
13 was asking him to come -- actually I'd asked for him ---

14 **THE COURT:** He's been appointed -- you have a new
15 charge? Is that what you're talking about?

16 **MR. THOMAS:** Yes. And he's ---

17 **THE COURT:** Well, he's not appointed on this.

18 **MR. THOMAS:** Yes, I understand. But I have been --
19 he's been appointed because I haven't been able to be
20 released because this case went on. And I wanted him to
21 argue these issues for me because they are related to why
22 ---

23 **THE COURT:** Well, I would not allow that. He's not
24 your counsel in this case. You are proceeding pro se.

25 **MR. THOMAS:** Yes ---

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1 **THE COURT:** And that apparently was your decision to do
2 that.

3 **MR. THOMAS:** Your Honor, ---

4 **THE COURT:** Now proceed with evidence with respect to
5 what you have enumerated as your complaints.

6 **MR. THOMAS:** Can I have a -- is there a possibility
7 that I -- could I plug this in so I could play this audio
8 file, please? Can I play this recording? I have a
9 voicemail that was left on my voicemail.

10 **THE COURT:** And what is it? You apparently know what
11 it is. Describe it to me.

12 **MR. THOMAS:** It is the victim in the case admitting
13 that I never did hit her. She said -- the report says that
14 I punched her, and we both know if I punched her I would be
15 -- she would be in the hospital. She said that on my
16 voicemail. She knew she was being recorded.

17 And this was in May of -- this is the month while I was
18 out on bond -- while I was out on bail. And I had gone --
19 I'd actually taken the recording also to the solicitor's
20 office and to the -- and to the sheriff's office. And they
21 had -- the sheriff's office had written the information on
22 the report.

23 The solicitor's office never did do anything with it
24 other than hand it to my public defender. My public
25 defender didn't bother to plug it in to find out how

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1 important that recording might be ---

2 **THE COURT:** No. That's an inaccurate statement. Your
3 public defender has just testified that he tried to open it
4 and could find no program to open this jump drive. Do you
5 have any objection from the State?

6 **MR. SMITH:** I do, Your Honor. The testimony from the
7 attorney was that he could not access the file and also
8 informed Mr. Thomas of that fact. And, Your Honor, we would
9 object to his explaining the contents of the tape.

10 **THE COURT:** Well, he's already done that. So -- all
11 right. Proceed.

12 **MR. THOMAS:** I'm sorry?

13 **THE COURT:** Proceed.

14 **Direct Examination by Mr. Thomas Continued:**

15 Q. Do you have a copy of the transcript from the motion to
16 relieve counsel hearing?

17 A. I do not, not in front of me.

18 **MR. THOMAS:** Can you -- can you furnish him a copy,
19 please, so he can read from it?

20 (Pause)

21 A. All right. I have it.

22 Q. You have it? Can you go to -- yeah, the page -- page 2
23 starting at line 17 and follow with me. Well, Your Honor,
24 -- me speaking. Well, Your Honor, actually the only way I
25 can do that, represent myself, is if I'm able to represent

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1 myself. I'm not able to do that from the County jail. I've
2 got a fifteen thousand dollar (\$15,000.00) bond. I have no
3 place -- I have no way of making my bail.

4 And I go on to talk -- tell the judge -- correct me if
5 I'm wrong, okay? No way for me to do legal research. No
6 way for me to start researching my case, court rules,
7 criminal procedure, none of those -- none of those options
8 from jail.

9 A. Correct.

10 Q. Did the judge acknowledge that my -- don't want to
11 relieve you was due to my circumstances?

12 A. Right. You wanted to proceed pro se is what you had
13 shared with me, but ultimately said that you would continue
14 with me as your attorney because of your lack of access to a
15 law library. So I did my best to bring various legal
16 research down to you for you to have while I continued to
17 represent you.

18 Q. Did you -- did you advocate for my right to represent
19 myself in this hearing while you were still my attorney --
20 hadn't been relieved?

21 A. I think you did most of the talking in that -- that
22 hearing.

23 Q. Yes. All right. And I explained to the judge that
24 there was no law library, no way for me to do legal

25 research. Did you -- have you ever tried a case? Could you

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1 try a -- could you try a case without access to Westlaw,
2 court rules, statutes, et cetera? Could you?

3 A. I guess ---

4 **THE COURT:** That's not relevant.

5 **MR. THOMAS:** I'm sorry. My ability to represent myself
6 was being limited with no access to a law library. And I'm
7 pro se. I couldn't begin to guess what court rules and --
8 admits into evidence, I couldn't begin to guess that stuff.
9 And a jail's literally required to have that. And my
10 attorney did nothing to make sure that I either had that or
11 released so that I could ---

12 **THE COURT:** You made a motion to be -- to have him
13 relieved as your attorney.

14 **MR. THOMAS:** And I asked him ---

15 **THE COURT:** Don't interrupt me again or I'll find you
16 in contempt and tack six months on consecutive to what
17 you're doing now.

18 You made a motion to have him relieved. You backed out
19 of that. You subsequently then entered a guilty plea and
20 expressed to the court that you were satisfied with the
21 services that had been rendered. That is the record on the
22 day that you pled guilty. Is there anything else you want
23 to ask Mr. Gravlee with respect to what you claim to be --
24 is inadequate representation?

25 **MR. THOMAS:** I -- can I ask for a continuance, Your

1 Honor, so I can go through this and organize this paperwork?

2 It's become a nightmare.

3 **THE COURT:** No, sir. The hearing has been commenced.

4 We're going to complete it today.

5 **MR. THOMAS:** I was only able to get -- I have no way to

6 organize -- I can try. Is there any way that I can plug

7 this in and play this recording, please? And this -- I

8 would testify that the recording is the same recording that

9 was on the flash drive that I gave the solicitor in 2017.

10 And that -- I believe that -- it should have been very

11 important to my attorney when I told him that, you know,

12 hey, this is her admission that she lied. And he didn't

13 try. He didn't try. He didn't download a driver file to

14 ---

15 **THE COURT:** And that would be with respect to the case

16 you pled to, is that right?

17 **MR. THOMAS:** Yes.

18 **THE COURT:** And that was the CDV, second, with a

19 maximum penalty of three years?

20 **MR. THOMAS:** Yes.

21 **THE COURT:** Mr. Gravlee was able to get a CDV, first,

22 with a maximum of ten years dismissed. And that is an

23 offense that you admitted to today on the record and that

24 your witness admitted she was a witness to.

25 Does anybody have a device? I'm not -- this is a State

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1 computer, and I'm not sticking that jump drive into my
2 computer.

3 **MR. THOMAS:** Well, I guess can I testify?

4 **THE COURT:** Your witness has a ---

5 **MR. THOMAS:** Oh, I see Mr. Hill. Can I call Derham
6 Hill?

7 **THE COURT:** No. Here's your witness' computer.

8 **MR. SMITH:** And, Your Honor, we would object to this
9 because it's not the same flash drive that he gave the
10 solicitor. And also there's no way to authenticate this
11 recording.

12 **THE COURT:** I agree, but I'm going to allow him to do
13 it anyway.

14 (Pause)

15 **THE COURT:** You can allow her to come around and ---

16 **MR. THOMAS:** I don't know how ---

17 **THE COURT:** --- operate it.

18 **MR. THOMAS:** I don't know how to do this.

19 (Pause)

20 (Whereupon the audio was played by Ms. Harvley)

21 **MR. THOMAS:** I have another one. That was from my
22 voicemail in May by Dianne after I asked her -- been ordered
23 not to contact her and asked her not to contact me. I have
24 another one from a deputy -- a Deputy Young from the Pickens
25 County Sheriff's Office regarding a charge of violating bond

JOHN MAXWELL GRAVLEE - CROSS- EXAMINATION BY MR. SMITH

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1 conditions.

2 **THE COURT:** Do you have any other questions of Mr.
3 Gravlee?

4 **MR. THOMAS:** Yeah.

5 **Direct Examination by Mr. Thomas Continued:**

6 Q. Did you hear that? Did you hear that?

7 A. I did.

8 Q. What would you -- what do you think, I mean, what would
9 you have done with that -- would you have been able -- do
10 you think you could have done something, anything persuasive
11 with the judge at my bond hearing or my revocation hearing
12 illustrating that she actually falsified charges on me?

13 A. From what I could hear from it, it wasn't a categorical
14 denial of any kind of assault that you may have done, only
15 that she didn't think that you had hit her three times.

16 Q. That what?

17 A. That you had hit her in the face or punched her three
18 times.

19 Q. Did she say three times?

20 A. I think so.

21 Q. Well, I -- can we play it again? I don't believe -- I
22 think she ---

23 **THE COURT:** No, sir. This is your evidence. He heard
24 three times.

25 **MR. THOMAS:** Okay. I don't have anymore questions for

JOHN MAXWELL GRAVLEE - CROSS-EXAMINATION BY MR. SMITH

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1 Mr. Gravlee.

2 THE COURT: Okay. Cross-examination.

3 Cross-examination by Mr. Smith:

4 Q. Mr. Gravlee, will you please summarize for us the facts
5 giving rise to the CDV -- CDV, first, case and the CDV,
6 second?

7 A. The first degree charge concerned, I believe, what was
8 essentially testified to earlier. There the victim from the
9 initial domestic violence, second degree, charge had shown
10 up at the house where Mr. Thomas and Ms. Harvley lived at
11 which point in time an altercation happened. She was struck
12 in the face, received some facial fractures. I think our
13 argument was that it was a -- somewhat of a self-defense or
14 a Castle Doctrine kind of defense where he was ejecting a
15 trespasser from his residence.

16 The second degree case, I believe that concerned an
17 argument in a home that Mr. Thomas and Dianne Phillips had
18 occupied. There -- something regarding the slamming of
19 doors and getting upset about that. There was a fight
20 allegedly over a phone that was wrestled away. And I
21 believe the victim claimed she was struck during this time,
22 punched in the face several times is what she said.

23 I had a picture that I showed Mr. Thomas. I'd given
24 him copies of the discovery and showed a picture of the
25 victim with some -- what appeared to be blood on her lips

1 and a little bit of redness to the face. And ultimately
2 that was the charge that he pled to.

3 I think -- I imagine I shared with him that that was
4 the stronger of the two cases. They had, like I explain to
5 every single client, he's got a right to a trial, happy to
6 represent him in a trial or a plea, but whichever route he
7 chooses is his call and his alone.

8 Q. Was it clear to you from that day whether the events
9 described on that call would have been the events of the
10 CDV, first, case or the CDV, second?

11 A. I can't speak to the contents of that phone call, but I
12 would imagine that it was regarding the domestic violence,
13 second degree, charge.

14 Q. Okay. There's no way for you to verify that the
15 contents on that recording are the same that are on the
16 flash drive, right?

17 A. No, but I would imagine that it -- I remember when Mr.
18 Thomas was explaining it to me that essentially it was
19 something along those lines that it was a voicemail or some
20 kind of message from Dianne Phillips, ---

21 Q. Okay.

22 A. --- who was the victim in that case.

23 Q. And you testified earlier that you did explain to Mr.
24 Thomas that you were not able to play this video?

25 A. That's correct.

JOHN MAXWELL GRAVLEE - CROSS- EXAMINATION BY MR. SMITH

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1 Q. Okay. And you told him that before he pled guilty?

2 A. I'm sorry?

3 Q. You told him that before you [sic] pled guilty?

4 A. That's correct.

5 Q. Okay. What was the potential defenses you saw in this
6 case?

7 A. In the second degree ---

8 Q. Yes.

9 A. --- case? It would have been -- probably in most of
10 these cases it's a -- if it's one person saying one thing
11 and one person saying the other, it's a credibility issue.
12 So you try to attack the victim's credibility in that case.

13 Q. Would you have called Ms. Phillips as a witness if this
14 case had gone to trial?

15 A. She would have had to have been called to trial as the
16 victim.

17 Q. Okay. Would you have cross-examined her at trial?

18 A. I would have.

19 Q. Okay. Was Mr. Thomas aware of this? Did you discuss
20 that with him?

21 A. Yes. He's got a right to confront the witnesses
22 against him under the Constitution. And so he would have --
23 I would have cross-examined her about her allegations and
24 her credibility or lack thereof.

25 Q. Okay. Let's -- let's talk briefly about this witness,

JOHN MAXWELL GRAVLEE - CROSS- EXAMINATION BY MR. SMITH

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1 Ms. Farrah [sic] Harvley. Can you talk about the times in
2 which you've talked with her?

3 A. Yes. She -- she and I spoke on the phone I wouldn't
4 say more than three times, but I'd say more than -- more
5 than once. I know I spoke with her on October 12th of 2017.
6 And that was about the domestic violence, first degree,
7 charge.

8 And then some point after that -- I'd say at some point
9 in the month of October of 2017 Ms. Harvley came to the
10 courthouse, shared with me that she didn't like being in
11 public, just made her anxious and she preferred that I meet
12 her at her car. So I walked out of the courthouse, down to
13 the parking lot where she was in her car, and she gave me
14 copies of things that she had in her possession that Mr.
15 Thomas wanted me to have.

16 Q. Okay. Was there anything in that that you believed was
17 exculpatory or helpful to the defense?

18 A. There was things in there that were conversations
19 between -- and it was tough to tell exactly what they were
20 because they were kind of like screen shots, some of them,
21 some of them were emails from his address, some from -- that
22 appeared to be from Dianne that -- there were some good and
23 bad stuff in there for our case.

24 Q. Okay. Did you discuss all of that with Mr. Thomas?

25 A. I did.

JOHN MAXWELL GRAVLEE - CROSS- EXAMINATION BY MR. SMITH

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1 Q. Okay. Did you tell Mr. Thomas the elements of CDV,
2 second?

3 A. Yes. I -- with -- I can't recall our specific
4 conversations, but with every client I go over what the
5 State has to prove.

6 Q. Okay. Can you remember if he gave you any indication
7 that he did not understand what you were telling him about
8 that?

9 A. I couldn't recall, but I don't think he ever said that
10 he didn't understand what was going on.

11 Q. Okay. What's your -- do you have a standard practice
12 for witnesses [sic] who tell you they don't understand?

13 A. For clients?

14 Q. Yes.

15 A. If they don't understand the charges against them I
16 would probably have them evaluated ---

17 Q. Okay.

18 A. --- and sent to Department of Mental Health for a
19 competency evaluation, which I didn't do in this case.

20 Q. You testified earlier about this speedy trial issue.
21 Do you think there was anything else you could have done on
22 that?

23 A. No.

24 Q. Okay. Did you inform Mr. Thomas that the plea deal was
25 for a recommendation of five years probation?

JOHN MAXWELL GRAVLEE - CROSS- EXAMINATION BY MR. SMITH

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1 A. It started out more than that. I believe it -- the
2 prosecutor originally was asking for additional active time,
3 I think, in the amount of 90 days, waiving credit for
4 previous time followed by home incarceration of two years, I
5 believe. I think it went back and forth between two and
6 one.

7 Mr. Thomas was not interested in the home incarceration
8 program. And that is when the offer then went back,
9 negotiated it down to the 90 days and the five years
10 probation and then eventually was able to get the 90 days
11 off of the table altogether so that he would receive a time
12 served and probation offer.

13 Q. Okay. And that was for a recommendation?

14 A. Correct.

15 Q. Did you explain to Mr. Thomas that Judge Verdin didn't
16 have to follow the recommendation?

17 A. I always advise clients of that.

18 Q. Okay. Do you remember him giving you any indication
19 that he did not understand that?

20 A. No.

21 Q. Okay. What did he say about that plea offer? Did he
22 want to take it?

23 A. He did because it got him out of jail that day.

24 Q. Okay. And explain to me how it would be that he ended
25 up pleading guilty on the day of his hearing on his motion

JOHN MAXWELL GRAVLEE - REDIRECT EXAMINATION BY MR. THOMAS

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1 to relieve counsel.

2 A. We had that hearing. And I've read that transcript.

3 And Judge Verdin allowed us to go -- she said we're going to
4 hold off on the motion because it was her understanding that
5 there was a plea offer and that I'd negotiated it down to
6 probation and whether he wanted to talk with me about it.
7 So we stepped down from that hearing.

8 I imagine we would have gone in the back hallway to
9 discuss it. At which time he apparently wanted to go
10 forward on that and did plea to the second degree.

11 Q. Okay. I don't -- if he had told you at that point that
12 he still did not want you as his counsel, what would you
13 have done?

14 A. If he still didn't want me as counsel?

15 Q. Yes.

16 A. I mean, I guess we would have just gone back up there
17 and said we weren't ready to proceed on the probation plea
18 because he would still have wanted to file a motion to have
19 me relieved, or fired, or whatever he would want to call it.

20 Q. Okay. Give me just a moment, please.

21 (Pause)

22 Q. No further questions.

23 **MR. SMITH:** Thank you, Your Honor.

24 **THE COURT:** All right. Anything else?

25 **Redirect Examination by Mr. Thomas:**

1 Q. During the -- you were still my attorney -- you
2 remained my attorney all throughout, correct? All the way
3 to the plea?

4 A. Correct.

5 Q. As far as the motion to relieve counsel, is it not your
6 -- as my attorney, still, is it not your position to argue
7 to the judge that -- the means by which I represent myself
8 has been limited by the jail and that the jail's not
9 supposed to, I mean, that they're supposed to provide a law
10 library or did you do anything to help accommodate co-
11 counsel appointment or somebody from a legal, you know,
12 somebody that could do the research for me if I needed to,
13 if I needed any legal research done for trial?

14 A. We didn't address the lack of a law library at the jail
15 because we went forward on that plea. And so that wasn't
16 going to be relevant anymore if you were going to be
17 entering a plea on the charge.

18 Q. Because -- wouldn't be relevant to what? I'm sorry.

19 A. The lack of a law library was not going to be relevant
20 anymore if you were deciding to plead guilty to the charge.

21 Q. Right. But at the time that I was wanting to represent
22 myself and before I decided to plead guilty when I was
23 trying to relieve you and going to represent myself, the law
24 library was relevant to that motion, wasn't it?

25 A. You felt very strongly about a law library in the jail,

JOHN MAXWELL GRAVLEE - REDIRECT EXAMINATION BY MR. THOMAS

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1 yes. And I spoke to the jail about it. I remember calling
2 Lieutenant Leopard at the Pickens County Jail and asking if
3 there was going to be any access. And she said, no,
4 unfortunately they did not have a law library. And I was
5 unable to get you a law library at the jail while you were
6 incarcerated.

7 Q. Okay. Is it lawful for them to not have a law library
8 for me if I fall under, I mean, ---

9 **THE COURT:** This is beyond the scope of this hearing.

10 **MR. THOMAS:** Okay.

11 **THE COURT:** Any other questions for this witness?

12 **MR. THOMAS:** No, Your Honor.

13 **THE COURT:** All right. Thank you. You may step down.

14 **MR. GRAVLEE:** Thank you, Your Honor.

15 **MR. THOMAS:** Yeah, actually I do, Your Honor. Yes, I
16 do.

17 Q. Do you have my -- you still have my email address on
18 the folder?

19 A. I do.

20 Q. Do you still have the password on it?

21 A. You did give me a password.

22 Q. There's no password on it?

23 A. No, you did.

24 Q. Okay. Is it still on there?

25 A. Yes. Would you like me to disclose your password?

JAMES DURHAM HILL - DIRECT EXAMINATION BY MR. THOMAS

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1 Q. No. Actually, is there any way I can get a copy of it,
2 please?

3 **THE COURT:** This has got nothing to do with this
4 hearing. Is there any other questions relevant to this
5 hearing?

6 **MR. THOMAS:** Okay.

7 Q. Do you recall why I gave you the password?

8 A. I do. And I told you I was not comfortable logging
9 onto your email accounts.

10 Q. Did I have access to it at that time?

11 A. In the jail, no.

12 Q. Thank you. Nothing further.

13 **THE COURT:** All right. Thank you. You can step down.

14 **MR. GRAVLEE:** Thank you, Your Honor.

15 **THE COURT:** Call your next witness.

16 **MR. THOMAS:** Durham Hill.

17 **MADAM CLERK:** Place your left hand on the Bible and
18 raise your right hand.

19 **James Durham Hill, being**
20 duly sworn testified as follows;

21 **MADAM CLERK:** Please state your name for the record.

22 **MR. HILL:** Durham Hill.

23 **Direct Examination by Mr. Thomas:**

24 Q. Mr. Hill, when did you receive the flash drive that you
25 gave to Mr. Gravlee?

JAMES DURHAM HILL - DIRECT EXAMINATION BY MR. THOMAS

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1 A. I'm not sure of the date I received or our office
2 received the flash drive. I believe you dropped it off at
3 the front desk with a receptionist who then transferred it
4 to me. I then called your attorney, Mr. Gravlee, and then
5 provided him the flash drive.

6 Q. Did you -- did you play it? Plug it in? Play it?
7 Open the file?

8 A. No, I did not. You were represented at the time. I
9 didn't think that I should be in control of that flash
10 drive. I wanted to get it to your attorney as soon as
11 possible.

12 Q. Why would you want to get it to him? Why wouldn't you
13 open it if I gave it to you?

14 A. Because he was your attorney.

15 Q. And you gave it to him for what reason? If I gave it
16 to you, you would assume that I already had it. I had it in
17 my possession at one time. I gave it to you. Why would you
18 give it to my attorney?

19 A. I didn't know what it was. And I wasn't comfortable
20 plugging that into my computer.

21 Q. Okay. Was I -- was I ever indicted on either of the
22 charges? Domestic violence?

23 A. I don't believe you were indicted on the DV, second.
24 You may have been indicted on the domestic violence, first
25 degree, but that case was dismissed as a part of the plea.

JAMES DURHAM HILL - DIRECT EXAMINATION BY MR. THOMAS

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1 Q. Okay. Well, I mean, was I indicted before it was
2 dismissed?

3 A. I just said I don't know. It may have been.

4 Q. Is there -- can we can find out, please? I mean, I
5 need an answer for that.

6 A. I guess you could look it up in the clerk of court's
7 office, but again, it was dismissed.

8 Q. Okay. And you don't recall in discovery a proposed
9 indictment? Do you do that ---

10 **THE COURT:** Asked and answered.

11 **MR. THOMAS:** I'm sorry.

12 Q. Do you propose an indictment before it goes to the
13 grand jury with discovery? I mean, do you actually get the
14 indictment ready for the grand jury?

15 **MR. SMITH:** Objection. Your Honor, I don't believe
16 this is relevant. He's asking questions about ---

17 **THE COURT:** Sustained. It's not relevant.

18 Q. When did you originally schedule my bond revocation
19 hearing? When was it originally scheduled?

20 A. I believe your attorney requested a hearing. After you
21 were arrested for the second domestic violence incident it
22 would have been placed on the docket that upcoming term of
23 court. I also filed a motion for bond revocation to be
24 heard at that same time.

25 Q. September when? I'm sorry?

JAMES DURHAM HILL - CROSS-EXAMINATION BY MR. SMITH

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1 A. I didn't give a day. It would have been after your
2 second arrest, that next term of court.

3 Q. You don't remember what day it was? The hearing? This
4 first -- the hearing was scheduled ---

5 A. Mr. Gravlee testified to that date earlier. I don't
6 know the exact date off the top of my head.

7 Q. Do you remember whether it was rescheduled at any
8 point? Scheduled at one time and then moved to another day?

9 A. Not to my knowledge.

10 Q. That's all. Thank you.

11 **THE COURT:** Any questions?

12 **MR. SMITH:** Yes, Your Honor.

13 **Cross-examination by Mr. Smith:**

14 Q. Mr. Hill, who was in charge of scheduling the hearing
15 on the motion to be relieved in December?

16 A. I believe Mr. Thomas had been issued a bond card or at
17 that point he was incarcerated, so he was brought over from
18 the jail. He had filed a motion to be relieved. He came up
19 over on the day he was bond carded, brought over from the
20 jail. And we put him in front of Judge Verdin to hear that
21 motion.

22 Q. Okay. How much time elapsed between his arrest and
23 when he ultimately pleaded guilty in December?

24 A. His second arrest?

25 Q. For the CDV, second.

GARY THOMAS - DIRECT TESTIMONY

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1 A. I believe he was arrested in early May or late April on
2 the CDV, second. He then pled December 1st of that year,
3 2017.

4 Q. Okay. Do you know how much of that time -- during how
5 much of that time was he incarcerated?

6 A. I believe it was 78 days.

7 Q. Okay. Did you do anything to intentionally delay his
8 trial in this case?

9 A. No.

10 Q. Just one moment, please.

11 (Pause)

12 **MR. SMITH:** No more questions, Your Honor. Thank you.

13 **THE COURT:** All right. You can step down. Any other
14 witnesses?

15 **MR. THOMAS:** Do I come up there to testify?

16 **THE COURT:** Come around.

17 **MR. THOMAS:** I'm sorry?

18 **THE COURT:** Yes. You're calling yourself as a witness?

19 **MADAM CLERK:** Please place your left hand on the Bible,
20 raise your right hand.

21 **THE COURT:** The other way.

22 **Gary Thomas**, being duly
23 sworn testified as follows;

24 **MADAM CLERK:** Please state your name for the record.

25 Please state your name for the record.

GARY THOMAS - DIRECT TESTIMONY

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1 **MR. THOMAS:** Gary -- Gary Zachariah Thomas.

2 **MADAM CLERK:** Thank you.

3 **Direct Testimony by Mr. Thomas:**

4 **MR. THOMAS:** I had originally -- I'm going to have to
5 start at -- I have to start at April 26th, the day when I
6 was charged with domestic violence by Dianne and then kind
7 of go back from that date. On April 26th I showed Dianne an
8 email that she'd sent to me. And it was sent to me from her
9 address to whom it may concern.

10 And I would like to have that entered into evidence as
11 what -- our conversation about -- on April 26th. It's dated
12 April 18th, but she was a live-in care provider at the time.

13 **MR. SMITH:** Objection.

14 **MR. THOMAS:** And she came home from a client's ---

15 **THE COURT:** Based on what?

16 **MR. SMITH:** Your Honor, to the relevance of this. It's
17 a text message from April from a domestic violence incident
18 that occurred in September.

19 **MR. THOMAS:** I'm sorry? For what reason?

20 **MR. SMITH:** On the grounds of relevance that you're
21 reading text messages from April from a domestic violence
22 incident that occurred in the fall.

23 **MR. THOMAS:** It's one of the -- I'm sorry, Your Honor.
24 It's one of the emails that was in Ferris' possession that I
25 asked my attorney to go get. And it's also an email that

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1 was in my email account that I gave him my password to
2 retrieve so he could use it in my case.

3 **THE COURT:** I will just tell you, Mr. Thomas, I have
4 given you wide latitude. You have enumerated what your
5 complaints are. This is not an opportunity for you to just
6 open up this sorted history that you have lived. Deal with
7 the issues presented with respect to a post-conviction
8 relief application.

9 **MR. THOMAS:** Yes, Your Honor. I pled guilty -- I was
10 booked into jail in September for first degree domestic
11 violence. And I talked to my attorney about it and didn't
12 believe that I should have been charged with first degree --
13 I think at the time the warrant was -- the warrant was too
14 -- charged me too high.

15 And I said, well, -- I asked him to get a charge -- the
16 charge reduced. After I seen that they were trying to
17 revoke my bond, I asked him to try to get the bond reduced
18 at that hearing, and he didn't do that.

19 And I asked him to get it reduced after that so that he
20 could get me -- it would be a change of circumstances so it
21 would give me a chance to have my bond reviewed again and to
22 bring all this evidence to the judge to show the judge that
23 it's really -- I was trying to avoid this woman all during
24 this time. I went to a motel room and she was following me
25 and stalked me.

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1 I went to the police, I went to the solicitor's office
2 while I was out on bail trying to get them to ask her to
3 leave me alone to stop following me, stalking me, trying to
4 get me locked up. And ---

5 **THE COURT:** Let me explain to you something.

6 **MR. THOMAS:** I'm sorry?

7 **THE COURT:** When you plead guilty you waive your right
8 to present defenses.

9 **MR. THOMAS:** Sir, I understand. But I felt like my
10 attorney wasn't doing what he could be doing on my case. He
11 could have been getting my charge reduced if he were trying
12 to, contact the solicitor to try to.

13 Whether he has the power to do that or not he could
14 have filed a motion for it to be amended, or reduced, or
15 contact the solicitor and ask him to reduce it so that there
16 were only, I mean, I'm looking at six years rather than 13
17 at a plea bargain whether that ---

18 **THE COURT:** All right. I'll just tell you, you were on
19 the record with a motion to have him be relieved as your
20 attorney. You backed away from that. At that point you
21 could have made your complaints.

22 Subsequent to that on the same day you then entered a
23 guilty plea at which you said under oath that you were
24 satisfied with his service. I am not opening this up for
25 you to enter every single complaint you have about how your

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1 case proceeded.

2 **MR. THOMAS:** Okay. When Judge Verdin asked me was I
3 happy with what he'd done, this is two hours after I was
4 trying to relieve him for not doing the things I'd asked him
5 to do. But he did print me an email from the jail
6 confirming there was no law library. And he did print me
7 State versus Campbell which illustrates that at least in
8 September he knew that I was asking for him to make a motion
9 for my release according to that statute.

10 That's the only thing that that statute dealt with.
11 That's the evidence that he knew that my mind was on getting
12 out according to State versus Campbell. He didn't make
13 either of those motions. He didn't -- and he didn't try to
14 get a law library or something for me in the jail so I could
15 represent myself.

16 And at that point I knew that if I -- if I were to
17 suggest I was happy with him -- and the only way I could go
18 get a guilty plea in to get out of jail to go to her
19 apartment or to the sheriff's office to get my evidence was
20 to get out on probation so that I could do it because he had
21 my email address and my password and he didn't go in my
22 email and get it. He didn't feel comfortable with it.

23 He had her -- he had her address, my home address, and
24 he knew that she had all this evidence, and he didn't go to
25 get it. He would not do anything to investigate my case.

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1 He did not reach out to anybody to get any of the evidence
2 that I have now that I'd been trying to show that this
3 evidence shows that she was making threats to me and making
4 false reports to the police long before April -- April 26th.
5 And it was ongoing, and ongoing, and ongoing.

6 And all I asked him to do is get that information so he
7 could take it to the solicitor and let the solicitor know
8 that this woman's admitting that I never hit her and she's
9 continuing to terrorize me.

10 I've been to the sheriff's office three times. I had a
11 deputy call me and say, hey, man, you'd better watch out,
12 buddy, she's got it in for you. I've got a recording of
13 that.

14 While I was out on bond she was coming to where I was
15 at to my storage unit trying to get me locked up for
16 violating bail conditions. She was terrorizing me. And
17 then she started terrorizing my roommate, my fiancé ---

18 **THE COURT:** Did you call the police and make a
19 complaint?

20 **MR. THOMAS:** Yes, I did. Actually I have a police
21 report here. I went to the sheriff's office. I went to the
22 sheriff's office ---

23 **THE COURT:** It did not result in an arrest?

24 **MR. THOMAS:** No. They wouldn't -- the information on
25 the report -- I have -- from April 7th, April 7th she called

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1 police and she said -- I was at my storage unit. And she
2 said that I was threatening her ---

3 **MR. SMITH:** Objection ---

4 **MR. THOMAS:** --- with bodily injury ---

5 **MR. SMITH:** --- to hearsay.

6 **MR. THOMAS:** --- and property damage. And then 15
7 minutes later I'm calling the police telling, hey, man, she
8 just called you and she said -- made these threats against
9 me, but she's coming to pick me up. She took me all the way
10 to Greenville and -- took me home that night and then called
11 the police the next night making an allegation against me.

12 And there are no arrests in that. Neither one of these
13 were any arrests, but she just keeps calling the police and
14 saying I'm threatening her, and threatening her, and
15 threatening her.

16 And so I got to the point where when she called, if I
17 knew she called, I would call and say, okay, well, she just
18 said this, but here she is to pick me up. And I have all
19 these details. And most of this is in my email, the other
20 half of it was in ---

21 **THE COURT:** Okay, stop. Confine yourself to the issues
22 enumerated when you started this hearing. I'm not going to
23 listen to you and this lady -- this sorted relationship.

24 **MR. THOMAS:** I asked my attorney to get into my email
25 and get the evidence, to at least review it and see what

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1 kind of trial I would have, what the solicitor would want to
2 do when he saw that evidence, and he didn't do it. If he
3 wasn't going to gather my evidence from my email with a
4 password, I couldn't count on him to go diligently and try
5 to search down, hunt down witnesses that were going to be
6 testifying that she was invading my home and committing
7 crimes against myself and my home, you know, after she'd
8 been told to stay away.

9 I mean, I couldn't count on him to gather any evidence
10 for me. He wouldn't make any motions for me. He wouldn't
11 try to get me out of jail. All he did was come back to me
12 hoping for the plea bargain.

13 He was -- they're offering 90 days for stalking,
14 they're offering 90 days for stalking -- probation. That's
15 all he wanted to do was come tell me what they were offering
16 to plead guilty.

17 I was asking him to get my evidence and take it to the
18 solicitor and show the solicitor that it's really me that
19 was the victim. He had the opportunity to do that. He had
20 my password, he had my email. He didn't do it. He just
21 didn't do it.

22 I asked him to, to get my evidence for my case. I told
23 him right where to find it. And it's all right here dated
24 -- dated -- all backdated prior to September. It's dated in
25 May, May 1st, April, I mean, emails going back all the way,

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1 you know, all the way back to way before April. It's all
2 proof that she'd been threatening me, she'd mock threats.

3 She'd been threatening to send -- fabricate a case
4 against DSS. She took pictures -- I ---

5 **MR. SMITH:** Objection to hearsay.

6 **MR. THOMAS:** She's planting evidence on me before the
7 first charge ever came around. Then she admits in a
8 voicemail that she lied about it. And he wouldn't gather
9 any of it for me. So I was scared to death to go to trial
10 with him as my lawyer. So, yeah, I was happy that he
11 printed State versus Campbell.

12 You know, she -- the judge said facing up to three
13 years. I didn't know five years probation -- she said three
14 years suspended -- I was told it was going to be three
15 suspended -- I thought it was going to be time served with
16 three years, three years suspended to time served for the 60
17 to 80 days I did in jail. I didn't know it was going to be
18 five with probation with it.

19 I mean, she already accepted my plea. And since then,
20 I mean, I thought, well, you know, I could get out -- plead
21 guilty and get out and get my evidence and take it back to
22 the police and take it back to the solicitor and show them
23 they were wrong.

24 And then the police -- the sheriff's department
25 actually emailed the solicitor and forwarded all my

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1 information and my evidence to them. And they said, well,
2 now she's the victim, so we can't do nothing about it.

3 But that was my goal. My goal was to plead guilty to
4 get out so I could get the evidence that Mr. Gravlee
5 wouldn't. I couldn't trust him to get my evidence. I gave
6 him the opportunity.

7 Half mile from the courthouse, and if he didn't want to
8 go see her, she didn't want to talk to him or -- I gave him
9 my email, and he didn't get any of it. He wouldn't even --
10 he wouldn't even investigate what was on the flash drive in
11 his possession.

12 I mean, I don't know -- what kind of -- what kind of
13 trial can I expect like that, you know? I was scared. I
14 was scared to go to trial and take a chance on 13 years with
15 this woman coming in lying and turning on tears. And I
16 would have had no proof that she's telling a lie. I had no
17 proof whatsoever. He wasn't getting it for me.

18 The kind of trial -- case I would have had if he would
19 have got -- I would have been confident in it if I knew he
20 had a whole handful of my evidence, but he didn't have
21 nothing. And he wouldn't get it.

22 I didn't think he was going to do any better in another
23 year. I was one of eight men in a room on a floor, laying
24 on one floor, eight by twelve. You know, we got two -- two
25 foot by six foot, and that's how we're going to live for the

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1 next year waiting for trial.

2 Your Honor, the average wait for trial, a year, year
3 and a half. I'd only been in jail for two months. I was
4 going to be sitting in there broke. I couldn't make bond,
5 couldn't pay bond. I was going to be in there for the next
6 year waiting to go to trial, so I would really have the
7 sentence served. I'd plead guilty, at least I'd get out and
8 be free on probation while I'm trying to fight my case.

9 And she -- I couldn't get police to even contact her.
10 There's information on the report. Detective Chapman -- we
11 went to her house to get my property and she stepped out and
12 became belligerent with him and she just showed out to
13 everybody. But I couldn't get proof of none of these
14 reports, none of these witnesses appeared or nothing.

15 I was stuck in jail with -- my only -- my only source
16 of contact was Mr. Gravlee. And Mr. Gravlee, he wouldn't
17 even get -- to get what I asked him to get. I couldn't get
18 at it. I had no access to it in jail. I couldn't make
19 bail. I knew I was going to be sitting in jail for the next
20 year, year and a half, maybe.

21 I mean, depending on a speedy trial, year, year and a
22 half waiting for trial and living in extremely violent, I
23 mean, people getting jumped on, people going to the hospital
24 all the time, all the time. I got jumped on, split my head,
25 attacked me while I was sleeping.

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1 **THE COURT:** Okay. Anything else with respect to the
2 application for post-conviction relief?

3 **MR. THOMAS:** I wasn't happy, Your Honor -- I wasn't
4 happy with the deal or the guilty plea. I was happy that at
5 least he gave me the State versus Campbell and to show that
6 I was trying to get him to do that. And I was happy that he
7 did get confirmation from the jail lieutenant that there's
8 no law library, no way for me to represent myself.

9 And two hours after I was trying to -- trying to ---

10 **THE COURT:** Okay.

11 **MR. THOMAS:** --- get the judge ---

12 **THE COURT:** Anything else?

13 **MR. THOMAS:** I'm sorry?

14 **THE COURT:** You've been over that. I've heard that at
15 least a half a dozen times.

16 **MR. THOMAS:** Okay. Well, the sentence -- the
17 sentencing -- the sentencing is -- that's -- I cited in my
18 -- I've got a motion -- my motion for summary ---

19 **THE COURT:** Okay. Well, let me straighten you out on
20 that.

21 **MR. THOMAS:** I'm sorry?

22 **THE COURT:** There might have been a recommendation. No
23 circuit judge in the State is required to go along with a
24 recommendation, but Judge Verdin in your sentencing gave you
25 a legal sentence.

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1 **MR. THOMAS:** A what?

2 **THE COURT:** She gave you a legal sentence. There is
3 nothing illegal about the sentence that you received.

4 **MR. THOMAS:** Your Honor, if I can, please? If you
5 don't mind? I mean, I've got -- I have State versus Proctor
6 here. I have State versus Ellis. And it says that
7 probation is clearly part of the defendant's term of
8 imprisonment. And my term of imprisonment is three years,
9 three years in prison ---

10 **THE COURT:** Okay. Well, I tell you what, I am ruling
11 that that was a legal sentence. If you disagree with that,
12 perhaps a higher court would agree with you. I don't
13 believe they will. I believe that there's plenty of case
14 law out there that would confirm that this was a legal
15 sentence.

16 **MR. THOMAS:** Okay. May I ask if -- is it possible that
17 -- for the 19 months I did do on probation, is it possible
18 that I get credit for that? I filed a motion for credit in
19 ---

20 **THE COURT:** I'm not going to make a ruling on that, but
21 I -- the State, I mean, you can -- you can pursue it if you
22 want to, but I will tell you that you do not get credit for
23 ---

24 **MR. THOMAS:** Do not get credit for it?

25 **THE COURT:** No. You've got to live out the term of

GARY THOMAS - CROSS-EXAMINATION BY MR. SMITH

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1 probation.

2 MR. THOMAS: I'm sorry?

3 MR. SMITH: The State objects that that's outside the
4 grounds of this action.

5 THE COURT: It's outside. I sustain. Anything else
6 with respect to the -- your complaints in the post-
7 conviction relief application?

8 (Pause)

9 THE COURT: Okay. Any cross-examination?

10 MR. SMITH: Just a few questions, Your Honor.

11 **Cross-examination by Mr. Smith:**

12 Q. Mr. Thomas, when you pled guilty didn't Judge Verdin
13 tell you that you could have a jury trial?

14 A. I'm sorry?

15 Q. When you pled guilty didn't Judge Verdin tell you that
16 you could have a jury trial?

17 A. Yes, she did.

18 Q. Okay. And you told her you wanted to plead guilty
19 anyway, waive that right?

20 A. Well, I mean, like I said, I didn't -- I couldn't
21 imagine it being a very good jury trial if my attorney
22 wasn't going to have any evidence there for me. I mean, it
23 was going to be her credibility against mine.

24 And he refused to get any evidence to -- to disprove
25 her credibility, which -- which it was already in his

GARY THOMAS - CROSS-EXAMINATION BY MR. SMITH

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1 possession and access to my email. He refused to gather the
2 evidence. I had no rebuttal evidence. I had no -- nothing.
3 Nothing.

4 So trial was going to be about her saying that I did
5 something and me saying that I didn't, and she was going to
6 be found credible. I mean, that's just ---

7 Q. Well, hold on just a second. She asked you were you
8 happy with Mr. Gravlee, and you told her you were.

9 A. You what?

10 Q. She asked you were you happy with Mr. Gravlee, and you
11 told her that you were.

12 A. Was I -- was I -- no, she asked me was I happy what he
13 done for me. And I was -- I was -- when I said, yes, ma'am,
14 I was referring to the printing of the case and the -- and
15 the email to the -- to the jail lieutenant confirming that
16 there was no law library in the jail, no way for me to
17 represent myself. That's what I was referring to.

18 I wasn't happy with his performance as an attorney per
19 say, but as a -- as a contact for the jail because she
20 wouldn't give me nothing like that in writing. I was not
21 happy with his performance as my attorney.

22 Like I said, repeatedly said, he would not gather my
23 evidence. He would not file a motion. He did not do
24 anything to try to get my charge reduced. He did not try to
25 get my bond reduced.

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1 My so-called victim got a protection order against me,
2 came -- came to the jail to visit me a week later, and he
3 didn't even bother to go over and get transcripts for the
4 order of protection hearing to confront her with that. And
5 he knew that that took place.

6 Q. Okay.

7 A. I mean, I was not happy with his -- not as an attorney.

8 Q. Okay.

9 A. I was not happy with his performance as an attorney,
10 no.

11 Q. Okay. Thank you.

12 **MR. SMITH:** No more questions, Your Honor.

13 A. I'm sorry?

14 **THE COURT:** All right. Thank you. You can step down.

15 A. I'm sorry?

16 **THE COURT:** He had no more questions. You may step
17 down.

18 (Pause)

19 **THE COURT:** All right. Anything else?

20 **MR. THOMAS:** No, Your Honor.

21 **THE COURT:** All right. Anything from the State?

22 **MR. SMITH:** We'll just rely on the testimony from
23 cross-examination, Your Honor.

24 **THE COURT:** Application denied. I don't find there's
25 anything in the record that shows that Mr. Gravlee acted

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1 below an objective standard of reasonableness. And I don't
2 find that this guilty plea was involuntarily entered despite
3 all of these -- this complaining.

4 And I find that Mr. Gravlee gave advice. He said he
5 told him he could get up to five years probation. He did
6 explain the elements of the offense.

7 The record is clear that the guilty plea was
8 voluntarily made despite these post-conviction regrets. And
9 I don't find that there was anything that the witness -- I
10 find that Mr. Gravlee attempted to contact the witness. And
11 so there's no failure to investigate. Denied. Okay.

12 **MR. SMITH:** Thank you, Judge.

13 **THE COURT:** Thank you.

14 (Hearing Ended at 3:48 pm)

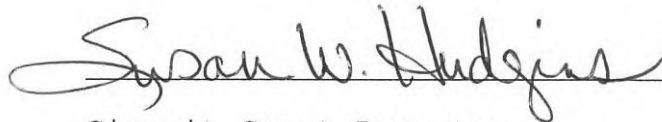
15 (End of Requested Transcript of Record)

Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the 22nd day of October 2019.

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

April 30, 2021


Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

Gary Z. Thomas, #910751,

V.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-39-1276

ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed on November 30, 2018, by Gary Z. Thomas (Applicant). The State (Respondent) filed a return on February 28, 2019, in which it requested an evidentiary hearing on some claims and moved to dismiss on others. Applicant filed an amended application on July 22, 2019. Respondent filed a return to the amended application on October 11, 2019, again requesting an evidentiary hearing for the resolution of some claims and moving to dismiss others. Respondent also filed a return to Applicant's motion for sanctions, which had been served upon Respondent by Applicant on or around September 6, 2019.

An evidentiary hearing in the matter was held before the undersigned on October 22, 2019, at the Greenville County Courthouse. Applicant was present and represented himself.¹ Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and called Ferris Harvley, Assistant Public Defender John Maxwell Gravlee (plea counsel) of the Greenville County Public Defender's Office and Assistant Solicitor James Durham Hill

¹ Applicant was present at the hearing as a pro se litigant, as he had moved successfully to relieve his PCR counsel and proceed pro se in this PCR action at an earlier hearing. Thomas v. State, No. 18-CP-39-1276 (Greenville, S.C. Ct. Common Pleas, April 18, 2019). This Court notes the order resulting from that hearing indicates Judge Kinlaw questioned Applicant thoroughly and gave him proper warnings regarding the dangers of self-representation.

(solicitor) of the Thirteenth Circuit Solicitor's Office as witnesses. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies his application for post-conviction relief.

PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections.² On December 1, 2017, he appeared before the Honorable Letitia H. Verdin in order to move to relieve plea counsel; however, Applicant ultimately waived presentment to a count of second-degree domestic violence (2014-GS-39-2623) and pleaded guilty to the same. The solicitor's recitation of facts at the plea hearing indicated the victim was Applicant's live-in girlfriend, and that law enforcement officers responded to a call from Applicant's residence regarding domestic violence. Plea Tran. 5-6. The solicitor stated Applicant and the victim had been arguing about a cell phone, and that Applicant threw her down on the couch and punched her when she threatened to call police, at which point the victim called police from her sister's home. Plea Tran. 5-6. In accordance with the solicitor's recommendation, Judge Verdin sentenced Applicant to imprisonment for three years, suspended to probation for five years. Applicant did not appeal his plea or sentence.

CURRENT PROCEEDING

On November 30, 2018, Applicant filed an application for post-conviction relief, in which he challenged his guilty plea and alleged that he was being held in custody unlawfully because he (1) received the constitutionally ineffective assistance of counsel, (2) was deprived of

² Although Applicant was sentenced to time served, a review of SCDC's inmate search detail report for Applicant and the public index entry for Applicant's underlying criminal conviction shows that Applicant is presently incarcerated in SCDC for this offense of second-degree criminal domestic violence after the Circuit Court revoked his probation.

the right to represent himself adequately, (3) was prejudiced by the solicitor's manipulation of the General Sessions roster, (4) was sentenced to probation for five years in excess of the statutory maximum, and (5) entered his guilty plea involuntarily due to the constitutionally ineffective assistance of counsel and the denial of his right to adequately represent himself. On July 22, 2019, Applicant filed an amended application for post-conviction relief, setting forth the addition claim that he was being held in custody unlawfully because his guilty plea was not entered into voluntarily, knowingly, and intelligently due to a supposed defect in Judge Verdin's colloquy during Applicant's plea hearing.

At the start of the PCR hearing, Respondent asked that Applicant clarify for the record the claims upon which he intended to proceed, and Applicant specified he wanted to present the following allegations: (1) his sentence exceeds the maximum allowed by statute, (2) plea counsel was constitutionally ineffective for failing to object to Applicant's illegal sentence, (3) Applicant's probation officer made Applicant sign additional conditions of release that were not part of his sentence, (4) plea counsel was constitutionally ineffective for failing to conduct an adequate investigation, (5) plea counsel was constitutionally ineffective for failing to move for speedy trial, and (6) Applicant's guilty plea was not knowingly and voluntarily entered. This Court finds that all allegations other than these have been waived by Applicant and they will not be addressed in this order.

Victim's Motion to Quash Applicant's Subpoena

On October 21, 2019, Patricia D. Phillips, Esquire, filed a motion to quash Applicant's subpoena of the victim in the underlying criminal action on behalf of the victim. Before the evidentiary hearing began, this Court heard argument from the parties and the victim's counsel as to this motion so that the victim would have notice that her attendance would be required at

the evidentiary hearing if the Court denied the motion to quash. Phillips argued the victim had been served with the subpoena only a few days before the hearing, which would thereby cause inconvenience if she were required to comply and testify at the evidentiary hearing with such short notice. She also argued the victim's testimony would not be relevant to the hearing as the victim did not testify or address the plea court during Applicant's plea hearing and characterized the subpoena as Applicant's using the post-conviction relief process to harass the victim. Applicant argued his last-minute subpoena could not have been sent earlier because he did not have time to prepare for the evidentiary hearing or subpoena the victim earlier due to his lack of sufficient notice of the time and place of the hearing; additionally, Applicant argued the victim's testimony was critical to his case because he had been framed, and he required her testimony in order to support his claims. Respondent did not take a position on the issue.

This Court finds Applicant is entitled to call any witness with admissible testimony as allowed under the South Carolina Rules of Evidence; however, Applicant failed to establish that the victim's testimony was relevant or material to his claims. This Court ruled the victim would be required to be present in the Greenville County Courthouse in compliance with Applicant's subpoena at the time of the evidentiary hearing, which was held later in the day. This Court informed the parties and the victim's counsel that Applicant would have to put up sufficient evidence during his hearing in order to establish a prima facie case that the victim's testimony was necessary to establish his claims, and that this Court would grant the victim's motion to quash if Applicant failed to do so. Later in the day, at the start of the evidentiary hearing, Applicant asked the Court if he would be allowed to call the victim as a witness. This Court informed Applicant that its ruling stood and Applicant had not yet made any showing that the victim's testimony would be necessary. Applicant never again asked to call the victim as a

witness, and this Court finds Applicant abandoned the issue, conceding the issue to the victim and her counsel. Therefore, it was not necessary for this Court to issue a final ruling on the motion.

Denial of Applicant's Motion for Sanctions

On September 6, 2019, Applicant filed a motion for sanctions, titled "Notice of Motion and Motion for Sanctions (S.C. Code Ann. § 15-36-10)".³ Applicant moved for sanctions therein, in accordance with S.C. Code Ann. § 15-36-10, et seq., alleging Assistant Attorney General Smith had knowingly, intentionally, and maliciously maintained a frivolous defense on Respondent's behalf against Applicant's claim that he had been subjected to an illegal sentence of five years' probation, causing Applicant to be wrongfully incarcerated. Applicant also alleged therein that Respondent had violated a court order requiring the evidentiary hearing to be held in an earlier term than that of October 21, 2019. Respondent filed a return to Applicant's motion on October 11, 2019, arguing therein that it had complied with the terms of Judge Kinlaw's order of continuance, issued in April of 2019, and acted without any impropriety in adding Applicant's case for an evidentiary hearing during the October of 2019 PCR term in the Thirteenth Judicial Circuit. Respondent also argued its position in response to Applicant's PCR allegations was not a frivolous position being offered knowingly, intentionally, and maliciously, as required by the relevant code section.

This Court finds Applicant has failed to establish any frivolous arguments on the part of Respondent and failed to demonstrate any improper actions in scheduled Applicant's evidentiary hearing. Respondent has established a basis to proceed with litigation and assert its legal positions therein that is not frivolous. Applicant's motion for sanctions is denied.

³ This written motion does not appear in the public index, but this Court was provided with a copy bearing the file markings of the Pickens County Clerk of Court, which indicated that the motion had been filed on the aforementioned date. Applicant was a pro se litigant when he filed the motion.

Testimony at PCR Hearing

Applicant called Ferris Harvley as his first witness at the PCR hearing. She testified she is in a romantic relationship with Applicant, and was cohabitating with him in an apartment from early in May of 2017 until his arrest in September of 2017. She testified he scheduled an appointment with plea counsel in order to provide him with some “paperwork” on Applicant’s behalf, but that she did not keep that appointment. She testified the purpose of the meeting was to give evidence to plea counsel that the victim had been stalking her and Applicant. She testified she never invited the victim to their apartment, and she told the victim by text message not to come to the apartment. She testified she went with Applicant to the police so that they could file a report concerning the victim’s supposed harassing her and Applicant, and Applicant gave some documents to the police at that time in support of their allegations against the victim. She testified she asked plea counsel to come to her to get these documents but that he did not do so. She testified she did take some but not all of the documents to plea counsel, but that he did not contact her after that meeting, ask any questions of her, or try to get any other information from her.

She affirmed she was a witness to Applicant’s second arrest, and summarized the event by testifying that the victim came to the parking lot at the apartment in order to make accusations against Applicant. She testified she asked the victim to leave the apartment and tried to retreat into the apartment, at which point the victim tried to force her way in despite her yells that the victim should leave. She testified Applicant appeared and knocked the victim unconscious on the front porch of the apartment. She testified a maintenance worker was calling police during the incident, and that the victim informed them that she was going to call the police once she sat up, and that she then left. She testified that threats were made.

Applicant then called as a witness plea counsel. He affirmed he still had in his possession copies of all documents given to him by Harvley and a USB drive given to him by either Applicant or Harvley. When asked if he had inspected the contents of the drive, he testified Applicant had given the drive to the solicitor who gave it to plea counsel. He testified he tried to access the single file on the drive, but was unable to do so because he did not have any program on his computer that would open it, and he did not recall the format of the file. He testified he did not remember the exact time at which the solicitor passed the drive along to him, but that he informed Applicant in September of 2017 that he had been unable to open the file on the drive, at which time Applicant was in jail. When asked if he could plug the drive into a computer at the PCR hearing in order to describe the file, he answered that he did not have access to a computer. He testified they went before Judge Verdin in December of 2017 because Applicant had indicated to him that he wished to have plea counsel relieved so that he could proceed as a pro se defendant, but that they were able to negotiate a deal on the day of that hearing wherein Applicant would plead guilty and be sentenced to time served with probation so that he could be released on the same day.

He testified he requested a personal recognizance bond at Applicant's request, but that Judge Verdin instead ordered that Applicant pay a \$50,000 surety bond with GPS monitoring. He testified that this would have occurred during the first term of General Sessions in Pickens County, as there is usually only a single term per month. He testified he was ultimately able to get a charge of first-degree domestic violence dismissed on Applicant's behalf, and described the underlying incident that case as the one in which Applicant pushed the victim down and out of Applicant's door. He did not remember how many terms of court went by while Applicant was in jail. In response to questioning from this Court, plea counsel testified he moved for a bond

reduction at Applicant's request. He testified he requested Applicant receive a personal recognizance bond, but that Judge Verdin denied the motion. He noted the solicitor moved to revoke Applicant's bond and testified he was able to convince the bond court not to revoke. At Applicant's request, plea counsel read portions of State v. Campbell, 277 S.C. 408, 288 S.E.2d 395 (1982). He testified he did not cite Campbell at Applicant's bond hearing because he did not think the case was relevant, and that he probably did not cite any specific statutes either. He testified he probably would not have made a difference whether or not he had cited any statutes at Applicant's bond hearing.

Applicant asked if plea counsel knew of any procedures whereby he could have requested that the first-degree domestic violence charge against Applicant be reduced. Plea counsel testified he asked the solicitor to dismiss the first-degree charge as a part of Applicant's agreement to plead guilty to the separate offense of second-degree domestic violence, and the solicitor agreed to do so. Plea counsel testified the solicitor refused to make a recommendation that Applicant be sentenced to time served.

Plea counsel affirmed Applicant noted he did not want to have plea counsel relieved during the December of 2017 hearing before Judge Verdin due to Applicant's lack of access to legal resources while in jail, and testified he supplied Applicant with various legal resources at the time.

Applicant played a recording for the Court and plea counsel, in which someone claims to be looking at a police report and commenting that the speaker does not remember much about "that night" but that the speaker would have been in the hospital if another had punched her.⁴ Plea counsel his estimation of the recording was that the speaker was not making a categorical

⁴ Applicant asserted that the speaker was the victim, and that the message was directed towards him as the person who punched her.

denial of assault that Applicant committed, saying only that Applicant did not punch the victim three times.

When asked on cross-examination to summarize the facts giving rise to the first-degree and second-degree criminal domestic violence charges against Applicant, plea counsel testified there was a pending second-degree CDV charge against Applicant when the victim showed up at the apartment where Applicant and Harvley lived, that an altercation ensued during which the victim was struck in the face, and that the victim received facial fractures as a result. He testified their defense would have been that Applicant struck the victim in self-defense. He testified the second-degree CDV charge, which preceded the first-degree CDV charge, came about when Applicant and the victim got into an argument in their mutual home, and a fight occurred over a phone, after which the victim claimed Applicant had struck her in the face multiple times. He testified there were photographs he received in discovery in the case that showed the victim with bloody lips and a red face. He testified Applicant pleaded guilty to this second-degree offense because the State had a stronger case there than it did in the first-degree CDV case. He testified he informed Applicant of his right to a trial and left the decision about whether to plead guilty or proceed trial to his client.

He affirmed he informed Applicant that he had not been able to access the file on the USB drive before Applicant pleaded guilty. He explained that his defense at trial if Applicant had pleaded not guilty to second-degree CDV would have been to attack the credibility of the victim and would have had no choice but to call the victim as a witness in order to cross-examine her. He testified he explained to Applicant that the victim would have had to testify at trial because Applicant had a right to confront her under the Confrontation Clause.

He testified he spoke with Harvley on multiple occasions by phone. He spoke to her on October 12, 2017, about the first-degree CDV case against Applicant. He testified Harvley came to the courthouse at some point after that during October of 2017 and told him she did not like being in public because it gave her anxiety, and told him she preferred to meet at her car. He testified he followed her to her car and received copies from her of things on Applicant's behalf. He testified those documents contained some good and some bad evidence. He discussed the evidence with Applicant, and told him the elements the State would have to prove should Applicant plead not guilty. He testified Applicant gave no indication that he did not understand. He testified he could not believe he could have done anything further to get a speedier trial for Applicant.

He testified he informed Applicant that the plea deal included a recommended five years' probation. The original plea deal, he testified, included active prison time and home incarceration for two years. Since Applicant did not want home incarceration, he was able to negotiate ninety days of active time plus probation for five years. Eventually, he was able to get the offer reduced to a recommendation to time served and probation, with no active time. He testified he explained this final offer to Applicant, and that Applicant wanted to take it so that he could be released from jail on the same day. He testified Applicant decided to plead guilty and take this final offer before the conclusion of the hearing on Applicant's motion to relieve counsel and proceed as a pro se defendant. He testified that, if Applicant had indicated during that final plea negotiation during the hearing that he did not want to continue with plea counsel as his attorney, he would have informed Judge Verdin that they could not move forward with the entry of a guilty plea because Applicant wanted to relieve him as counsel.

On redirect, plea counsel testified he did not believe it was his duty to inform Judge Verdin during Applicant's plea hearing that Applicant had only limited access to a law library at the jail because Applicant wanted to plead guilty in exchange for the State's sentencing recommendation, making Applicant's complaint about the law library irrelevant. Plea counsel affirmed Applicant had told plea counsel his email address and account password so that plea counsel could access emails contained therein, and plea counsel testified he did not access that account because he was not comfortable logging into his client's personal email account.

Applicant called the solicitor as a witness. He testified Applicant dropped off a USB drive with the solicitor's receptionist, and that he passed it along without opening it to plea counsel. He did not open any files on the drive because Applicant was represented at the time and the solicitor did not feel comfortable plugging it into any of his computers. He testified he would have scheduled a bond hearing for Applicant at the next term of court after his second arrest, and does not remember its being rescheduled. On cross-examination, the solicitor testified Applicant had filed the motion to relieve plea counsel and that Applicant was taken to the courthouse for a bond hearing. He testified Applicant was arrested in early May of 2017 for second-degree criminal domestic violence and pleaded guilty in December of that year, meaning that he was incarcerated for approximately seventy-eight days. He testified he did not do anything intentional to delay Applicant's court appearances.

Finally, Applicant testified on his own behalf. He testified he pleaded guilty to second-degree domestic violence because he was booked in September of 2017 for first-degree criminal domestic violence. He testified he asked plea counsel to get the charge reduced in order to get a hearing and that plea counsel did not comply. He asked plea counsel to get the charge reduced afterwards in order to have his bond reviewed against evidence to the court's attention. He

testified plea counsel did not do enough in his defense, and that plea counsel could have asked to have the charge reduced. He testified the only method he had for gathering the evidence necessary for him to defend himself was to plead guilty in order to get out of jail since plea counsel did not do a proper investigation. He testified the victim has continued to “terrorize” him to this day, and that she has also terrorized Harvley. He testified the solicitor behaved inappropriately by refusing to reduce the charge despite having seen the evidence. He was scared to let plea counsel try the case considering his lack of preparation. He testified he would have been confident to proceed to trial if plea counsel had had the evidence of Applicant’s innocence. He testified about the poor conditions in the jail. He testified he was not satisfied with the plea deal offered by the State.

On cross-examination, Applicant affirmed Judge Verdin informed him that he had the right to proceed to a jury trial instead of pleading guilty. He testified he waived his right to a trial because he did not think he would have had a good jury trial since plea counsel did not have any evidence to support his defense and challenge the victim’s credibility. When asked if he informed Judge Verdin during his plea hearing that he was happy with plea counsel’s performance, he affirmed that he did so and explained that he was referring only to the fact that plea counsel had given him printouts of case law and emailed the jail to complain about Applicant’s limited access to the law library, and that he did not intend his statement to Judge Verdin to show that he was happy with plea counsel’s performance as an attorney.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety, including the transcript from Applicant’s plea hearing, which included discussion as to Applicant’s motion to relieve plea counsel, and the hearing on Applicant’s motion to relieve his PCR counsel, which was held

before the Honorable Alex Kinlaw, Jr. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is

conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Applicant received an illegal sentence. Plea counsel was constitutionally ineffective for failing to object to the illegal sentence.

Applicant argues he received an illegal sentence because he was sentenced to imprisonment for three years, suspended to probation for five years, and that the five-year probation term exceeds the maximum sentence of three years allowed for a conviction of second-degree criminal domestic violence, that plea counsel’s performance was deficient due to his failure to object to the illegal sentence, and that he was prejudiced thereby.

However, even if the claim of an illegal sentence is properly before this Court, this Court finds Applicant was not subjected to an illegal sentence. A person convicted of second-degree domestic violence must be fined or “imprisoned for not more than three years, or both.” S.C. Code Ann. § 16-25-20(C). The plea court had the authority to “suspend the imposition . . . and place the defendant on probation” S.C. Code Ann. § 24-21-410 (1976). “The period of probation or suspension of sentence shall not exceed a period of five years” S.C. Code Ann. § 24-21-440. Here, the plea court sentenced Applicant to imprisonment for three years and suspended the service of the sentence upon a term of probation. Applicant’s reliance upon Thompson v. S.C. Dep’t of Pub. Safety, 335 S.C. 52, 515 S.E.2d 761 (1999), is misplaced

because the case concerns an interpretation of the phrase “term of imprisonment” for the purpose of establishing the start date of the requirement that the Department of Public Safety suspend the driver’s license of someone sentenced for felony DUI, not the legality of a sentence of probation that is longer than the maximum amount of active prison time allowed by a statute setting out the range of penalties for a criminal offense. As the sentence was lawful, there would have been no reason for plea counsel to object thereto, and this Court finds Applicant has failed to demonstrate any deficiency in plea counsel’s performance.

This Court finds Applicant has failed to demonstrate his sentence was illegal, failed to demonstrate any deficiency in plea counsel’s performance in failing to object to the sentence, and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

Applicant’s probation officer required him to sign conditions of release that were not required by his sentence.

Applicant asserted at the start of his PCR hearing that he wished to move forward on the allegation that he is entitled to post-conviction relief because his probation officer required him to sign conditions of release that were in excess of those required by Judge Verdin’s sentence; however, Applicant did not mention this allegation again during the hearing and provided no testimony of evidence that would support this position or supply a legal basis for the claim. This Court finds Applicant has failed to meet his burden in demonstrating that he is entitled to relief and has abandoned this ground for relief. As such, this allegation is denied and dismissed with prejudice.

Plea counsel was constitutionally ineffective for failing to conduct an adequate investigation.

Applicant argues plea counsel performed an inadequate investigation, and that this deficiency left Applicant with no choice but to plead guilty so that he could get out of jail and then present his defense at a later time.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney’s “[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel’s decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel’s judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

This Court finds plea counsel conducted a reasonable investigation in the underlying criminal case. The testimony of both plea counsel and Harvley indicated plea counsel did speak with Harvley, although the testimony diverged between the two as to the number of times of their conversations. Plea counsel’s testimony that he spoke with Harvley on multiple occasions and met with her in person in order to receive information from her about the conflict between Applicant and the victim is more credible than her testimony in contradiction to the extent of

their interactions. Plea counsel testified he reviewed the documents presented to him by Harvley and shared his opinions about the value of them with Applicant before Applicant pleaded guilty. With regards to the audio recording that Applicant claims captures the victim recanting her allegations, plea counsel's conduct was likewise reasonable. Plea counsel testified he received the recording from the solicitor, whose testimony indicated he had received it directly from Applicant. Plea counsel testified he did not listen to the audio recording that was on the USB drive he received from the solicitor, whose testimony was that he had received it directly from Applicant. Plea counsel testified he attempted to open the file saved thereon, but was unable to do so because his computer did not have a computer program able to access the file. He testified he informed Applicant that he could not access the file, and this Court finds Applicant was aware of the fact plea counsel could not watch the recording before pleading guilty. Instead of sharing with plea counsel a desire that he do further investigation into the contents of the USB drive, Applicant decided to plead guilty, removing from counsel the obligation to conduct further investigation in the case.

This Court finds Applicant has failed to demonstrate he suffered prejudice from trial counsel's supposed failure to conduct an adequate investigation. The testimony of both Applicant and plea counsel indicates Applicant was not satisfied with plea counsel's representation of Applicant during the underlying criminal case. Applicant, plea counsel, and the solicitor appeared before Judge Verdin on December 1, 2017, so that Applicant could move to relieve plea counsel. The transcript from that hearing indicates Applicant abandoned his complaints of plea counsel and pleaded guilty in order to avail himself of a sentencing recommendation from the solicitor that Applicant viewed with favor at the time. While Judge Verdin was questioning Applicant regarding his wishes as to his representation, Applicant

mentioned the solicitor had made a plea offer that day. Applicant told Judge Verdin he would like to take a break in the hearing so that he could discuss the plea offer with plea counsel, and thanked the court for its suggestion that the proceedings resume once Applicant had decided whether to accept or reject the latest plea offer. After that break, Applicant affirmed to Judge Verdin that he was happy with everything plea counsel had done for him, that he understood he would be giving up his right to a jury trial by pleading guilty, and that he wanted to plead guilty.

Applicant played for this Court the audio recording in which he claims the victim recants her allegations against him. Even assuming that speaker on the recording was the victim and the person to whom she was referring therein was Applicant, Applicant failed to demonstrate that he would not have pleaded guilty if plea counsel had somehow listened to the recording. This is especially true since Applicant was aware of the recording's existence before he pleaded guilty; in fact, he provided the solicitor with the USB drive containing the recording. Applicant touted the supposed exculpatory value of the recording to plea counsel before pleading guilty, indicating he knew it would have been available as evidence should he have asserted his right to a trial instead of pleading guilty. Plea counsel's testimony at the hearing, after he listened to the recording, was that he did not consider it to have contained any exculpatory evidence that would have negated any of the elements of second-degree criminal domestic violence, for which Applicant pleaded guilty. Plea counsel also testified he would have taken the case to trial had Applicant not pleaded guilty or had Applicant not abandoned his motion to have counsel relieved, and that he would have called the victim as a witness and cross-examined her at trial. This Court finds Applicant wanted to abandon his motion to relieve counsel and decided to plead guilty on December 1, 2017, in order to take advantage of the solicitor's sentencing

recommendation, which would allowed him to be released from jail on that day, rather than out of a fear that plea counsel had not conducted an adequate investigation.

This Court finds Applicant has failed to demonstrate plea counsel was constitutionally ineffective with respect to his failure to conduct an adequate investigation because Applicant has failed to demonstrate any deficiency in plea counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

Plea counsel was constitutionally ineffective for failing to failing to move for a speedy trial.

Applicant argues plea counsel was constitutionally ineffective for failing to assert Applicant's right to a speedy trial because Applicant was being housed in poor conditions at the detention center while awaiting trial and did not have access to legal resources, which forced him to plead guilty in order to escape the jail's conditions and have access to evidence and legal resources after being released following the entry of his guilty plea.

The South Carolina Court of Appeals has held that a reviewing court must consider four factors when determining whether a defendant's right to a speedy trial has been violated: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right to a speedy trial, and 4) the prejudice suffered by the defendant. State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (S.C. Ct. App. 2009) (citations omitted). This Court finds Applicant has failed to show that plea counsel's performance was deficient due to his failure to move for a speedy trial. Applicant was arrested in May of 2017, and pleaded guilty in December of 2017, which was not an unreasonable period of time. See Cooper at 218, 687 S.E.2d at 67 (finding the trial court's denial of Cooper's motion to dismiss the charges against him when Cooper argued his right to a speedy trial was violated when his trial was delayed by 44 months). Plea counsel's testimony indicated he unsuccessfully moved for a bond reduction, but that the court would not give Applicant a personal recognizance bond as Applicant wanted. During this time, Applicant had

also been charged with first-degree criminal domestic violence, and the indication from testimony at the PCR hearing was that this pending case contributed to the length of time between Applicant's arrest and his plea hearing. The solicitor testified credibly that he did not take any actions to delay the disposition of Applicant's charge. Applicant's testimony was that he was unhappy with the conditions of the jail while he was awaiting trial, and he testified as to his having to share space with others at the detention center, but he has failed to demonstrate in any way that there was any impropriety in the tie between his arrest and the entry of his guilty plea. This Court finds Applicant has failed to establish plea counsel's performance was deficient when counsel failed to assert Applicant's right to a speedy trial because Applicant has not shown that the right was violated.

This Court finds Applicant has failed to establish any prejudice from plea counsel's failure to assert Applicant's right to a speedy trial. Applicant's testimony at the PCR hearing on this point concerned the allegedly dissatisfactory conditions at the detention center and his desire to conduct his own legal research after being released from jail after pleading guilty.

Applicant's guilty plea was not knowingly and voluntarily given.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not warn him that he could receive probation for five years, did not advise him of the elements of second-degree criminal domestic violence, did not make an effort to get the charge reduced, did not ask for Applicant to be released on his personal recognizance, and did not advocate for Applicant's right to represent himself, and because Applicant did not have access to a law library while he was in jail awaiting trial. Applicant has failed to show the plea was unknowing or involuntary for the reasons stated below.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not inform him that he could be sentenced to probation for five years if he pleaded

guilty. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to advise Applicant that he could be sentenced to probation for five years if he pleaded guilty. Plea counsel credibly testified he made specific plea deal requests at Applicant's direction, and explained the final plea offer to Applicant. Plea counsel testified he informed Applicant that the recommendation would include the solicitor's request that Applicant receive probation for five years, that Applicant gave no indication that he did not understand this aspect of the recommendation the solicitor would give if Applicant pleaded guilty or Judge Verdin's authority to sentence Applicant to probation, and that Applicant indicated at the time that he approved of the deal so that he could be released from jail. In light of all the evidence, this Court finds plea counsel adequately informed Applicant of the potential sentence he could face, including probation for five years, and that Applicant accepted this sentencing recommendation when he pleaded guilty. This Court finds Applicant has failed to show plea counsel's actions with regards to explaining to Applicant the potential sentence he could face if he pleaded guilty caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not explain to him the elements of the offense charged. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to advise of the elements of second-degree domestic violence. Plea counsel credibly testified at the PCR hearing that he discussed with Applicant the evidence in the case and the elements of the offense. Plea counsel further testified Applicant gave no indication that he did not understand the substance of that discussion. Applicant affirmed to Judge Verdin at the plea hearing that he understood that he was pleading guilty to second-degree criminal domestic violence and that he had discussed the

case with plea counsel. This Court finds Applicant has failed to show plea counsel's actions with regards to explaining to Applicant the elements of second-degree criminal domestic violence caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not make an effort to get his charge of second-degree criminal domestic violence reduced to a lesser offense. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to engage in negotiations with the solicitor on his behalf. The testimony from plea counsel and from the solicitor indicates plea counsel engaged in negotiations with the solicitor in an attempt to secure a favorable plea deal for Applicant. Plea counsel's testimony shows he was able to secure progressively more favorable deals from the solicitor throughout his representation of Applicant, which culminated in the final plea offer that Applicant accepted when he pleaded guilty before Judge Verdin in December of 2017. Indeed, plea counsel testified he was able to get the solicitor to dismiss the charge for first-degree criminal domestic violence that was also pending against Applicant at the time. Applicant has failed to show that he was entitled to plead guilty to some lesser offense. Applicant waived his right to seek challenge the State's evidence by pleading guilty, affirmed to Judge Verdin that he understood that he was pleading guilty to the offense and wanted to plead guilty, and denied that anyone was forcing him to plead guilty. This Court finds Applicant has failed to show plea counsel's actions with regards to plea negotiations caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not seek to have Applicant released on his personal recognizance while awaiting trial. This Court finds plea counsel's performance was not deficient with respect to his actions

regarding Applicant's pre-trial detention. Plea counsel credibly testified at the PCR hearing that he made multiple attempts to gain a more favorable bond for Applicant, including his moving for a bond reduction and requesting that Applicant be released on his personal recognizance, but these efforts were not successful. Applicant has not explained any further efforts plea counsel could or should have made on Applicant's behalf. Applicant testified that he was not satisfied with the condition of his pre-trial confinement, but has failed to show that his discomfort entitles him to set aside his guilty plea and depart from his solemn declaration of guilty therein. See Satterwhite v. State, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997) (instructing that the fact that an applicant for post-conviction relief may have pleaded guilty in order to obtain a release from administrative segregation does not render the guilty plea involuntary) (citing Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992)). This Court finds Applicant has failed to show plea counsel's actions with regards to Applicant's pre-trial detention caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not advocate for Applicant's right to represent himself in the underlying criminal case. This Court finds plea counsel's performance was not deficient with respect to his actions regarding Applicant's desire to relieve counsel. Plea counsel credibly testified he took Applicant before Judge Verdin in December of 2017 so that Applicant could move to relieve counsel. The transcript from that hearing shows Applicant informed Judge Verdin of his reservations about plea counsel's representation, but it also shows that Applicant abandoned his motion in order to accept a plea offer from the State. Plea counsel performed with reasonable diligence in taking Applicant before the court in order to inform the court of his desire to relieve counsel. At that time, Applicant could have persisted in his motion if he believed he or substitute counsel could

do something else in his defense or in plea negotiations that plea counsel had not done, but Applicant's decision to abandon that effort in order to accept the State's offer and plead guilty indicates that he was satisfied with plea counsel's work in plea negotiations, at least at the end. This Court finds Applicant has failed to show plea counsel's actions with regards to Applicant's request to relieve counsel caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because he did not have adequate access to legal resources during his pre-trial detention. The transcript from Applicant's plea hearing on December 1, 2017, shows Applicant informed Judge Verdin of his dissatisfaction with the legal resources at his disposal at the detention center, and that Applicant expressed an opinion that he would not be able to adequately represent himself with those resources if he were to proceed in his criminal case as a pro se defendant. This Court does not need to consider the quality of the legal resources at the Pickens County Detention Center because it was not Applicant's responsibility to advocate on his own behalf in the criminal case as he was represented by plea counsel. Plea counsel credibly testified he conducted legal research, evaluated the evidence in the case, and discussed those matters with Applicant. Applicant's own testimony agrees that plea counsel shared case law with him. Plea counsel was not limited to the legal resources at the jail, and the responsibility for conducting legal research would have been his, and not Applicant's, as Applicant was not a pro se defendant and plea counsel was not engaging in a hybrid representation. See United States v. Lawrence, 161 F.3d 250 (4th Cir. 1998) ("[t]he Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding pro se"), United States v. Mikolajczyk, 137 F.3d 237 (5th Cir. 1998) (holding that, as the defendant

“had no right to standby counsel, it seems unlikely that standby counsel’s failure to assist could be a violation of his Sixth Amendment rights”), and United States v. Bova, 350 F.3d 224 (1st Cir. 2003) (nothing that the defendant did not have the right both to “represent himself and to enjoy the benefit of standby appointed counsel”). At any rate, Applicant waived his right to challenge the State’s case by waiving his right to a trial by pleading guilty. This Court finds Applicant has failed to show that the quality of the legal resources at the detention center caused Applicant’s guilty plea to have been entered unknowingly or involuntarily.

Applicant has failed to demonstrate that this Court should allow him to depart from the guilty plea he entered before Judge Verdin in December of 2017. He has failed to show any deficiencies in plea counsel’s performance or an Applicant’s circumstances at the time that caused Applicant to plead guilty rather than proceeding to trial. On the contrary, the evidence before this Court indicates Applicant desires to be released from incarceration on probation in accordance with the sentencing recommendation to which Applicant subjected himself by pleading guilty. Applicant has failed to show he did not understand and accept the consequences of pleading guilty to second-degree criminal domestic violence or plead guilty of his own free will. As such, these allegations are denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate

counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides if the applicant wishes to seek appellate review and is represented by post-conviction relief counsel, that counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 22 day of January, 2020.

Edward W. Miller
EDWARD W. MILLER
Presiding Judge

Guerrilla, South Carolina

CLERK OF COURT
SICKENS COUNTY
SOUTH CAROLINA

2020 JAN 29 P 4:42

STATE OF SOUTH CAROLINA

2020 FEB 14 P 3:02

COUNTY OF PICKENS

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Gary Z. Thomas,

CP
Case No: 2018-DR-39-1276MOTION TO AMEND/ALTER
JUDGMENT

Plaintiff,

v.

State of South Carolina,
Respondent.

COMES NOW the Applicant, Gary Z. Thomas, pro se, and submits this MOTION TO AMEND/ALTER JUDGMENT pursuant to Rule 59, SCRPC, and asserts that all issues herein must be specifically addressed and ruled upon by the PCR Court to enable Applicant fair review of the legal conclusions reached by the PCR Court.

Applicant submits that the following issues have not been specifically and properly addressed in the ORDER OF DISMISSAL (hereinafter "Order") and further submits that addressing said issues will illustrate how the legal conclusions reached by the Court are clearly erroneous:

1. Whether Applicant's 1st Degree domestic violence charge was sufficiently grounded in probable cause, and therefore a *lawfully* prosecuted offense;
 - A. *Not* susceptible to dismissal for lack of probable cause; and
 - B. *Legitimately* triable as a 10-year felony domestic violence if Applicant declined plea offers; and
 - C. *Legitimately* used to induce Applicant's plea to the separately charged 2nd degree

domestic violence?

2. Whether 17-23-90¹ was an available remedy for Counsel to:
 - A. Secure Applicant's desired "speedy trial" on the 1st degree domestic violence charge; *or*
 - B. Secure Applicant's desired release without bail if the State did not try Applicant by the second term of Court following Applicant's felony arrest and imprisonment?
3. Whether the South Carolina Supreme Court's definition "term of imprisonment" (equating probation with incarceration) was intended to be applicable *only* in the case of license suspensions resulting from DUI convictions²?
4. Whether Counsel's advice concerning sentence possibilities if Applicant declined plea offers and asserted his right to go to trial was erroneous advice?
5. Whether Counsel's decision to not investigate the contents of the USB drive "touted" by Applicant to contain exculpatory evidence was grounded in a specific determination that revealing the contents of the drive was not necessary to Applicant's defense if he decided to go to trial?
6. Whether Counsel's *discomfort* qualifies as a constitutionally sufficient reason to forsake his "duty" to investigate *all reasonably available* and lawfully available evidence offered by Applicant and immediately accessible?

¹ South Carolina Code of Laws, Section 17-23-90. Applicant refers to statutory provisions herein in their abbreviated versions (e.g. "17-23-90"). All statutes cited herein are from the South Carolina Code of Laws. The *sole discussion* in the 1-headnote, 2-paragraph State v. Campbell, 277 SC 408 (1982) was the applicability of and interpretation of 17-23-90, which Counsel admitted printing at Applicant's request at least two weeks prior to the first term of court following Applicant's *felony arrest*.

² See State v. Ellis, 397 SC 576 (2012).

THE UNLAWFUL 1ST DEGREE DOMESTIC VIOLENCE PROSECUTION

Both the warrant issued in September 2017 and the testimony of Counsel at the 2019 PCR hearing clearly show that Applicant's 1st degree domestic violence charge was based on allegations that the purported victim received "fractures" as a result of being struck once in the face with a closed fist.³ According to the Order (at page 9) Counsel described the underlying offense as "*an altercation during with the victim was struck in the face, and the victim received facial fractures as a result.*"

The statute describing 2nd degree domestic violence states in pertinent part:

A person commits the offense of 2nd degree domestic violence if the person violates subsection A and *moderate bodily injury* to the person's own household member results.

16-25-20(C)(1) (emphasis added). "Moderate bodily injury" is defined as follows:

Moderate bodily injury means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or *injury that results in a fracture or dislocation*. . . .

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16-3-600(A)(1). First degree domestic violence is a *felony* punishable by ten years imprisonment, whereas 2nd degree domestic violence is punishable by three years imprisonment.

It is clear from both the warrant charging Applicant with 1st degree domestic violence and Counsel's summary of the injuries alleged in the case that the Applicant should never have been

³ There were no aggravating factors alleged to have been applicable to the offense charged. The 1st degree domestic violence was based entirely on the degree of injury alleged.

charged with 1st degree domestic violence. It is clear that the warrant facially failed to establish probable cause for a charge of *1st degree* domestic violence. *See Pickens County A/W 2017A3920700174.*

While the PCR Court's Order finds that Counsel provided competent representation with respect to pre-trial issues and plea negotiations, such findings are based solely on the excuses Counsel offered for his negligent representation; not on the actual failures Counsel himself admitted. One of the most obvious failures that influenced Applicant's decision to plea was Counsel's refusal to utilize available legal procedure to seek the dismissal/reduction of his illegally prosecuted offense before it was unlawfully used (with Counsel's assistance and cooperation) to induce Applicant's plea to the separately charged offense of 2nd degree domestic violence.

The Order (at page 8) clearly notes that Counsel specifically and clearly *admitted* that he "*asked the Solicitor to dismiss the 1st degree charge as a part of Applicant's agreement to plead guilty to the separate offense of 2nd degree domestic violence.*" Rather than demand dismissal for lack of probable cause, *without* requiring Applicant's guilty plea to anything.

Although Counsel indicated he didn't know any other method by which he could get the charge reduced or dismissed, Applicant submits that 17-23-90 and preliminary hearing procedures and motion procedures were available. Counsel simply failed to use them to Applicant's advantage as instructed. Instead he bargained the illegal charge away with Applicant's guilty plea.

Consequently, the Applicant's guilty plea to the current 2nd degree domestic violence was (as shown) the product of coercion and misrepresentation, both of which render the plea involuntary. The State (through unchecked misrepresentation) put Applicant in peril of a possible

aggregate sentence of thirteen years in order to induce a plea.

Additionally, Counsel's advice regarding sentence possibilities if Applicant *did not* plea was *erroneous and misleading* based on Counsel's erroneous belief that consecutive sentences for both 1st and 2nd degree domestic violence (13 years) could result. Because the 1st degree charge could not realistically be tried as a 1st degree offense, the realistic actual possible sentence was an aggregate six years.

Applicant's eventual decision to plea was clearly based, at least in part, on erroneous advice from plea counsel, and in part on the State's misrepresentation of prosecution possibilities.

Guilty pleas entered "based on trial Counsel's erroneous sentencing advice . . . must be reversed." Alexander v. State, 303 SC 539 (1991); Ray v. State, 303 SC 374 (1991); Jackson v. State, 342 SC 95 (2000). Likewise, when a plea is at least partially motivated by "a threat by a prosecutor to do what the law will not permit . . . [the misrepresentation] renders the plea involuntary. . . in effect, the defendant is deceived into making the plea, and the deception prevents the act from being a true act of volition." Lassiter v. Turner, 423 F.2d, 899-900 (1970).

THE MANDATORY PROVISIONS OF 17-23-90 (Summarized in Campbell, Supra)

The provisions of 17-23-90 are mandatory and would have required the felony-charged Applicant's release without bail "if he was not indicted and tried by the second term" after his arrest; *provided* that Counsel would have demanded, on Applicant's behalf, the Applicant be brought to trial on the felony domestic violence count that was keeping him jailed.

As stated in Campbell, which Counsel admitted to printing *at Applicant's request, and weeks before the first term of court*,

Section 17-23-90 provides for discharge from imprisonments when a person is committed for a felony, *demands to be brought to trial*, and is not indicted and tried by the second term following his commitment. . . . [T]he statutory referenced discharge. . . . indicates the prisoner should be released without bail. . . .

Id., 277 SC at 409. (Emphasis added.)

Counsel acknowledged his awareness that Applicant desired both speedy trial and release from jail, testified that he wasn't aware of any procedure by which he could accomplish either for Applicant, and didn't think any statutes or cases cited for the circuit court would have helped any more than Counsel's falsely claimed repeated "unsuccessful" attempts to get Applicant a PR bond.⁴

Applicant submits that Counsel could have and *should have* complied with Applicant's instructions to use 17-23-90 to force either (a) a speedy trial for the 1st degree domestic violence charge, or (b) Applicant's release from jail without the requirement of bail. One or the other would have been achieved if Counsel had simply demanded trial.

Counsel's feigned ignorance of the provisions of 17-23-90 (which Counsel admitted was supplied to Counsel by the Applicant) is no excuse for Counsel's failing to secure trial or release by that *November* term of court which, incidentally, preceded the December hearings in which Counsel *remained* ineffective for Applicant.

As of the date of Applicant's plea, Counsel had utterly failed Applicant in several ways,⁵ all of which wholly undermined Applicant's confidence and trust in Counsel's ability to competently try his case. Counsel's failures were complete *before* Applicant elected to plead out; not the other way around.

⁴ Public index reveals that "credible" Counsel made no motions for bail on Applicant's behalf, contrary to his claims before the PCR Court.

⁵ The failure to confront the deficient arrest warrant; the refusal to review evidence offered by Applicant; the refusal to use 17-23-90 to Applicant's advantage; the failure to research and confront the legality of the jail's lack of legal research materials necessary for self-representation. See *Harden v. Bodiford*, ___ F. 3d ____.

The mere fact that Applicant was still in jail beyond that second (November) term of court was alone sufficient motivation for Applicant to plead guilty for release from further imminent harm resulting from deficient Counsel. The alternative was to remain in jail for probably at least another year awaiting trial with incompetent unprepared Counsel.

THE APPLICABILITY OF TERM OF IMPRISONMENT TO APPLICANT'S
UNLAWFULLY EXCESSIVE SENTENCE

The Order of Dismissal cites 24-21-410 and 24-21-440 for the proposition that the imposition of five years' probation for Applicant's three-year offense was lawful. Applicant submits that the Court's reliance on either or both cited statutes is clearly erroneous for several reasons. First, there are rules of statutory interpretation that require courts to interpret statutes in such a fashion that the interpretation serves to effectuate legislative intent. Wigfall v. Tideland Utilities, Inc., 354 SC 100, 110 (2003). Further, in its interpretation of statutes a court is required to avoid construing statutes in such a fashion that the construction produces an absurd result.

As a first point, it is clear from a glance at 24-21-440 that the provisions of that statute apply only to terms of imprisonment which *allow* the suspension of five years. The language "shall not exceed" merely sets an outside limit for periods of suspension; there is nothing in the language of the statute that can reasonably be interpreted as *extending* suspension or probation periods beyond statutory limits established for any particular offense. Courts are not empowered to create laws by reading into statutes terms not expressly put there by legislators. Article 1, Section 8, SC Constitution.

Furthermore, considering that legislative intent is an important factor in applying statutes, it is clear that the PCR Court's interpretation and application of 24-21-440 in connection with

24-21-410 produces an absurd result: five-year probationary terms of imprisonment for offenses as minor as littering,⁶ petit larceny, trespass, or 3rd degree domestic violence. For, the provisions of 24-21-410 clearly apply in equal form to “any offense” (meaning all offenses) not punishable by death or life imprisonment. Littering, trespass, and every other 30-day offense falls squarely with the meaning of “any offense” for purposes of 24-21-410.

Of a truth, if 24-21-410 and 24-21-440 may be interpreted to operate to permit five years probation for Applicant’s 3-year offense, the same must apply to littering, trespass, etc. Such a strained interpretation of the aforementioned statutory provisions obviously contradicts legislative intent. It would be absurd to assume that legislators anticipated or intended probation terms of five years for trespass, etc.

Additionally, and most importantly, the PCR Court’s erroneous application of the above-referenced statutes results from its adamant denial of the fact that, over two decades ago, our Supreme Court declared that “[p]robation. . . is *clearly part of a criminal defendant’s “term of imprisonment”*. . . State v. Ellis, 397 SC 576, 579 (2012) (quoting Thompson v. SC Department of Public Safety, 335 SC 52, 55 (1999).

As noted in State v. Ellis, the Court previously “*explained the relationship between incarceration, probation, and parole.*”

In sentencing a trial judge may impose a term of years but provide for a suspension of a part of such term of imprisonment, and the placing of a defendant on probation after serving a designated portion of the term of imprisonment . . . *probation*, a suspension of the period of incarceration, *is clearly part of a criminal defendant’s term of imprisonment*, as is actual incarceration, parole, and the suspended portion of the sentence, or supervised furlough.

⁶ This Court should note that in 16-11-700(C) (prescribing punishment for littering), the General Assembly uses the terms “imprisoned” and “term of imprisonment” interchangeably, meaning the two terms are one and the same to our lawmakers.

State v. Ellis, 397 SC at 580-81 (quoting Thompson, 335 SC at 55-56)⁷.

Furthermore, the Court of Appeals, in State v. Proctor, 345 SC 299 (2001), correctly noted that the Thompson Court explained:

“The phrase “term of imprisonment” has a *well established meaning* in South Carolina criminal law.” According to Thompson, the phrase “term of imprisonment” includes actual incarceration, parole, the suspended portion of the sentence, *probation*, and supervised furlough . . . The court *rejected a narrow view of the phrase that would limit it to the period of actual incarceration.*”

State v. Proctor, 345 SC at 303. Indeed, even the Court of Appeals noted the 1999 reference to the “well-established meaning” of the phrase term of imprisonment in South Carolina and the Supreme Court’s rejection of a “narrow view” that imprisonment means only actual incarceration. Again turning to the rules of statutory interpretation, Applicant submits that the law clearly states that the legislature is presumed to be aware of the Supreme Court’s interpretation of its statutes. Wigfall, Supra, 345 SC at 111. As such, the General Assembly is *presumed* to be aware of our Supreme Court’s interpretation of “term of imprisonment” equating probation with actual incarceration, and the General Assembly is also presumed to be in agreement with that interpretation if it fails over a 20-year period to define imprisonment to mean only physical incarceration. Id.

Based on a *correct* reading of applicable laws Applicant submits that “imprisoned” (see N.6) within the meaning of 16-25-20(C) is accomplished by the placing of a defendant on probation *in lieu of* the suspended incarceration term, not beyond the duration of. Based on the broad definition of “term of imprisonment” given by our Supreme Court, and accepted by our

⁷ Insofar as the Order of Dismissal suggests that Applicant’s reliance on the Thompson definition of “term of imprisonment” is *misplaced*. It is clearly in error; as the Ellis decision clearly illustrates, the Courts earlier interpretation of “term of imprisonment” was not intended to be strictly limited to cases involving license suspensions resulting from DUI convictions. Indeed, the Thompson Court applied the term to “criminal sentence”. Ellis applied the term in a burglary case. The Court of Appeals applied the term in a grand larceny case, State v. Proctor, 345 SC 299, 303 (2001). The phrase “term of imprisonment” applies to Applicant’s “criminal sentence” as well, regardless of how little the State (or the Circuit Court) may care for that idea.

legislators, it is clearly understood that the language “imprisoned for not more than three years” means that Applicant could only have been placed in a probationary term of imprisonment for not more than three years pursuant to the limit set by 16-25-20(C).

Because the probationary sentence incompetently and admittedly *negotiated* by plea Counsel was beyond statutory limits, it was unlawful, the product of *deficient* performance by Counsel and the State’s argument to the contrary has been *clearly a frivolous argument*.⁸

COUNSEL’S UNREASONABLY NEGLIGENT INVESTIGATION

Correctly noted in the Order of Dismissal (at page 17) a criminal defense attorney “*has a duty to undertake reasonably investigations or to make a decision that renders a particular investigation unnecessary . . . and has the duty to conduct a reasonable investigation to discover all reasonably available mitigating [and rebuttal] evidence. . .*”

Counsel testified he “wasn’t able to” review the USB drive contents because his computer didn’t immediately open the file stored on the device, but offered no testimony to the effect that he put forth any effort beyond his initial unsuccessful attempt at plugging the device into a USB port on his computer. *See Order, generally.* Counsel simply informed Applicant that he “couldn’t” access the file on the drive because it didn’t automatically load. Counsel’s effort to investigate the drive’s contents was not even *arguably* “reasonable.” Counsel did not testify that he made a decision that the drive’s contents were not necessary for Applicant’s defense; he simply stated he did not review the contents because they were not immediately and effortlessly

⁸ If the *pro se* Applicant can so easily defeat the State’s argument that his sentence was not unlawful from its imposition, he believes he is entitled to the benefit of the Courts acknowledgement that the State’s attorney *should have known* that the sentence has been unlawful from its imposition. Applicant also submits that Taylor Smith has been fully aware that the “term of imprisonment” was not defined *strictly* for the purpose of license suspensions. Taylor Smith would not imply that the Ellis court’s reliance on Thompson was “misplaced” because Ellis was a burglary case. His position that Applicant’s sentence was lawful continues to be frivolous and sanctionable.

accessed with his computer.

Counsel testified that he refused to access Applicant's email and Google accounts to review and retrieve evidence despite being instructed to do so. Counsel admitted he told Applicant he would not comply because he "was not comfortable" reviewing the *lawfully and reasonably available evidence* in Applicant's email account. Unfortunately, Counsel's testimony failed to explain how "not comfortable" translates to "not necessary" or how the evidence offered may (or may not) have impacted Applicant's defense if he chose to go to trial. To this day, Counsel has no idea the exculpatory value or impeachment value of the evidence he refused to review because he was "not comfortable" doing so.

When indigent's criminal defense attorneys are permitted to excuse negligent investigations simply by claiming *discomfort*, the sixth amendment's right to competent counsel will cease to be enforceable.

The application for PCR stated several grounds for relief, each ground identifying a separate instance of deficient performance by Counsel (omissions, misrepresentations of law, and poor advice based on Counsel's own misunderstanding of law), and all of which were contributing factors in Applicant's *eventual, last minute* decision to plead guilty⁹.

At the PCR hearing, Counsel's "credible" testimony was the equivalent of *credible*

⁹ The Order implies that Applicant's plea freed Counsel from his duty to investigate although the refused investigation was refused *before the plea*. The record clearly does not support *any* findings that plea Counsel's choices and failures were grounded in Applicant's decision to plead guilty; the transcript of the Motion to Relieve Hearing (held *immediately before* the plea hearing) clearly demonstrates that Applicant's alluding to "a plea offer" came after – *not before* – the challenged omissions from Counsel. The Order also noted the consistent testimonies of Counsel and Applicant that Applicant went into plea negotiations very displeased with Counsel's representation. All evidence in the record shows that Applicant wasn't intending to plead guilty until relieving Counsel wasn't going to prove beneficial due to there being no law library or legal resources within the jail to enable Applicant to move forward as a pro se litigant. Judge Verdin acknowledged the Applicant's decision to not relieve Counsel was "due to [his] circumstances" (Motion Transcript 3-4) which involved the deprivation of one constitutional right (legal access) that was not going to be addressed by Counsel as a deprivation that actually and realistically *prevented* the meaningful exercise of the right to self-representation. While the PCR Court seemingly misses the importance and relevance of the jail's unlawful denial of a law library, it does not change the fact that the constitutional right of self-representation was actually and substantially effected (denied) by the denial of the right to legal access at the jail.

admissions to the errors enumerated in the Application and maintained at the PCR hearing.

These cumulative errors/omissions:

1. Left Applicant in jail for 78 days on *illegal charges* with a bail he could not pay;
2. Resulted in Applicant's eventually being coerced into pleading guilty through the State's misrepresentation of the possible range of consequences should Applicant proceed to trial and be convicted;
3. Deprived Applicant of the right to be either (a) tried immediately, *or* (b) released without bail;
4. Resulted in Applicant's being *unconstitutionally* deprived of the right (by deprivation of the means) to represent himself¹⁰;
5. Wholly and irrevocably undermined Applicant's confidence in Counsel's ability to competently try his case before a jury; and
6. Wholly and irrevocably undermined Applicant's confidence in Counsel's intent to defend Applicant's position before a jury.

Applicant's unrefuted testimony was that his guilty plea was motivated by Counsel's failures and poor advice. He has therefore satisfied the "prejudiced prong" of his ineffective Counsel claim. See Alexander v. State, 303 SC 539 (1991) and Jackson v. State, 342 SC 95 (2000).

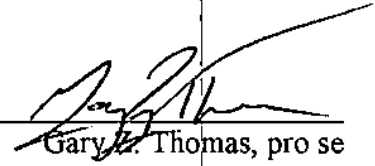
Applicant has in fact shown that Counsel's performance was substandard, his advice was erroneous, and his omissions and poor advice motivated – *compelled* – Applicant to plead for the unlawful sentence he is now serving.

The evidence has established Applicant's entitlement to relief; only the erroneous

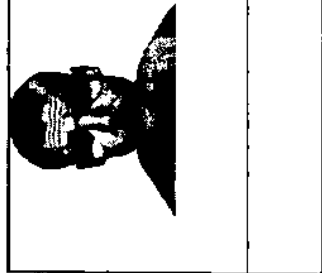
¹⁰ See Note 9 above.

conclusions of the PCR Court deny Applicant's entitled relief.

Signed this 14th day of February, 2020. Respectfully submitted.



Gary L. Thomas, pro se



ARREST WARRANT

2017A3920700174

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

PICKENS

THE STATE

against

GARY ZACHARIAH THOMAS

Address [REDACTED] CT

City/State ZIP 29673

Date of Birth: [REDACTED] SSN: [REDACTED]

Sex: M Race: W Height: 5-7 Weight: 160

State: [REDACTED] DL#: [REDACTED]

B: [REDACTED] Agency ORI#: [REDACTED]

Securing Agency: CITY OF PICKENS

Securing Officer: TYE NALLEY

Charge: DOMESTIC VIOLENCE 1ST DEGREE

Offense Code: 3811

Offense/Ordinance Sec: 16-25-0020 (A)

This warrant is CERTIFIED FOR SERVICE in the

County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

fit with according to law

Signature of Judge (L.S.)

Date

Time

RETURN

Copy of this arrest warrant was delivered to

defendant GARY ZACHARIAH THOMAS

29.10.2017

Signature of Constable/Law Enforcement Officer

TURN WARRANT TO:

PICKENS MUNICIPAL COURT

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

PICKENS

Personally appeared before me the affiant TYE NALLEY

being duly sworn deposes and says that defendant GARY ZACHARIAH THOMAS

did within this county and state on 09/05/2017

State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of PICKENS

in the following particulars:

DESCRIPTION OF OFFENSE: 16-25-0020 (A) / DOMESTIC VIOLENCE 1ST DEGREE

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE DEFENDANT, DID ON 9/5/2017 WILFULLY AND UNLAWFULLY CAUSE OR ATTEMPT TO CAUSE PHYSICAL HARM TO THE VICTIM, PATRICIA PHILLIPS, THE VICTIM IS THE DEFENDANT'S EX-GIRLFRIEND WHO HAD PREVIOUSLY CO-HABITATED. THE DEFENDANT DID STRIKE HER WITH A CLOSED FIST TO THE LEFT SIDE OF THE FACE CAUSING A CONCUSSION AND FRACTURES OF THE FACIAL BONES. THIS OFFENSE OCCURRED AT INDIA DRIVE APARTMENT WHICH IS LOCATED WITHIN THE CITY LIMITS OF PICKENS, SC. INCIDENT REPORT, PICTURES OF INJURIES, VICTIMS VOLUNTARY STATEMENT AND CASE#2017-04477 ARE ON FILE AT THE PICKENS POLICE DEPARTMENT

Signature of Affiant

Affiant's Address

PO BOX 217

PICKENS SC 29671

Affiant's Telephone

(864) 878-6421

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

it appearing from the above affidavit that there are reasonable grounds to believe that

defendant GARY ZACHARIAH THOMAS

on 09/05/2017

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of PICKENS) as set forth below:

DESCRIPTION OF OFFENSE: DOMESTIC / DOMESTIC VIOLENCE, 1ST DEGREE

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 09/15/2017 12:34 PM

by Tye Nalley (L.S.)

MELANIE DAVIS

Judge Code: MRD1

Issuing Court:

☐ Magistrate☒ Municipal☐ Circuit

ORIGINAL

Case: 2017-04513

SEP 26 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	2020 MAR -2 P 4:17
	)	
	)	Case No: 2018-CP-39-1276
Gary Z. Thomas,	)	
	)	CLERK OF COURT
	)	PICKENS COUNTY
	)	SOUTH CAROLINA
	)	AMENDED MOTION TO AMEND/ALTER
	)	JUDGMENT
Applicant,	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
	)	
Respondent.	)	

COMES NOW the Applicant, Gary Z. Thomas, pro se, and submits this AMENDED MOTION TO AMEND/ALTER JUDGMENT pursuant to Rule 59, SCRCP, and asserts that all issues herein must be specifically addressed and ruled upon by the PCR Court to enable Applicant fair review of the legal conclusions reached by the PCR Court.

Applicant submits that the following issues have not been specifically and properly addressed in the ORDER OF DISMISSAL (hereinafter "Order") and further submits that addressing said issues will illustrate how the legal conclusions reached by the Court are clearly erroneous:

1. Whether Applicant's 1st Degree domestic violence charge was sufficiently grounded in probable cause, and therefore a *lawfully* prosecuted offense;
 - A. *Not* susceptible to dismissal for lack of probable cause; and
 - B. *Legitimately* triable as a 10-year felony domestic violence if Applicant declined plea offers; and

- C. *Legitimately* used to induce Applicant's plea to the separately charged 2nd degree domestic violence?
2. Whether 17-23-90¹ was an available remedy for Counsel to:
 - A. Secure Applicant's desired "speedy trial" on the 1st degree domestic violence charge; *or*
 - B. Secure Applicant's desired release without bail if the State did not try Applicant by the second term of Court following Applicant's felony arrest and imprisonment?
 3. Whether the South Carolina Supreme Court's definition "term of imprisonment" (equating probation with incarceration) was intended to be applicable *only* in the case of license suspensions resulting from DUI convictions²?
 4. Whether Counsel's advice concerning sentence possibilities if Applicant declined plea offers and asserted his right to go to trial was erroneous advice?
 5. Whether Counsel's decision to not investigate the contents of the USB drive "touted" by Applicant to contain exculpatory evidence was grounded in a specific determination that revealing the contents of the drive was not necessary to Applicant's defense if he decided to go to trial?
 6. Whether Counsel's *discomfort* qualifies as a constitutionally sufficient reason to forsake his "duty" to investigate *all reasonably available* and lawfully available evidence offered by Applicant and immediately accessible?

¹ South Carolina Code of Laws, Section 17-23-90. Applicant refers to statutory provisions herein in their abbreviated versions (e.g. "17-23-90"). All statutes cited herein are from the South Carolina Code of Laws. The *sole discussion* in the 1-headnote, 2-paragraph State v. Campbell, 277 SC 408 (1982) was the applicability of and interpretation of 17-23-90, which Counsel admitted printing at Applicant's request at least two weeks prior to the first term of court following Applicant's *felony arrest*.

² See State v. Ellis, 397 SC 576 (2012); See also State v. Proctor, 345 SC 299 (2001).

THE UNLAWFUL 1ST DEGREE DOMESTIC VIOLENCE PROSECUTION

Both the warrant issued in September 2017 and the testimony of Counsel at the 2019 PCR hearing clearly show that Applicant's 1st degree domestic violence charge was based on allegations that the purported victim received "fractures" as a result of being struck once in the face with a closed fist.³ According to the ORDER (at page 9) Counsel described the underlying offense as "*an altercation during with the victim was struck in the face, and the victim received facial fractures as a result.*"

The statute describing 2nd degree domestic violence states in pertinent part:

A person commits the offense of 2nd degree domestic violence if the person violates subsection (A) and *moderate bodily injury* to the person's own household member results.

16-25-20(C)(1) (emphasis added). "Moderate bodily injury" is defined as follows:

Moderate bodily injury means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or *injury that results in a fracture or dislocation*. . . .

16-3-600(a)(2) (emphasis added).

The offense of 1st degree domestic violence is committed by the infliction of "great bodily injury" or "is accomplished by means likely to result in great bodily injury." 16-25-20(B).

Great bodily injury means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of a bodily member or organ.

16-3-600(A)(1). First degree domestic violence is a *felony* punishable by ten years imprisonment, whereas 2nd degree domestic violence is punishable by three years imprisonment.

³ There were no aggravating factors alleged to have been applicable to the offense charged. The first degree domestic violence was based entirely on the degree of injury alleged.

It is clear from both the warrant charging Applicant with 1st degree domestic violence and Counsel's summary of the injuries alleged in the case that the Applicant should never have been charged with 1st degree domestic violence. It is clear that the warrant facially failed to establish probable cause for a charge of *1st degree* domestic violence. *See Pickens County A W 2017A3920700174 (Attached).*

While the PCR Court's ORDER finds that Counsel provided competent representation with respect to pre-trial issues and plea negotiations, such findings are based solely on the excuses Counsel offered for his negligent representation; not on the actual failures Counsel himself admitted. One of the most obvious failures that influenced Applicant's decision to plea was Counsel's refusal to utilize available legal procedure to seek the dismissal/reduction of his illegally prosecuted offense before it was unlawfully used (with Counsel's assistance and cooperation) to induce Applicant's plea to the separately charged offense of 2nd degree domestic violence.

The ORDER (at page 8) clearly notes that Counsel specifically and clearly *admitted* that he "*asked the Solicitor to dismiss the 1st degree charge as a part of Applicant's agreement to plead guilty to the separate offense of 2nd degree domestic violence,*" rather than demand dismissal for lack of probable cause, *without* requiring Applicant's guilty plea to anything.

Although Counsel indicated he didn't know any other method by which he could get the charge reduced or dismissed, Applicant submits that 17-23-90 and preliminary hearing procedures and motion procedures were available. Counsel simply failed to use them to Applicant's advantage as instructed. Instead he bargained the illegal charge away with Applicant's guilty plea.

Consequently, the Applicant's guilty plea to the current 2nd degree domestic violence was

(as shown) the product of coercion and misrepresentation, both of which render the plea involuntary. The State (through unchecked misrepresentation) put Applicant in peril of a possible aggregate sentence of thirteen years in order to induce a plea.

Additionally, Counsel's advice regarding sentence possibilities if Applicant *did not* plea was *erroneous and misleading* based on Counsel's erroneous belief that consecutive sentences for both 1st and 2nd degree domestic violence (13 years) could result. Because the 1st degree charge could not realistically be tried as a 1st degree offense, the realistic actual possible sentence was an aggregate six years.

Applicant's eventual decision to plea was clearly based, at least in part, on erroneous advice from plea counsel, and in part on the State's misrepresentation of prosecution possibilities.

Guilty pleas entered "based on trial Counsel's erroneous sentencing advice . . . must be reversed." Alexander v. State, 303 SC 539 (1991); Ray v. State, 303 SC 374 (1991); Jackson v. State, 342 SC 95 (2000). Likewise, when a plea is at least partially motivated by "a threat by a prosecutor to do what the law will not permit . . . [the misrepresentation] renders the plea involuntary. . . in effect, the defendant is deceived into making the plea, and the deception prevents the act from being a true act of volition." Lassiter v. Turner, 423 F.2d, 899-900 (1970).

THE MANDATORY PROVISIONS OF 17-23-90 (Summarized in Campbell, Supra)

The provisions of 17-23-90 are mandatory and would have required the felony-charged Applicant's release without bail "if he was not indicted and tried by the second term" after his arrest; *provided* that Counsel would have demanded, on Applicant's behalf, the Applicant be brought to trial on the felony domestic violence count that was keeping him jailed.

As stated in Campbell, which Counsel admitted to printing *at Applicant's request, and weeks before the first term of court*;

Section 17-23-90 provides for discharge from imprisonments when a person is committed for a felony, *demands to be brought to trial*, and is not indicted and tried by the second term following his commitment. . . . [T]he statutory reference to discharge. . . . indicates the prisoner should be released without bail. . . .

Id., 277 SC at 409. (Emphasis added.)

Counsel acknowledged his awareness that Applicant desired both speedy trial and release from jail, testified that he wasn't aware of any procedure by which he could accomplish either for Applicant, and didn't think any statutes or cases cited for the circuit court would have helped any more than Counsel's falsely claimed repeated "unsuccessful" attempts to get Applicant a PR bond.⁴

Applicant submits that Counsel could have and ***should have*** complied with Applicant's instructions to use 17-23-90 to force either (a) a speedy trial for the 1st degree domestic violence charge, or (b) Applicant's release from jail without the requirement of bail. One or the other would have been achieved if Counsel had simply demanded trial.

Counsel's feigned ignorance of the provisions of 17-23-90 (which Counsel admitted was supplied to Counsel by the Applicant) is no excuse for Counsel's failing to secure trial or release by that ***November*** term of court which, incidentally, preceded the December hearings in which Counsel ***remained*** ineffective for Applicant.

As of the date of Applicant's plea, Counsel had utterly failed Applicant in several ways,⁵

⁴ Public index reveals that "credible" Counsel made no motions for bail on Applicant's behalf, contrary to his claims before the PCR Court (Attached). Applicant also asserts that Counsel's credibility should be re-evaluated in light of the false testimony given.

⁵ The failure to confront the deficient arrest warrant; the refusal to review evidence offered by Applicant; the refusal to use 17-23-90 to Applicant's advantage; the failure to research and confront the legality of the jail's lack of legal research materials necessary for self-representation. See Harden v. Bodiford, 442 Fed. Appx. 893 (4th Cir. 2011); Bounds v. Smith.

all of which wholly undermined Applicant's confidence and trust in Counsel's ability to competently try his case. Counsel's failures were complete *before* Applicant elected to plead out; not the other way around.

The mere fact that Applicant was still in jail beyond that second (November) term of court was alone sufficient motivation for Applicant to plead guilty for release from further imminent harm resulting from deficient Counsel. The alternative was to remain in jail for probably at least another year awaiting trial with incompetent unprepared Counsel.

THE APPLICABILITY OF TERM OF IMPRISONMENT TO APPLICANT'S UNLAWFULLY EXCESSIVE SENTENCE

The ORDER OF DISMISSAL cites 24-21-410 and 24-21-440 for the proposition that the imposition of five years' probation for Applicant's three-year offense was lawful. Applicant submits that the Court's reliance on either or both cited statutes is clearly erroneous for several reasons. First, there are rules of statutory interpretation that require courts to interpret statutes in such a fashion that the interpretation serves to effectuate legislative intent. Wigfall v. Tideland Utilities, Inc., 354 SC 100, 110 (2003). Further, in its interpretation of statutes a court is required to avoid construing statutes in such a fashion that the construction produces "absurd results that could not have been intended by the legislature." State v. Kinnard, 427 SC 367, 375 (2019).

THE RIGHT OF SELF-REPRESENTATION IMPAIRED (DENIED) BY THE JAIL'S BOUNDS v. SMITH VIOLATION

It is well recognized that pre-trial detainees have a constitutional right to reasonable legal resources in jail. See, e.g. Harden v. Bodiford, 442 Fed. Appx. 893 (4th Cir. 2011)(citing Bounds

v. Smith).

Insofar as the PCR Court determined that the jail's lack of a law library or other minimal material necessary for reasonable legal research was not relevant to the issue of whether Applicant's right of self-representation was being unlawfully obstructed, the Court was clearly in error. The lack of a law library (a violation of Applicant's rights in itself) was *central* to the issue of whether Applicant was effectively denied the right to proceed pro se. The denial of a *right* which *substantially interferes with the free exercise of the right of self-representation* was certainly an issue of relevance and should have been addressed and remedied by Counsel in the hearing in which it became an issue.

The PCR Court's acceptance of Counsel's stated belief that he was not under an obligation to bring it to the Court's attention that Applicant's right to represent himself was being denied due to his being deprived of the *means* to represent himself was error. Counsel himself agreed he continued to be *appointed* through the hearing in which he left Applicant to defend his position alone.⁶

The PCR Court failed to consider that which was clearly acknowledged by Judge Verdin at the time: *Applicant's decision not to relieve Counsel and proceed pro S.E. was "due to [his] circumstances" at the time* (Motion Tran. 3) which involved unlawful circumstances as a matter of law. Harden, supra; Bounds, supra.

Counsel's silence in the Motion hearing was tantamount to abandonment of the Applicant and his right to move forward as a pro se litigant without unlawful hindrances. Consequently, this final abandonment pushed Applicant to plead out to avoid more betrayals from Counsel, *since self-representation was not going to be a feasible option.*

⁶ Counsel spoke not one word in Applicant's defense at the December Motion hearing.

As a first point, it is clear from a glance at 24-21-440 that the provisions of that statute apply only to terms of imprisonment which *allow* the suspension of five years. The language “shall not exceed” merely sets an outside limit for periods of suspension; there is nothing in the language of the statute that can reasonably be interpreted as *extending* suspension or probation periods beyond statutory limits established for any particular offense. Courts are not empowered to create laws by reading into statutes terms not expressly put there by legislators. Article 1, Section 8, SC Constitution.

Furthermore, considering that legislative intent is an important factor in applying statutes, it is clear that the PCR Court’s interpretation and application of 24-21-440 in connection with 24-21-410 produces an absurd result: five-year probationary terms of imprisonment for offenses as minor as littering,⁷ petit larceny, trespass, or 3rd degree domestic violence. For, the provisions of 24-21-410 clearly apply in equal form to “any offense” (meaning all offenses) not punishable by death or life imprisonment. Littering, trespass, and every other 30-day offense falls squarely with the meaning of “any offense” for purposes of 24-21-410.

Of a truth, if 24-21-410 and 24-21-440 may be interpreted to operate to permit five years probation for Applicant’s 3-year offense, the same must apply to littering, trespass, etc. Such a strained interpretation of the aforementioned statutory provisions obviously contradicts legislative intent. It would be absurd to assume that legislators anticipated or intended probation terms of five years for trespass, etc.

Additionally, and most importantly, the PCR Court’s erroneous application of the above-

⁷ This Court should note that in 16-11-700(C) (proscribing punishment for littering), the General Assembly uses the terms “imprisoned” and “term of imprisonment” interchangeably, meaning the two terms are one and the same to our lawmakers.

referenced statutes results from its adamant denial of the fact that, over two decades ago, our Supreme Court declared that “[p]robation . . . is *clearly part of a criminal defendant’s ‘term of imprisonment’*. . . .” State v. Ellis, 397 SC 576, 579 (2012) (quoting Thompson v. SC Department of Public Safety, 335 SC 52, 55 (1999)).

As noted in State v. Ellis, the Court previously “*explained the relationship between incarceration, probation, and parole.*”

In sentencing a trial judge may impose a term of years but provide for a suspension of a part of such term of imprisonment, and the placing of a defendant on probation after serving a designated portion of the term of imprisonment . . . ***Probation***, a suspension of the period of incarceration, ***is clearly part of a criminal defendant’s term of imprisonment***, as is actual incarceration, parole, and the suspended portion of the sentence, or supervised furlough.

State v. Ellis, 397 SC at 580-81 (quoting Thompson, 335 SC at 55-56)⁸.

Furthermore, the Court of Appeals, in State v. Proctor, 345 SC 299 (2001), correctly noted that the Thompson Court explained:

“The phrase “term of imprisonment” has a *well established meaning* in South Carolina criminal law.” According to Thompson, the phrase “term of imprisonment” includes actual incarceration, parole, the suspended portion of the sentence, ***probation***, and supervised furlough . . . The court *rejected a narrow view of the phrase that would limit it to the period of actual incarceration.*”

State v. Proctor, 345 SC at 303. Indeed, even the Court of Appeals noted the 1999 reference to the “well-established meaning” of the phrase term of imprisonment in South Carolina and the Supreme Court’s rejection of a “narrow view” that imprisonment means only actual incarceration. Again turning to the rules of statutory interpretation, Applicant submits that the

⁸ Insofar as the Order of Dismissal suggests that Applicant’s reliance on the Thompson definition of “term of imprisonment” is *misplaced*, it is clearly in error. As the Ellis decision clearly illustrates, the Court’s earlier interpretation of “term of imprisonment” was not intended to be strictly limited to cases involving license suspensions resulting from DUI convictions. Indeed, the Thompson Court applied the term to “criminal sentence”. Ellis applied the term in a burglary case. The Court of Appeals applied the term in a grand larceny case. State v. Proctor, 345 SC 299, 303 (2001). The phrase “term of imprisonment” applies to Applicant’s “criminal sentence” as well, regardless of how little the State (or the Circuit Court) may care for that idea.

law clearly states that the legislature is presumed to be aware of the Supreme Court's interpretation of its statutes. Wigfall, supra, 345 SC at 111. As such, the General Assembly is *presumed* to be aware of our Supreme Court's interpretation of "term of imprisonment" equating probation with actual incarceration, and the General Assembly is also presumed to be in agreement with that interpretation if it fails over a 20-year period to define imprisonment to mean only physical incarceration. Id.

Based on a *correct* reading of applicable laws Applicant submits that "imprisoned" (see N.6) within the meaning of 16-25-20(C) is accomplished by the placing of a defendant on probation *in lieu of* the suspended incarceration term, not beyond the duration of. Based on the broad definition of "term of imprisonment" given by our Supreme Court, and accepted by our legislators, it is clearly understood that the language "imprisoned for not more than three years" means that Applicant could only have been placed in a probationary term of imprisonment for not more than three years pursuant to the limit set by 16-25-20(C).

Because the probationary sentence incompetently and admittedly *negotiated* by plea Counsel was beyond statutory limits, it was unlawful, the product of *deficient* performance by Counsel and the State's argument to the contrary has been *clearly a frivolous argument*.⁹

COUNSEL'S UNREASONABLY NEGLIGENT INVESTIGATION

Correctly noted in the ORDER OF DISMISSAL (at page 17) a criminal defense attorney "has a duty to undertake reasonably investigations or to make a decision that renders a

⁹ If the *pro se* Applicant can so easily defeat the State's argument that his sentence was not unlawful from its imposition, he believes he is entitled to the benefit of the Courts acknowledgement that the State's attorney *should have known* that the sentence has been unlawful from its imposition. Applicant also submits that Taylor Smith has been fully aware that the "term of imprisonment" was not defined *strictly* for the purpose of license suspensions. Taylor Smith would not imply that the Ellis court's reliance on Thompson was "misplaced" because Ellis was a burglary case. His position that Applicant's sentence was lawful continues to be frivolous and sanctionable.

particular investigation unnecessary . . . and has the duty to conduct a reasonable investigation to discover all reasonably available mitigating [and rebuttal] evidence. . . ."

It appears that the PCR Court overlooked the legal requirement that a criminal defendant's attorney's decision to place limitations on investigations may only be deemed reasonable where "reasonable professional judgements support the limitation on investigation." Wiggins v. Smith, 539 US 510, 533 (2003) (quoting Strickland v. Washington, 466 US (1991); McKnight v. State 378 SC 33 (2008); Sparkman v. State, 2007-MO-054. This means that when Counsel chooses not to investigate an immediately available source of evidence (e.g. a USB drive in his possession and an email account containing literally hundreds of emails from Applicant's so-called victim),¹⁰ counsel must "*articulate a valid reason*" [for not investigating] to avoid a finding of ineffectiveness. McKnight, supra; Walker v. State, 408 SC 400, 405 (2014) (failure to put forth "some effort . . . to ascertain whether [available evidence] would aid the defense is unreasonable."). Limited investigations that are "the result of inattention [rather than] reasoned strategic judgements" are not of the *valid reason* variety. Wiggins, 539 US at 534.

Counsel testified he "wasn't able to" review the USB drive contents because his computer didn't immediately open the file stored on the device, but offered no testimony to the effect that he put forth any effort beyond his initial unsuccessful attempt at plugging the device into a USB port on his computer. See Order, generally. Counsel simply informed Applicant that he "couldn't" access the file on the drive because it didn't automatically load. Counsel's effort to investigate the drive's contents was not even *arguably* "reasonable." Counsel did not testify that he made a decision that the drive's contents were not necessary for Applicant's defense; he

¹⁰ Although the PCR Court refused to allow Applicant to introduce evidence during his testimony, Applicant did appear at the PCR hearing with one such email that was sent from Applicant's Google account to Counsel's email on October 12, 2017. In this particular email the "victim" indicated she was *forced* to seek an Order of Protection and stated "I just want to be able to fix all this." (Meaning the falsified charges) See Attached.

simply stated he did not review the contents because they were not immediately and effortlessly accessed with his computer.

Counsel testified that he refused to access Applicant's email and Google accounts to review and retrieve evidence despite being instructed to do so. Counsel admitted he told Applicant he would not comply because he "was not comfortable" reviewing the *lawfully and reasonably available evidence* in Applicant's email account. Unfortunately, Counsel's testimony failed to explain how "not comfortable" translates to "not necessary" or how the evidence offered may (or may not) have impacted Applicant's defense if he chose to go to trial. To this day, Counsel has no idea the exculpatory value or impeachment value of the evidence he refused to review because he was "not comfortable" doing so.

When indigent's criminal defense attorneys are permitted to excuse negligent investigations simply by claiming *discomfort*, the sixth amendment's right to competent counsel will cease to be enforceable.

According to Counsel's own testimony, his "investigation" was limited to interviewing only one potential witness in connection with the 1st degree domestic violence charge and that only occurred because the witness came to Counsel. The PCR record reflects that Counsel has not offered any valid reason for excluding Applicant's Google account and the USB drive from his investigation in the 2nd degree domestic violence case. Counsel offered only excuses for his obvious *inattention* to Applicant's trial defense.

Had the PCR Court allowed Applicant to introduce evidence, Applicant would have introduced the attached email between Counsel and the State (dated November 10, 2017) to show that Counsel was concentrating his efforts on inducing a guilty plea while Applicant was seeking to relieve Counsel for doing so instead of preparing for trial.

The Application for PCR stated several grounds for relief, each ground identifying a separate instance of deficient performance by Counsel (omissions, misrepresentations of law, and poor advice based on Counsel's own misunderstanding of law), and all of which were contributing factors in Applicant's *eventual, last minute* decision to plead guilty¹¹.

At the PCR hearing, Counsel's "credible" testimony was the equivalent of *credible admissions* to the errors enumerated in the Application and maintained at the PCR hearing. These cumulative errors/omissions:

1. Left Applicant in jail for 78 days on *illegal charges* with a bail he could not pay;
2. Resulted in Applicant's eventually being coerced into pleading guilty through the State's misrepresentation of the possible range of consequences should Applicant proceed to trial and be convicted;
3. Deprived Applicant of the right to be either (a) tried immediately, *or* (b) released without bail;
4. Resulted in Applicant's being *unconstitutionally* deprived of the right (by deprivation of the means) to represent himself¹²;
5. Wholly and irrevocably undermined Applicant's confidence in Counsel's ability to

¹¹ The Order implies that Applicant's plea freed Counsel from his duty to investigate although the refused investigation was refused *before the plea*. The record clearly does not support *any* findings that plea Counsel's choices and failures were grounded in Applicant's decision to plead guilty: the transcript of the Motion to Relieve Hearing (held *immediately before* the plea hearing) clearly demonstrates that Applicant's alluding to "a plea offer" came after – *not before* – the challenged omissions from Counsel. The Order also noted the consistent testimonies of Counsel and Applicant that Applicant went into plea negotiations very displeased with Counsel's representation. All evidence in the record shows that Applicant wasn't intending to plead guilty until relieving Counsel wasn't going to prove beneficial due to there being no law library or legal resources within the jail to enable Applicant to move forward as a pro se litigant. Judge Verdin acknowledged the Applicant's decision to not relieve Counsel was "due to [his] circumstances" (Motion Transcript 3-4) which involved the deprivation of one constitutional right (legal access) that was not going to be addressed by Counsel as a deprivation that actually and realistically *prevented* the meaningful exercise of the right to self-representation. While the PCR Court seemingly misses the importance and relevance of the jail's unlawful denial of a law library, it does not change the fact that the constitutional right of self-representation was actually and substantially effected (denied) by the denial of the right to legal access at the jail.

¹² See Note 9 above.

competently try his case before a jury; and

6. Wholly and irrevocably undermined Applicant's confidence in Counsel's intent to defend Applicant's position before a jury.

Applicant's unrefuted testimony was that his guilty plea was motivated by Counsel's failures and poor advice. He has therefore satisfied the "prejudiced prong" of his ineffective Counsel claim. See Alexander v. State, 303 SC 539 (1991) and Jackson v. State, 342 SC 95 (2000).

Applicant has in fact shown that Counsel's performance was substandard, his advice was erroneous, and his omissions and poor advice motivated – *compelled* – Applicant to plead for the unlawful sentence he is now serving.

THE IMPROPER DENIAL OF APPLICANT'S PROPERLY SUBPOENAED WITNESS

It was improper for the Court to even *entertain* the State's¹³ MOTION TO QUASH as the Motion sought to ask the Court deny Applicant his properly subpoenaed witness on the grounds that it would "cause inconvenience if [Phillips] were required to comply." It was even more improper for the Court to imply that Applicant's failure to *argue* with the Court for his properly subpoenaed witness justified a finding that "Applicant abandoned the issue, conceding the issue to the [State]" (ORDER at page 4-5).

State's improperly selected Judge had already threatened Applicant with an additional six months' imprisonment for *interrupting*; Applicant certainly knew better than to argue.

¹³ The ORDER OF DISMISSAL at page 3 defectively state that the MOTION TO QUASH was brought by "Patricia D. Phillips, Esquire . . . on behalf of the victim." However, Phillips was the subpoenaed witness (and the "speaker" referenced at page 8, footnote 4) and the Motion was signed by the State's attorney.

THE IMPROPER DENIAL OF APPLICANT'S MOTION FOR SANCTIONS

It is well settled that Article 1, Section 8 of the South Carolina Constitution does not permit the State's granting itself continuances if or when the State might deem appropriate or necessary. See Williams v. Borden's, Inc., 274 SC 275 (1980).

The authority of the Court to grant continuances and determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudication power of the Court carries with it the *inherent power to control the order of its business* to safeguard the rights of litigants.

Id. 274 SC at 279. The Williams Court didn't provide for departures from this firm Constitutional rule where the State believed it to be appropriate. The terms of Hon. Alex Kinlaw's ORDER RELIEVING COUNSEL AND CONTINUING THE MATTER were clearly violated. That was an act of contempt and a violation of the state constitution on the part of Taylor Smith. The same, however, was obviously not going to be properly addressed by the judge chosen for the occasion¹⁴.

The evidence has established Applicant's entitlement to relief; only the erroneous conclusions of the PCR Court deny Applicant's entitled relief.

Signed this 2nd day of March, 2020. Respectfully submitted.



Gary Z. Thomas, pro se

¹⁴ If judges are "presumed to know the law and correctly apply it." State v. Ray, 310 SC 431, 437 (1993); Walton v. Arizona, 497 US 639 (1990), then it must be presumed that Judge Miller intentionally violated the Judicial Oath (the oath to "preserve, protect, and defend" the Constitution) when he rewarded Smith's blatant violation of the separation of powers clause of our state Constitution.

Max Gravlee

From: Gary Thomas <masonry.svcs@gmail.com>
Sent: Thursday, October 12, 2017 3:51 PM
To: Max Gravlee
Subject: Fwd: I love you

----- Forwarded message -----

From: "Diane PHILLIPS" <dianep411976@gmail.com>
Date: Oct 10, 2017 1:03 PM
Subject: I love you
To: "Gary Thomas" <masonry.svcs@gmail.com>
Cc:

I am lost without you. I get in the shower I cry for you. When I go to bed I reach you and you are not there. I get up in the middle of the night looking for you. I go to the back door and just sit there waiting for you to come in. I have lost my job because I can't function. I never wanted the protection order. I had my family, the police, and my counselor telling me I had to do it. I can't believe you are still in jail. I can't do anything to help you at this point. From what I hear you don't want my help and you hate me. I would wait on you 6 months if I knew that is what you wanted. Nobody understands me and I really can't talk to anyone. I'm not allowed to want to see you be that wonderful boyfriend and family you used to be. I don't know what even happen. I don't know what happened that weekend. I thought I was coming home Monday and you and are were work on things and I was going to help with your daughter. I have been told that you and Farris were together the whole time. I have text messages from you telling people you hate me and want to kill me. I know you don't care but I am devastated. I just want to be able to fix all this. I know I have at least 6 months before I can see you. I will have to move if you and i ever decide to be together again. I can tell you that no damn body is as hurt and upset about all this as me. So much I don't understand. You had so many stories going on. Telling me you loved me and wanted us to be together while others were told that you were forced to sleep with me and you despised me. I talked with Chris some yesterday. He is the only one I knew that knows us and knows how upset I am.

228

FW: Gary Thomas

Max Gravlee

Sent: Friday, November 10, 2017 1:36 PM

To: Katherine Vissage

From: Hill, Durham [DHill@greenvillecounty.org]

Sent: Friday, November 10, 2017 12:35 PM

To: Max Gravlee

Subject: Gary Thomas

Max, as we discussed on the phone. Mr. Thomas can plea to one DV 2nd for 90 days in the stockade followed by 1 yr HIP or 2 years HIP. Would be no victim contact and any restitution for medical bills. I will send a formal offer letter on Monday. If acceptable and I can notify the victim I will have him transported on the 20th. Just let me know.

CONFIDENTIALITY NOTICE: This e-mail and any files transmitted with it are confidential and may contain information which is legally privileged or otherwise exempt from disclosure. They are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please immediately notify the sender and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing, or copying of this e-mail is strictly prohibited.

Telephone: 864-467-8647
 Telefax: 864-467-8610



Greenville County Courthouse
 305 E. North Street, Suite 325
 Greenville, SC 29601-2185

W. Walter Wilkins

11/10/2017

JOHN MAXWELL GRAVLEE
 214 EAST MAIN STREET
 B 240
 PICKENS, SC 29671

RE: Plea Offer for State v. Gary Zachariah Thomas

Dear John Maxwell Gravlee :

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

<i>Warrant Number:</i>	<i>Charge:</i>
2017A3910100440	Domestic / Domestic Violence 2nd Degree

The State will dismiss the following:

<i>Warrant Number:</i>	<i>Charge:</i>
2017A3920700174	Domestic / Domestic Violence, 1st degree

The State will make the following sentence recommendations/negotiation:

90 days (at stockade) followed by 1 year HIP
 OR
 2 years HIP

Other conditions/comments:

No Victim Contact + restitution for medical bills

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 12/31/2017 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,

Durham Hill
Assistant Solicitor

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

GARY Z. THOMAS,)
)
 APPLICANT,)
)
 -VS-)
)
 STATE OF SOUTH CAROLINA,)
)
 RESPONDENT.)
 _____)

2018-CP-39-01276

EXCERPT OF
TRANSCRIPT OF RECORD

OCTOBER 22, 2019
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE EDWARD W. MILLER

APPEARANCES:

ATTORNEY FOR APPLICANT:

PRO SE

ATTORNEY FOR RESPONDENT:

TAYLOR Z. SMITH, ASSIST. ATTORNEY GENERAL
TERRI BAILEY, ASSIST. ATTORNEY GENERAL

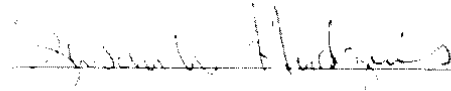
SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate excerpt of transcript or record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 22nd day of October 2019.

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

December 6, 2019



Circuit Court Reporter

JOHN MAXWELL GRAVLEE - REDIRECT BY MR. THOMAS

5

1 A. Yes. Would you like me to disclose your password?

2 Q. No. Actually, is there any way I can get a copy of it,
3 please?

4 **THE COURT:** This has got nothing to do with this
5 hearing. Is there any other questions relevant to this
6 hearing?

7 **MR. THOMAS:** Okay.

8 Q. Do you recall why I gave you the password?

9 A. I do. And I told you I was not comfortable logging
10 onto your email accounts. *[TO GATHER EVIDENCE OF MALICIOUS*

11 Q. Did I have access to it at that time?

12 A. In the jail, no. *[THANKS TO FAILURE TO*

13 Q. Thank you. Nothing further. *17-23-90*

14 **THE COURT:** All right. Thank you. You can step down.

15 **MR. GRAVLEE:** Thank you, Your Honor.

16 (Excerpt of Hearing Ended at 3:23 pm)

17 (End of Requested Excerpt of Transcript of Record)

*Google Photos Evidence Folder And Gmail Account
password provided to counsel. Evidence link:*

<https://photos.app.goo.gl/BVGZxNNUG2uexRMr2>

*[Only a portion of evidence made available
to Be refused By Gravlee]*

JOHN MAXWELL GRAVLEE - REDIRECT BY MR. THOMAS

4

1 A. You felt very strongly about a law library in the jail,
 2 yes. And I spoke to the jail about it. I remember calling
 3 Lieutenant Leopard at the Pitkin County Jail and asking if
 4 there was going to be any access. And she said, no,
 5 unfortunately they did not have a law library. And I was
 6 unable to get you a law library at the jail while you were
 7 incarcerated. *A PER SE CONSTITUTIONAL RIGHTS VIOLATION*
[WHICH DIRECTLY AND ADVERSELY AFFECTED MY
ABILITY AND RIGHT TO REPRESENT MYSELF]

8 Q. Okay. Is it lawful for them to not have a law library
 9 for me if I fall under, I mean, --- *VIOLATES PRE TRIAL DETAINEE'S*
RIGHTS HADEN V. BEDFORD

10 THE COURT: This is beyond the scope of this hearing.

11 MR. THOMAS: Okay.

12 THE COURT: Any other questions for this witness?

13 MR. THOMAS: No, Your Honor.

14 THE COURT: All right. Thank you. You may step down.

15 MR. GRAVLEE: Thank you, Your Honor.

16 MR. THOMAS: Yeah, actually I do, Your Honor. Yes, I
 17 do.

18 Q. Do you have my -- you still have my email address or
 19 the folder?

20 A. I do.

21 Q. Do you still have the password on it?

22 A. You did give me a password.

23 Q. There's no password on it?

24 A. No, you did.

25 Q. Okay. Is it still on there?

JOHN MAXWELL GRAVLEE - REDIRECT BY MR. THOMAS

3

1 Redirect Examination by Mr. Thomas:

2 Q. During the -- you were still my attorney -- you
3 remained my attorney all throughout, correct? All the way
4 to the plea?

5 A. Correct.

6 Q. As far as the motion to relieve counsel, is it not your
7 -- as my attorney, still, is it not your position to argue
8 to the judge that -- the means by which I represent myself
9 has been ^{inadequately} limited by the jail and that the jail's not
10 supposed to, I mean, that they're supposed to provide a law
11 library ^{by FEDERAL LAW} or did you do anything to help accommodate co-
12 counsel appointment or somebody from a legal, you know,
13 somebody that could do the research for me if I needed to,
14 if I needed any legal research done for trial?

15 A. We didn't address the lack of a law library at the jail
16 ^{OTHER WAY AROUND. WENT ON TO PLEA BECAUSE LACK OF}
because we went forward on that plea. And so that wasn't
17 ^{A LAW LIBRARY PRECLUDED MEANINGFUL SELF REPRESENTATION}
going to be relevant anymore if you were going to be
18 ^{AND WANTED GOING TO GO TO TRIAL WITH LAWYER THAT}
entering a plea on the charge. ^{"WAS NOT COMFORTABLE" doing}

19 Q. Because -- wouldn't be relevant to what? I'm sorry. ^{THIS}

20 A. The lack of a law library was not going to be relevant ^{TO B}
21 anymore if you were deciding to plead guilty to the charge.

22 Q. Right. But at the time that I was wanting to represent
23 myself and before I decided to plead guilty when I was
24 trying to relieve you and going to represent myself, the law
25 library was relevant to that motion, wasn't it?

INDEXWITNESSPAGE NO.

JOHN MAXWELL GRAVLEE

REDIRECT BY MR. THOMAS -----

7

CERTIFICATE OF REPORTER -----

6

EXHIBITSNODESCRIPTIONIDEVIDENCE

(No Exhibits Were Presented During This Excerpt of the
Hearing)

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Gary Z. Thomas, #310751,

Applicant,

Case No. 2018-CP-39-1276

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

RETURN TO APPLICANT'S MOTION TO
ALTER OR AMEND THE JUDGMENT
AND MOTION TO STRIKE

v.

State of South Carolina,

Respondent.

The State (Respondent), by and through undersigned counsel, making a return to Gary Thomas's (Applicant's) motion to alter or amend the judgment, would respectfully show unto this Court:

I. Procedural History

Applicant is presently incarcerated in the South Carolina Department of Corrections.¹ On December 1, 2017, he appeared before the Honorable Letitia H. Verdin in order to move to relieve plea counsel; however, Applicant ultimately waived presentment to a count of second-degree domestic violence (2014-GS-39-2623) and pleaded guilty to the same. The solicitor's recitation of facts at the plea hearing indicated the victim was Applicant's live-in girlfriend, and that law enforcement officers responded to a call from Applicant's residence regarding domestic violence. Plea Tran. 5-6. The solicitor stated Applicant and the victim had been arguing about a cell phone, and that Applicant threw her down on the couch and punched her when she threatened to call police, at which point the victim called police from her sister's home. Plea Tran. 5-6. In accordance

¹ Although Applicant was sentenced to time served and probation for the underlying criminal offense, the undersigned's review of Applicant's detail report at the South Carolina Department of Corrections and the Circuit Court's public index indicates Applicant is presently incarcerated after his probation was revoked.

with the solicitor's recommendation, Judge Verdin sentenced Applicant to imprisonment for three years, suspended to probation for five years. Applicant did not appeal his plea or sentence.

Applicant filed an application for post-conviction relief on November 30, 2018. Respondent filed a return on February 28, 2019, in which it requested an evidentiary hearing on some claims and moved to dismiss on others. Applicant filed an amended application on July 22, 2019. Respondent filed a return to the amended application on October 11, 2019, again requesting an evidentiary hearing for the resolution of some claims and moving to dismiss others. Respondent also filed a return to Applicant's motion for sanctions, which had been served upon Respondent by Applicant on or around September 6, 2019.

An evidentiary hearing in the matter was held before this Court on October 22, 2019, at the Greenville County Courthouse. Applicant was present and represented himself. Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and called Ferris Harvley, Assistant Public Defender John Maxwell Gravlee (plea counsel) of the Greenville County Public Defender's Office and Assistant Solicitor James Durham Hill (solicitor) of the Thirteenth Circuit Solicitor's Office as witnesses. This Court informed the parties from the bench at that hearing that the Court was denying the application for post-conviction relief and directed the undersigned to submit a proposed order of dismissal. On November 25, 2019, Applicant filed with the South Carolina Court of Appeals a notice of appeal of this Court's denial of relief. The Court of Appeals transferred the case to the South Carolina Supreme Court. Thomas v. State, Order filed November 26, 2019 (S.C. Ct. App.). The Supreme Court dismissed the appeal as premature because this Court had not yet issued a final judgment, and dismissed the appeal because Applicant failed to provide

a copy of the order on appeal with his notice of appeal and failed to show that he had served the notice on Respondent. Thomas v. State, Order filed December 3, 2019 (S.C. Sup. Ct.). The remittitur was issued on December 19, 2019. This Court issued an Order of Dismissal on January 22, 2020, denying the application for post-conviction relief with prejudice. On February 14, 2020, Applicant filed a motion to alter or amend the judgment in accordance with Rule 59(e), SCRPC.² The undersigned served Applicant with a filed copy of the order on February 27, 2020. On March 2, 2020, Applicant filed an amended motion to alter or amend the judgment. This return follows.

II. Motion to Strike

Applicant's amended motion to alter or amend the judgment, filed on March 2, 2020, includes documents that have not been properly admitted as evidence in this matter and a footnote that improperly cites to an item not in evidence. Pages seventeen through twenty-six are not properly for this Court and should not have been filed by Applicant. Page seventeen purports to be a photocopy of an email from the victim to Applicant that was subsequently forwarded to plea counsel. Page eighteen purports to be a photocopy of an email from the solicitor to plea counsel. Pages nineteen through twenty purport to be a photocopy of a letter from the solicitor to plea counsel. Pages twenty-one through twenty-six purport to be a photocopy of excerpts from the transcript of Applicant's PCR hearing before this Court, and they contain handwritten commentary thereupon. Footnote ten on page twelve of the amended motion refers explicitly to an item not in evidence—an item that the Court ruled inadmissible at the PCR hearing—and quotes therefrom in support of his argument that this Court erred in finding Applicant failed to show plea counsel was

² Presumably, Applicant filed his motion to alter or amend before being served with an order actually issued by this Court because he filed his motion upon his receipt of the proposed order submitted to the Court by the undersigned.

constitutionally ineffective with respect to his investigation into and decision not to access emails saved in Applicant's personal email accounts.

Pursuant to Rule 12(f), SCRCF, Respondent moves to strike the attached documents identified within the aforementioned page ranges and the reference in footnote ten. These items have not been properly authenticated. See Rule 901(a), SCRE, (requiring the authentication of evidence as a condition of its admissibility). Their relevance of the items to this action has not been established. See Rule 402, SCRE, (providing a general prohibition against irrelevant evidence). The items appear to contain instances of hearsay, which are not admissible absent an exception to the general prohibition against hearsay. Rule 802, SCRE. The reference in footnote ten is not properly included in the amended motion as the Court ruled that the item quoted therein was inadmissible at the PCR hearing. As such, the items are not properly part of the record and before this Court, and should be stricken from the record. Instead, if Applicant believes they are relevant, probative, and admissible with regard to his allegations properly raised at the PCR hearing, Respondent submits that it would have been proper for the parties to argue the authenticity, relevance, and probity of each item as they were offered for introduction at Applicant's evidentiary hearing so that this Court could render appropriate rulings. See Rule 103, SCRE, (providing the method for court rulings on the admissibility of evidence). Furthermore, with respect to footnote ten in the amended motion, the Court ruled that it was not admissible and Applicant has attempted to circumvent that ruling by including the supposed substance of that item in his amended motion.

A motion to alter or amend the judgment under Rule 59(e), SCRCF, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman v.

Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (citations omitted). Similarly, Applicant should be prohibited from seeking to introduce evidence in the record now after the PCR hearing in circumvention of Respondent's right to challenge the evidence at a hearing by attaching them now to his amended motion to alter or amend the judgment. If these documents are allowed to be made part of the record now, Respondent will be denied the ability to challenge the admissibility thereof, the ability to question witnesses and Applicant as to the items, and the ability to present evidence in reply. If footnote ten is allowed to remain, Applicant will be allowed to flout the Court's evidentiary ruling. Accordingly, this Court should strike these pages and the reference in footnote ten from the record and not consider them in ruling upon Applicant's motion to alter or amend the judgment or for any other purpose in this action.

III. Argument

In the motion to alter or amend the judgment filed in February 14, 2020, Applicant's first argument is that this Court erred in finding Applicant failed to demonstrate that his guilty plea was not knowingly and voluntarily entered because the Court overlooked plea counsel's failure to seek the dismissal of a count of first-degree criminal domestic violence, which was pending against Applicant at the time of his guilty plea and dismissed as a consequence thereof, because the threat of the wrongful prosecution for that offense left Applicant with no choice but to plead guilty to second-degree criminal domestic violence. A person convicted of a crime may file an application for post-conviction relief for various reasons. S.C. Code Ann. § 17-27-20. In this case, though, Applicant wants the Court to find plea counsel was constitutionally ineffective with regard to his failure to move to dismiss a crime for which Applicant was not convicted. Applicant pleaded guilty to second-degree criminal domestic violence; as a part of his plea deal, the offense of first-

degree criminal domestic violence was dismissed. For purposes of this PCR action, it should be irrelevant that Applicant was supposedly dissatisfied with plea counsel's performance in that dismissed case. Further, to the extent that he is claiming that his guilty plea to second-degree criminal domestic violence was not knowingly and voluntarily given due to plea counsel's not moving to dismiss the first-degree offense, Applicant has failed to show he would have insisted on going to trial on the second-degree offense had counsel moved to dismiss the other. The Court should not alter or amend its judgment on this basis.

Applicant's second argument is that this Court erred in not finding plea counsel constitutionally ineffective for not moving for a speedy trial in accordance with South Carolina Code Annotated Section 17-23-90. Again, Applicant seeks to have the Court review plea counsel's performance with respect to the dismissed first-degree offense. Applicant has failed to show he was entitled to relief under Section 17-23-90 and that he would have insisted on going to trial had plea counsel moved to relief thereunder. As the Court noted in its order, Applicant affirmed to Judge Verdin at his sentencing that he was happy with plea counsel's representation of him. The Court should not grant Applicant's motion to alter or amend on this ground.

Applicant's third argument is that this Court erred in finding plea counsel was not constitutionally ineffective for not objecting to Applicant's sentence because the terms of the sentence were lawful. In the Order of Dismissal, the Court noted the potential sentencing range authorized for those convicted of second-degree criminal domestic violence, the authority granting the sentencing court the ability to suspend Applicant's sentence and impose probation, and a statute limiting the term of probation to five years. The Court's finding that Applicant's sentence was lawful according to authorities cited should be reaffirmed.

Applicant contends South Carolina Code Annotated Sections 24-21-410 and 24-21-440 allow a sentencing court to impose a term of probation that does not exceed the maximum amount of time for which a defendant can be imprisoned after being convicted for any given offense. Section 24-21-410 provides that:

After conviction or plea for any offense, except for a crime punishable by death or life imprisonment, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation. Probation is a form of clemency.

Section 24-21-440 provides that:

The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit.

Applicant pleaded guilty to a felony, not a misdemeanor. His contention that this Court's interpretation of the above-quoted statutes would produce an absurd result if applied to misdemeanor offenses is therefore of no matter here. However, Respondent notes the suspension of prison sentences in favor of probation is acceptable in misdemeanor cases as well. Moore v. Patterson, 203 S.C. 90, --, 26 S.E.2d 319, 321 (1943) (noting the probation and parole act extends to courts the power to suspend sentences to many felonies "as well as misdemeanors."). Additionally, Applicant has failed to cite any authority that the maximum length of probation that may be imposed upon a defendant is limited not only by the five-year maximum provided in Section 24-21-440 but also more strictly by the maximum term of imprisonment that may be imposed in accordance with an applicable sentence provided in statute. The argument Applicant advances here is the same he advanced at his PCR hearing and it fails for those reasons this Court

noted in its Order of Dismissal and for those reasons articulated by Respondent herein. This Court should deny Applicant's motion to alter or amend the judgment on this third ground.

The fourth ground Applicant presents in his motion to alter or amend the judgment is that this Court erred in finding Applicant failed to show there was any deficiency in trial counsel's pre-trial investigation. This Court found plea counsel's duty to continue investigating any information on the USB digital storage device Applicant gave to plea counsel ended when Applicant decided he wanted to plead guilty. Plea counsel testified he was unable to access the file stored on the device and notified Applicant of that fact. By Applicant's own testimony at the PCR hearing, he knew of the contents of the device, and waived his right to confront the victim with them by pleading guilty.

Applicant contends further that plea counsel's performance was deficient because plea counsel declined to log onto Applicant's personal email accounts using Applicant's credentials. A motion to alter or amend the judgment under Rule 59(e), SCRCP, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman, at 456, 392 S.E.2d at 482. Applicant did not argue at the PCR hearing that he was entitled to post-conviction relief based upon plea counsel's failure to access Applicant's email accounts, and he should be barred from doing so now in a motion to alter or amend the judgment. However, even if Applicant did properly present plea counsel's decision not to access Applicant's email account as an issue at the hearing, he has not presented any evidence that the contents thereof had exculpatory value, but has merely speculated thereto. A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415,

417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant for post-conviction relief alleging that his defense attorney failed to prepare for a case must show the way in which the outcome of the case would have been different had counsel done the additional preparation. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Applicant has not shown how the outcome of his case would have been different had plea counsel logged onto the email accounts.

What is instructive in all of these instances that Applicant contends constitute deficient performance on the part of plea counsel is that Applicant decided to waive his right to challenge the State's evidence and present his own evidence by pleading guilty and availing himself of a negotiated sentence. In each instance, Applicant's testimony at the PCR hearing shows he knew of the supposedly exculpatory evidence before he pleaded guilty, and he has testified he was unhappy with plea counsel's alleged failure to take the evidence seriously or adequately consider its value; yet Applicant affirmed at his plea hearing that he was happy with the work plea counsel had done for him and that he wanted to waive his trial rights by pleading guilty. This Court recognized that Applicant's overriding desire was to be released from custody, motivating him to accept the State's sentencing recommendation so that he could be released immediately. Applicant has given this Court no reason to depart from its finding that Applicant failed to show that plea counsel did not conduct an adequate investigation and that Applicant failed to establish that he would not have pleaded guilty absent from deficiency in plea counsel's investigation. This Court should deny Applicant's motion to alter or amend the judgment on this fourth ground.

At the conclusion of his motion to alter or amend the judgment, Applicant lists supposed errors or omissions in plea counsel's performance, referring to them as "cumulative". It does not

seem that Applicant is arguing he is entitled to post-conviction relief based upon the theory of cumulative errors; however, in the event that Applicant is doing so, Respondent submits Applicant is not entitled to relief on this basis. A motion to alter or amend the judgment under Rule 59(e), SCRCP, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman, at 456, 392 S.E.2d 481 at 482. Applicant did not argue at the PCR hearing that he was entitled to post-conviction relief based upon the cumulative effect of errors committed by plea counsel, and he should be barred from raising the issue now in his motion to alter or amend the judgment.

Notwithstanding Applicant's failure to properly raise the issue during or before his PCR hearing, Applicant is not entitled to relief in reliance upon the theory of cumulative errors. "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. "Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. Id.; see also Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (holding that it is unsettled whether individual errors that may not be prejudicial when considered independently may be prejudicial when considered cumulative, but recognizing that an applicant for post-conviction relief would have to show, as a threshold matter, that counsel committed errors). Claims that a defendant was afforded the ineffective assistance of counsel should be reviewed by post-conviction relief courts individually, not cumulatively. Smalls, at 194, 810 S.E.2d at 846 ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors.");

Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (in upholding the trial court's denial of habeas relief, explicitly holding that claims of the ineffective assistance of counsel are not to be reviewed collectively). Applicant has failed to demonstrate any reason that the theory of cumulative errors should be recognized in his case and that plea counsel committed errors that, when considered collectively, support a finding that there is a reasonable likelihood that Applicant would have insisted on a trial in the absence of the errors. Applicant has failed to show that this Court should alter or amend its Order of Dismissal by finding that Applicant is entitled to post-conviction relief based upon the theory of cumulative errors.

Applicant filed his amended motion to alter or amend the judgment on March 2, 2020. The grounds he advances in that amended motion track for the most part his grounds in the original motion, but it does differ in some respects. On the second page of the amended motion, Applicant cites in the second footnote a case that was not cited in the corresponding footnote in the original motion. On the sixth page of the amended motion, Applicant notes in footnote four that he is attaching something in support of his argument that plea counsel gave false testimony before this Court at the PCR hearing and asks this Court to reconsider its finding that plea counsel's testimony was credible; this assertion was not included in the corresponding footnote in the original motion. Also on the sixth page, Applicant cites in the fifth footnote a case that was not cited in the corresponding footnote in the original motion. On the seventh page of the amended motion, Applicant includes a case citation that was not present in his original motion, intended to support his argument that this Court erred in finding plea counsel's performance was not deficient for not objecting to Applicant's sentence on the ground that it was illegal. On pages seven through eight of Applicant's amended motion, he has included an argument (and a supporting footnote)

that this Court erred in not finding plea counsel was constitutionally ineffective for not asserting Applicant's right to proceed in the underlying criminal case as a pro se defendant; this argument was not included in the original motion. In the first full paragraph of page twelve of Applicant's amended motion, Applicant includes additional not argument not found in the original motion in support of his argument that the Court erred in finding Applicant failed to show plea counsel's performance was deficient with respect to his investigation and preparation. On page twelve of Applicant's amended motion, Applicant includes footnote ten, which is not found in the original motion, and quotes therein from an item the Court ruled inadmissible during the PCR hearing. On page thirteen of the amended motion, Applicant includes additional argument not found in the original motion in support of his argument that the Court erred in finding Applicant failed to show deficiency in plea counsel's investigation and preparation. On page fifteen of the amended motion, Applicant includes an argument and a supporting footnote that the Court erred in quashing Applicant's subpoena of the victim; this argument was not included in the original motion. On page sixteen of the amended motion, Applicant includes an argument and a supporting footnote that the Court erred in denying Applicant's motion for sanctions against the undersigned; this argument was not included in the original motion.

For those issues raises in the original motion and the amended motion, the amended motion has not provided any additional information or argument that requires the Court to alter or amend its Order of Dismissal; as to those issues, Respondent relies upon its earlier argument in this return. For those new issues not raised in the original motion, Respondent submits to the Court the arguments that follow.

Applicant argues the Court should reevaluate its finding that plea counsel gave credible testimony based upon a document attached to the amended motion to alter or amend the judgment and referenced in the fourth footnote. Respondent submits that the Court should not consider the attachment and moves earlier herein to strike it. Respondent argues Applicant could have questioned plea counsel about the matter at the PCR hearing and cross-examined plea counsel about it at that time, rather than attempting to add evidence into the record now without giving Respondent an opportunity to be heard on the matter. The Court should not alter or amend its order based upon this footnote or attachment.

Applicant argues in the amended motion to alter or amend the judgment that the Court erred in not finding Applicant's right to self-representation was denied and that plea counsel was constitutionally ineffective for failing to put forth that argument on Applicant's behalf. Applicant included in his application for post-conviction relief this claim, but the Court properly found Applicant waived the issue at the start of his PCR hearing and did not address it in the Order of Dismissal. Although Applicant now claims he has been subjected to a constitutional violation by citing Harden v. Bodiford, 442 F. App'x 893 (4th Cir. 2011), and Bounds v. Smith, 430 U.S. 817 (1977), the undersigned is not aware of Applicant's citing these cases previously in this litigation. Applicant should not be allowed to revive the issue now and present the claim in this manner for the first time in his motion to alter or amend the judgment.

Even if this Court or another court finds Applicant has properly raised the issue, he has failed to show he is entitled to relief on the merits. Applicant misstates the instruction of these

cases.³ Despite Applicant's contention, the cases do not guarantee an inmate access to a law library of a particular size. "The Constitution does not guarantee an inmate adequate legal assistance and an adequate law library; rather, it guarantees a right to reasonable access to the courts." Harden, at 896 (citations omitted). "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds, at 828. The "main concern" of the United States Supreme Court in Bounds was to protect the right of an inmate to file a petition or a complaint. Id. at 828, fn.17 (citing Wolff v. McDonnell, 418 U.S. 539, 576 (1974)). Bounds did not establish the right to legal assistance or a law library for inmates, but it acknowledged the well-established right of access to the courts. Lewis v. Casey, 518 U.S. 343 (1996) (citing Bounds, at 817, 821, 828). In Lewis, the United States Supreme Court explained that the tools the State is required to provide to inmates are those tools that "inmates 'need in order to attack their sentences, directly or collaterally, 'and in order to challenge the conditions of their confinement'" Al-Shabazz v. State, 338 S.C. 354, 378, 527 S.E.2d 742, 754-55 (2000) (citing Lewis, at 355). "Bounds did not create an abstract, freestanding right to a law library or legal assistance . . .," therefore, an inmate cannot show he has suffered a relevant and actual injury merely by establishing that the law library of his prison was inadequate in some theoretical sense. (quoting Lewis, at 351). Hendricks v. South Carolina Dep't of Corr., 385 S.C. 625, 629, 686 S.E.2d 191, 193 (2009). Instead, an inmate must demonstrate the alleged

³ The undersigned further submits it is inappropriate for Applicant to cite Harden as precedent, as the case is not published authority.

shortcomings “hindered his efforts to pursue a legal claim.” Id. at 629-30, 686 S.E.2d at 193 (citations omitted).

Unlike the inmates in the aforementioned cases, Applicant was not an inmate in prison serving a sentence in the underlying criminal case at the time he pleaded guilty. Instead, he was in a county detention center waiting for trial. He was represented by an appointed attorney as he was an indigent defendant, unlike the inmates in the cited cases who were having to file petitions for habeas corpus or complaints in civil rights actions without the benefit of legal representation. Applicant has therefore not shown that he would was in the position of someone who could have suffered a Bounds violation. He has also failed to demonstrate that the quality of the law library to which he had access in the detention center was not adequate to afford him the meaningful access to the courts or that his ability to pursue a legal claim was somehow hindered. The Court should deny Applicant’s motion to alter or amend the judgment on this ground because Applicant should not be allowed to raise this issue now and because Applicant has wholly failed to show he was denied the meaningful access to the courts.

Applicant argues in the amended motion to alter or amend the judgment that the Court erred in finding Applicant failed to show deficiency in plea counsel’s performance in regards to his investigation. Applicant contends the Court overlooked the requirement that a defense attorney’s decision not to investigate must be reasonable. The Court did not overlook that. The Court noted plea counsel decided not to do further research into the USB storage device given to him by the solicitor—who himself received it from Applicant—because Applicant decided to plead guilty and wanted to motion to relieve him as counsel. Plea counsel also testified at the PCR hearing that he was unable to access the single file on the storage device given to him and that he

notified Applicant of that fact before Applicant pleaded guilty. Applicant falsely claims plea counsel's testimony showed his investigation was limited only to his interviewing Harvley because plea counsel testified he reviewed the documents given to him by Harvley at Applicant's request. Under those circumstances, it was certainly reasonable for plea counsel to cease further investigation until the motion was resolved or until Applicant pleaded guilty or rejected the plea offer. Applicant, of course, knew of this supposed evidence at the time and chose to waive his right to present evidence in his defense and confront witnesses by accepting a favorable plea deal. The Court should not accept Applicant's argument on this issue, should not consider evidence entered into the record that was ruled inadmissible at the PCR hearing, and should deny the motion.

Applicant argues in the amended motion to alter or amend the judgment that the Court improperly quashed his subpoena of the victim. Respondent submits that Applicant is misstating the facts by identifying Respondent as the source of the motion to quash the subpoena and in asserting that any attorney for Respondent signed the motion. In fact, the victim moved to quash Applicant's subpoena; Respondent made it very clear at the PCR hearing that it did not take any position on the victim's motion and left the issue to the Court's discretion based upon the arguments advanced by Applicant and the victim. The sum total of Respondent's involvement was in providing information about the procedural posture of the matter at the Court's request. Although Respondent did not take a position on the victim's motion to quash, it certainly does not see any reason for the Court to alter or amend its judgment based upon the argument in Applicant's motion, especially since Applicant has misrepresented the relevant facts.

Applicant argues in the amended motion to alter or amend the judgment that the Court improperly denied his motion for sanctions against the undersigned in reliance upon Williams v.

Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980) (per curiam). In Williams, Bordon's, Inc. (Borden's), appealed a trial court's denial of the party's motion for a continuance when the motion was based upon the party's lawyer's request for a continuance when he needed to attend proceedings of the South Carolina General Assembly, of which the lawyer was a member. Id. at 276-77, 262 S.E.2d at 882-83. On appeal, Bordon's argued a statute granting absolute immunity, with some exceptions, from legislators representing parties in litigation from being called to appear in court during legislative sessions and while legislative committee meetings were taking place entitled it to a continuance as a matter of right. Id. at 277-78, 262 S.E.2d at 883. The South Carolina Supreme Court identified the statute as the legislature's assertion of power over the power of the courts to adjudicate when lawyer-legislators were involved, and affirmed that the courts have adjudicative power that contains "the inherent power to control the order of its business to safeguard the rights of litigants . . ." and to determine when cases should be heard and decided. Id. at 279, 262 S.E.2d at 883 (citations omitted). The Supreme Court held that the statute was unconstitutional insofar as it attempted to exercise ultimate authority over when lawyer-legislators were exempt from court appearance but then found the trial court abused its discretion in that particular case because the request was reasonable and did not prejudice the parties. Id. at 280-81, 262 S.E.2d at 884.

Applicant has presented in his motion no reason that the Court's analysis of the merits of Applicant's motion for sanctions and his failure to meet his requisite burden of proof in seeking such a remedy was incomplete or faulty. Applicant's motion for sanctions was in reliance upon South Carolina Code Section 15-36-10, et seq., and his argument is not made stronger by his cite to Williams. Williams concerned the legislature's improper assertion of dominance over the

judicial branch in cases in which lawyer-legislators were involved. Applicant cites the case in an attempt to analogize Respondent's actions during this litigation to the legislature's actions in passing the aforementioned statute concerning lawyer-legislations, implying the undersigned's actions usurped the judicial role of controlling and orderings its business. This Court's finding that Applicant failed to demonstrate any impropriety in the undersigned's actions explicitly shows the Court's role in controlling its business was not usurped as it had the authority to review Applicant's argument and Respondent's actions, and chose to recognize the legitimacy in the process after conducting that review. The Court should not grant Applicant's motion on this basis.

IV. Conclusion

WHEREFORE, having made its return to the motion to alter or amend the judgment and the amended motion to alter or amend the judgment and a motion to strike, Respondent respectfully requests that the Court deny the motion and the relief requested by Applicant therein and strike from the record and the Court's consideration the documents identified herein and the quotations in Applicant's original and amended motions to alter or amend that were ruled inadmissible at the PCR hearing.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
SC Bar No.: 103282

BY: s/Taylor Zane Smith
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May 29, 2020

STATE OF SOUTH CAROLINA)

COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

2018-CP-39-1276

GARY Z. THOMAS, #310751,)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

Respondent.)

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

Gary Z. Thomas, #310751
 3A-0021-A
 Trenton Correctional Institution
 84 State Highway S-19-29
 Trenton, South Carolina 29847

DATED this the 29th day of May, 2020.


 Kaitlyn S. Slice, Legal Assistant
 For Respondent

CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

2020 JUN -2 P 6:51

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	
Gary Z. Thomas, #310751,	)	
Applicant,	)	C. A. No. 2018-CP-39-1276
v.	)	
State of South Carolina,	)	
Respondent.	)	

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2020 OCT 21 A 9:43
THIRTEENTH JUDICIAL CIRCUIT

**ORDER DENYING APPLICANT'S
AMENDED MOTION TO
AMEND/ALTER JUDGMENT**

THIS MATTER is before the Court on Applicant Gary Z. Thomas (Applicant)'s Amended Motion to Alter or Amend this Court's Order of January 22, 2020, denying Applicant's application for post-conviction relief. Applicant represents himself, *pro se*, and Assistant Attorney General, Taylor Zane Smith, represents the State of South Carolina (Respondent). After consideration of the issues raised by the Applicant in his original SCRCPP 59(e) motion, filed on February 14, 2020, and his amended 59(e) motion, filed on March 2, 2020, and the Respondent's Return, the Court **DENIES** Applicant's Amended Motion for the reasons set forth below.

STANDARD OF REVIEW

The court that renders judgment, retains the sole power to open, modify, or vacate the judgment. *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Accordingly, SCRCPP 59(e) allows a party to serve a motion to alter or amend a judgment, "to request a trial judge to reconsider matters properly encompassed in a decision on the merits." *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). The deadline to serve a SCRCPP 59(e) motion is no later than ten days after receipt of written notice of the entry of the order. *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018). The ten-day deadline is absolute, as it strips a trial

court of power to grant an extension of time to file a motion to alter or amend a judgment. *Id.* at 256, 815 S.E.2d at 433. The failure of a party to serve a SCRCF 59(e) motion within the specified ten-day window following receipt of notice of entry of the order, converts the order into a final judgment. *Id.* at 257, 815 S.E. 2d at 433. Thereafter, the aggrieved party must resort to file a notice of intent to appeal. *Id.*

The South Carolina Supreme Court has provided for when a party may and must file a SCRCF 59(e) motion. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). However, reconsideration of a judgment is an extraordinary remedy that should be used sparingly. *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998); *Croft v. Bayview Loan Servicing, LLC*, 176 F.Supp.3d 582, 585 (D.S.C. 2016). South Carolina state courts have not specifically addressed the issue of how a SCRCF 59(e) motion is to be treated. Therefore, "where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure." *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991). The Fourth Circuit Court of Appeals, in construing the identical FRCP 59(e), has limited its application to three purposes. *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007). First, to accommodate an intervening change in controlling law; second, to account for new evidence not available at trial; and third, to correct a clear error of law or a manifest injustice. *Id.*

A party's mere disagreement with a court's ruling does not warrant a Rule 59(e) motion. *Croft*, 176 F.Supp.3d at 585. Consequently, due to the interests of finality and conservation of judicial resources, SCRCF 59(e) motions cannot be employed by an unsuccessful party to rehash

arguments and facts previously presented to the court, or to raise arguments which could, or should, have been made before judgment was rendered. *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

ANALYSIS

The Applicant asserts numerous grounds for his Amended Motion. The Court finds these raised issues to be without merit, as the Applicant has not provided any additional information or argument that requires the Court to alter or amend its January 22, 2020 Order of Dismissal of Applicant's post-conviction relief. The Court acknowledges that the Applicant is dissatisfied with his sentence for the second-degree domestic violence charge, for which he pleaded guilty in December 2017. However, Applicant's 59(e) motions are not the proper legal instrument to address such dissatisfaction. Applicant had the opportunity to present his case for post-conviction relief at an evidentiary hearing before this Court on October 22, 2019, wherein the Court considered all arguments, testimony, and evidence, and found the Applicant failed to meet his requisite burden of proof for post-conviction relief. Consequently, his application for post-conviction relief was denied.

Additionally, the Court notes that the ten-day deadline for the filing of a SCRPC 59(e) motion by the Applicant had long passed at the February 14, 2020 filing date of his original motion to alter or the amend this Court's January 22, 2020 Order. And, the filing date had passed with the filing of the Applicant's foregoing amended motion on March 2, 2020. The filing deadline for a 59(e) motion in this case was February 3, 2020. The Applicant did not file his original 59(e) motion until 23 days after the deadline and the foregoing amended motion was not filed until 40 days after the deadline. As the ten-day deadline is absolute, the Applicant's foregoing amended motion on this point alone is denied as time barred.

CONCLUSION

Having thoroughly considered the foregoing reasons raised by Applicant and consulting the South Carolina Rules of Civil Procedure, and relevant case law, the Court DENIES Applicant's Amended Motion to Alter or Amend this Court's January 22, 2020 Order, denying and dismissing Applicant's application for post-conviction relief with prejudice. Furthermore, the Court strikes from the record the documents identified and the quotations contained in the Applicant's original and amended motions to alter or amend that were ruled inadmissible at the post-conviction relief hearing.

IT IS SO ORDERED.



The Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit

Dated: October 20, 2020
Greenville, South Carolina

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2020 OCT 21 A 9:53

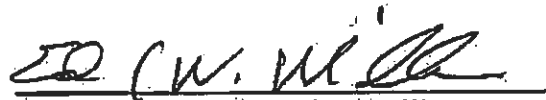
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	
	)	THIRTEENTH JUDICIAL CIRCUIT
Gary Z. Thomas, #310751,	)	C. A. No. 2018-CP-39-1276
Applicant,	)	
	)	
v,	)	SUPPLEMENTAL ORDER
	)	CORRECTING CLERICAL FILING
State of South Carolina,	)	ERROR OF ORDER DENYING
	)	APPLICANT'S AMENDED MOTION TO
Respondent.	)	ALTER/AMEND JUDGMENT
	)	

This Supplemental Order is being issued to correct and clarify a clerical filing error of this Court's Order Denying Applicant's Amended Motion to Alter/Amend Judgment, issued by the undersigned on September 14, 2020. The Court received notification on October 12, 2020 from the Pickens County Clerk of Court's Office that this Court's foregoing September 14, 2020 Order was not fully received by their office. For reasons unknown to the Court, the Pickens County Clerk of Court only received the caption page of the four (4) total pages of the Court's preceding Order.

The protocol for issuing a court order in a post-conviction relief action is to file the order with the respective clerk of court's office of the South Carolina county wherein the action was initiated. In the case at hand, the county was Pickens County. Accordingly, this Court, by way of the Greenville County Clerk of Court's Office, mailed two (2) executed original copies of the Order through the United States Mail to the Pickens County Clerk of Court after it was issued by the undersigned on September 14, 2020. The Court was not notified of the incompleteness of the receipt of the Order until inquiries were made with the Pickens County Clerk of Court's Office, after Applicant emailed the Court to press the undersigned to rule on his Amended Motion to Alter/Amend Judgment.

Therefore, having now succinctly delineated the facts regarding the clerical filing error of this Court's September 14, 2020 Order, the Court hereto reissues the same Order, denying Applicant's Amended Motion to Alter/Amend Judgment (see attached Order). Additionally, the Court further finds this matter is now moot, as Applicant has now been released from prison as he has completed his sentence for the second-degree domestic violence, for which he pleaded guilty in December 2017.

IT IS SO ORDERED.


The Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit

Dated: October 20, 2020
Greenville, South Carolina

CLERK OF COURT
SPICKENS COUNTY
SOUTH CAROLINA

2020 OCT 21 A 9:03

DOCKET NO. 2017-GS-39-
JDH 2623

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2017

THE STATE

vs.

GARY ZACHARIAH THOMAS

ARREST WARRANT NUMBER

2017A3910100440

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

WITNESSES

Brandon L. Faris

Pickens County Sheriff's Office

5/4/2017

Certified Copy

Theresa P. Walker
Clerk of Court
Pickens County, SC
Dated 12-20-18

INDICTMENT FOR
DOMESTIC VIOLENCE 2ND DEGREE

At a Court of General Sessions, convened on _____ the Grand Jurors of Pickens
County present upon their oath:

That GARY ZACHARIAH THOMAS did in Pickens County, on or about the 26th day of April 2017, did unlawfully cause physical harm or injury to [REDACTED], a household member or did unlawfully offer or attempt to cause physical harm or injury to [REDACTED], a household member, with apparent present ability under circumstances reasonably creating fear of imminent peril and moderate bodily injury resulted to [REDACTED] or the act was accomplished by means likely to result in moderate bodily injury to [REDACTED] or the offense was committed using physical force or the threatened use of force against another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with the report of any criminal offense, bodily injury or property damage to a law enforcement agency or a request for an ambulance or emergency medical assistance to any law enforcement agency or emergency medical provider. This is in violation of § 16-25-0020 of the South Carolina Code of Laws (1976) as amended.

Certified Copy
Harold P. Walker
Clerk of Court
Pickens County, SC
Dated Dec 20 2018 M6

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

102269
SOLICITOR BAR #

COUNTY OF Pickens
STATE VS.
Gary Zachariah Thomas
AKA:
Race: Sex: M Age: 42
DOB: SS#:
Address:
City, State, Zip: Easley, SC 29640-7993
DL#: SID#:

INDICTMENT/CASE#: 20170539 2623
A/W#: 2017A3910100440
Date of Offense: 4/26/2017
S.C. Code §: 16-25-0020(A)
CDR Code #: 3812

SENTENCE SHEET

0-3 yrs &/or 2500-5k

☐ CONVICTED OF or ☒ PLEADS

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was
TO: Domestic / Domestic Violence, 2nd degree

in violation of § 16-25-0020(A) of the S.C. Code of Laws, bearing CDR Code # 3812
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☒ Defendant Waives Presentment to Grand Jury. (defendant's initials)

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

ATTEST: [Signature] 102269 [Signature] 10/21/17
Hfl, Durham SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 3 days/months/years ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for 5

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be Certified Copy
by the State Department of Corrections. 18 days

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-65 (Domestic
Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

Total: \$ plus 20% fee: \$

Payment Terms: Hold open

☒ Set by SCDPPBS for 10 days

Recipient:

*Fine: \$

§ 14-1-206 (Assessments 107.5 %) \$

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$

§ 56-5-2995 (DUI Assessment) \$12 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 61.6 (Public Def/Probation) \$500 \$ 500.00

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$

§ 50-21-114(BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$

3% to County (if paid in installments) \$ 18.75

TOTAL \$ 643.75

Clerk of Court/ Deputy Clerk: Harold P. Weiborn, Jr.

Court Reporter: Lisa Scott

SCCA/217 (07/2016)

PTUP days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. ☐

May serve W/E beginning Complete 26 Week

Substance Abuse Counseling Batters Treatment

Random Drug/Alcohol testing ☒

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

NO CONTACT

WITH VICTIM

☐ Appointed PD or appointed other counsel,

Proviso 61.6 requires \$500 be paid to Clerk

during probation and shall be collected before

any other fees.

Presiding Judge [Signature]

Judge Code:

Sentence Date: 12/1/17