

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————
Certiorari to Sumter County

Honorable R. Kirk Griffin, Circuit Court Judge

—————
FAVIAN A. HAYES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000445

—————
APPENDIX
—————

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER)
)
 Favian Alphonzo Hayes,)
)
 PLAINTIFF,)
)
 v.)
)
 State of South Carolina,)
)
 DEFENDANT.)
)
 _____)

COURT OF GENERAL SESSIONS

TRANSCRIPT OF RECORD
 C/A #: 2007-CP-43-080
 C/A #: 2008-GS-43-646
 C/A #: 2008-GS-43-647

SUMTER COUNTY COURTHOUSE
 Monday, June 1, 2009

BEFORE:
 HONORABLE HOWARD P. KING, PRESIDING JUDGE.

APPEARANCES:

Assistant Solicitor Catherine Fant
 Attorney for the State of South Carolina

 David Sullivan, Esquire
 Public Defender for Sumter County
 Attorney for the Defendant

TAKEN BY MELISSA R. SINGLETARY
 CERTIFIED VERBATIM REPORTER

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HEARING

3

1 Ms. Fant: May it please the Court?

2 The Court: Yes ma'am.

3 Ms. Fant: Favian Hayes. Your Honor this is the
4 State of South Carolina versus Favian A Hayes, Indictment
5 number 2008-646 and 647 and 2007-801. He is present today
6 with his counsel, Mr. David Sullivan, and desires to plead
7 guilty to indictment number 2008-646 to Armed Robbery and
8 Criminal Conspiracy, on 2008-647 to one count of Armed
9 Robbery. The conspiracy on 647 is being nolle prosequere by
10 the State and on indictment number 2007-801 to Possession
11 of Cocaine Base, second offense as a lessor included
12 offense of PWID, cocaine base and the proximity charge is
13 being nolle prosequere by the State on that Indictment.

14 Bailiff: State your name please.

15 WITNESS: Fabian Hayes.

16 Bailiff: Do you solemnly swear your testimony to
17 the Court to be the truth, the whole truth and nothing but
18 the truth, so help you God?

19 WITNESS: Yes.

20 The Court: All right, Mr. Sullivan, you
21 represent the Defendant?

22 Mr. Sullivan: Yes sir.

23 The Court: Have you explained to him the charges
24 contained in these various indictments, the possible
25 punishment, his Constitutional rights, including his right

HEARING

1 to a jury trial?

2 Mr. Sullivan: Yes sir.

3 The Court: In your opinion does he understand
4 those thing?

5 Mr. Sullivan: He does.

6 The Court: And how has he indicated to you that
7 he wishes to plea?

8 Mr. Sullivan: Guilty Your Honor.

9 The Court: Do you agree with that decision?

10 Mr. Sullivan: I do.

11 The Court: You are Favian Alphonzo Hayes, is
12 that correct?

13 A: Yes sir.

14 The Court: All right Mr. Hayes, before I can
15 accept a plea of guilty, it is necessary for me to make
16 sure that your plea of guilty is freely and voluntarily
17 given. I therefore need to ask you some questions and if
18 you don't understand the questions or words I use, you tell
19 me and I'll be glad to explain them to you. You may talk
20 with your lawyer anytime as we go through this process, you
21 understand?

22 A: Yes sir.

23 The Court: How old are you?

24 A: Twenty-one

25 The Court: How far did you go in school?

HEARING

1 A: Twelfth grade.

2 The Court: Did you graduate?

3 A: No sir, I obtained my GED.

4 The Court: So you have your GED?

5 A: Yes sir.

6 The Court: What kind of work do you normally do?

7 A: Well, hard labor, but I got my certificate in
8 carpentry and plumbing when I was incarcerated at SCDC
9 but due to an injury, a personal injury I had, I got
10 laid off when I came home. I was seeking social
11 security at the time due to nerve damage that I had,
12 so I, but I, I still was in ...

13 The Court: Have you ever been treated for the
14 abuse of alcohol or drugs or for mental illness?

15 A: Sir?

16 The Court: Have you ever been treated for the
17 abuse of alcohol or drugs for mental illness?

18 A: Have I ever like attended mental health?

19 The Court: Have you ever been treated for
20 anything like that?

21 A: No sir.

22 The Court: Sir?

23 A: I attend mental health due to on occasion.

24 The Court: All right, what do you go to mental
25 health for?

HEARING

1 A: Sleeping medicine and depression.

2 The Court: Have you taken any medications, drugs
3 or alcohol in the last twenty-four hours?

4 A: My daily medication.

5 The Court: All right, what kind of medication?

6 A: Flexeril for depression and Trazodone for sleeping.

7 The Court: Okay. Does that effect your ability
8 to know and understand what you're doing here today? Is
9 that a no?

10 A: No, sir. It doesn't.

11 The Court: So other than that prescription
12 medication, are you today under the influence of any kind
13 of medication, drugs or alcohol?

14 A: No sir.

15 The Court: Are you today aware of any physical,
16 emotional or nervous problem that would keep you from
17 understanding what you're doing here today?

18 A: No sir.

19 The Court: You've heard your attorney tell me
20 that he has explained to you the charges contained in these
21 various indictments, the possible punishment, and your
22 Constitutional rights and that you understand these things,
23 is that correct?

24 A: Yes sir.

25 The Court: All right, let's take a look at the

HEARING

1 indictments. First of all, indictment number 08-GS-43-646
2 has been returned as a true bill by the Grand Jury of
3 Sumter County and it charges that you did, along with
4 Brandon McFadden, on or about July the 31st of last year,
5 violate South Carolina law in that while armed with a
6 deadly weapon specifically a hand gun, that you did
7 feloniously take from Latasha Skinner, in the presence of
8 Latasha Skinner, by means of force or intimidation certain
9 goods or monies at the Young's store at 96 Oswego Highway.
10 And the charge is one for armed robbery. Do you understand
11 that charge?

12 A: Yes sir.

13 The Court: Do you understand that for that
14 offense you could get ten to thirty years in prison?

15 A: Yes sir.

16 The Court: Do you understand that this is
17 considered a most serious offense and that under our two
18 strikes, three strikes law that if you were to have, after
19 you've served your time for this sentence, if you were to
20 have another more serious offense, that the State would
21 have to seek a penalty of mandatory life in prison, you
22 understand that?

23 A: Yes sir.

24 The Court: You also understand that this is a no
25 parole offense. That whatever I sentence you, you'll have

HEARING

1 to serve eighty-five percent of the sentence, you
2 understand, before you could be released on any kind of
3 community supervision, you understand that?

4 A: Yes sir.

5 The Court: It's also considered a violent
6 offense. Has your lawyer explained to you the difference
7 between a violent and non-violent offenses?

8 A: Yes sir. I believe you do more time than the eighty-
9 five percent and sixty five percent.

10 The Court: That's the no parole, parole defense.
11 Violent has a lot of different phases, but, normally if it
12 was not considered a no parole offense, you could be
13 considered for parole in less time than you can on those
14 that are eighty-five percent or no parole offenses. That
15 no parole offense you have to serve eighty-five percent
16 before you can be released for any kind of community
17 supervision, do you understand that?

18 A: Yes sir.

19 The Court: Okay. And Mr. Sullivan have you
20 explained also what is meant by violent and ...

21 Mr. Sullivan: Yes sir

22 The Court: ... the implications?

23 Mr. Sullivan: Yes sir.

24 The Court: Okay, All right. All right, and also
25 in that same indictment, it charges that you and Mr.

HEARING

9

1. McFadden did conspire to commit this offense and you're
2. also charged with the crime of criminal conspiracy, for
3. which you could also get five years in prison, you
4. understand that?

5. A: Yes sir.

6. The Court: Now under indictment number 647, that
7. indictment has also been returned as a true bill by the
8. grand jury of Sumter County and it charges that you did in
9. Sumter County while armed with a deadly weapon, did take
10. from Anna Hicks, at the Kangaroo Express at 503 Broad
11. Street, currency and lottery tickets and that is another
12. charge of armed robbery, do you understand that charge?

13. A: Yes sir.

14. The Court: Do you understand that for that
15. offense you can get ten to fifteen years in prison, do you
16. understand that?

17. A: Yes sir.

18. The Court: Do you also understand that, the same
19. thing with the other armed robbery, that there's a minimum
20. sentence of ten years and I cannot suspend that minimum
21. sentence, you understand that?

22. A: Yes sir.

23. The Court: And again, this armed robbery, just
24. like the other one, All right, is a more serious offense,
25. it is a violent offense and you would have to serve eighty-

1 five percent of whatever I sentence you to before you could
2 be released to any kind of community supervision, do you
3 understand that?

4 A: Yes sir.

5 The Court: Okay. Now, the final charge is in
6 indictment number 07-801, which has also been returned as
7 a true bill by the grand jury of Sumter County and it is a
8 drug indictment. It charges you in count one with
9 possession with intent to distribute cocaine base and count
10 two with possession with intent to distribute cocaine base
11 within one half mile of a school or play ground. The State
12 has indicated a willingness to accept a plea to possession
13 of crack or cocaine base second offense, instead of PWID
14 and to nolle prosequere or dismiss the proximity charge. Do
15 you understand the charges that are against you and the
16 charges you would be pleading guilty to as far as that
17 indictment is concerned?

18 A: Yes sir.

19 The Court: And you understand that for the
20 possession of crack second you could get up to five years
21 in prison and fined up to seventy-five hundred dollars, do
22 you understand that?

23 A: Yes sir.

24 The Court: Sir?

25 A: Yes sir.

HEARING

11

1 The Court: Okay. One other thing I forgot to
2 mention to you is on that other indictment for armed
3 robbery, the one at the Kangaroo Express, there's also a
4 charge of criminal conspiracy with Mr. McFadden, but the
5 State is willing to nolle prosequere or dismiss the criminal
6 conspiracy charge, you understand that?

7 A: Yes sir.

8 The Court: So what you would be pleading guilty
9 to would be two armed robbery charges, one criminal
10 conspiracy, one possession of crack second offense, do you
11 understand those charges as the ones that you would plead
12 guilty to?

13 A: Yes sir.

14 The Court: Okay. All right now, Mr. Hayes, when
15 you plead guilty you give up certain important
16 Constitutional rights. First you give up your right to
17 remain silent; that is your right against self
18 incrimination, your right to say nothing at all. You
19 cannot be compelled to testify or provide evidence against
20 yourself. You give up your right to have a jury trial,
21 that is your right to have a jury decide whether you're
22 guilty beyond a reasonable doubt. The jury would base
23 their decision upon evidence which the State presents, and
24 on any evidence that you might wish to introduce. In a
25 trial you would be presumed to be innocent and the State

HEARING

12

1. would have to present evidence that would convince all
2 twelve members of the jury of your guilt beyond a
3 reasonable doubt. And third you give up your right to
4 confront the witnesses against you. That is the right to
5 require the witnesses against you to come into court and
6 testify, have your lawyer cross-examine those witnesses and
7 the right to subpoena and call witnesses on your own
8 behalf. Do you understand those Constitutional rights?

9 A: Yes sir.

10 The Court: Do you understand that when you plead
11 guilty you waive or give up those Constitutional rights and
12 there will not be a jury trial?

13 A: Yes sir.

14 The Court: Understanding then the nature of the
15 charges against you and the consequences of your guilty
16 plea, how do you wish to plead to these charges as I have
17 outlined them to you; that is two counts of armed robbery,
18 one count of criminal conspiracy and one count of
19 possession of crack, second offense, guilty or not guilty?

20 A: Armed Robbery one, I plead guilty and the second
21 possession of crack cocaine, I plead guilty, but I do
22 have something to say, if I, if you do so wish.

23 The Court: Well I'll hear from you. You say you
24 plead guilty to one count armed robbery, which one are you
25 admitting to?

HEARING

13

1 A: To Young's Market.

2 The Court: All right, what about the Kangaroo?
3 That's in indictment number, Indictment number 08-GS-43-647
4 is the Kangaroo Express in the armed robbery of Ms. Anna
5 Hicks. How do you plead to that charge?

6 A: Not guilty.

7 The Court: Sir?

8 A: Not guilty.

9 The Court: All right sir. Ms. Fant, he does not
10 wish to plead guilty to that. Do you want to go ahead and
11 take the pleas on the other two and ...

12 Ms. Fant: Yes we would Your Honor. I think Mr.
13 Sullivan discussed with him the consequences of pleading to
14 the one that the other would still be pending, but we were
15 prepared to call the Young's Market Armed Robbery this
16 morning, so we would like to go forward with that and the
17 drug case.

18 The Court: All right. Do you understand what
19 the State is saying? They are willing to go ahead and
20 accept your plea if you admit and plead guilty to the
21 Young's Market and to the drug charge and that they will
22 stand aside the, for now, as far as the guilty plea is
23 concerned, the armed robbery of the Kangaroo Express, but
24 that they're prepared to go to trial on that. Do you
25 understand that?

HEARING

1 A: Yes sir.

2 The Court: All right, do you want this
3 indictment back Ms. Fant, that's the Kangaroo?

4 Ms. Fant: Yes.

5 Mr. Sullivan: Your Honor, could I discuss that
6 with him again?

7 The Court: Yes sir. Stand aside and give them a
8 minute.

9 (Counsel has discussion with client)

10 The Court: All right, is there any change to
11 that situation Mr. Sullivan? Does he still wish to have a
12 trial on the armed robbery of the Kangaroo? No...the
13 Kangaroo is the one that ...

14 Ms. Fant: Correct.

15 Mr. Sullivan: Your Honor, he wishes, he tells me
16 that he wants to plead to the Young's, but not to the
17 Kangaroo. I have explained to him that if Ms. Fant, and I
18 understand that she intends to prosecute him for the
19 Kangaroo, that if he on down the road gets that conviction
20 that he's looking at going to prison for the rest of his
21 life. I have explained that to him, but he tells me that
22 he still wants to plead guilty to the Young's, but not to
23 the Kangaroo.

24 The Court: All right Mr. Hayes, let's make sure
25 that you do understand what the possibilities are here.

HEARING

15

1 You understand that a guilty plea to the armed robbery of
2 the Young's foods stores is a minimum of ten and up to
3 thirty years in prison, do you understand that?

4 A: Yes sir.

5 The Court: All right and you understand that
6 even if the State, I'm not saying that they have any choice
7 about it at this time, I don't know whether they will or
8 not, but if they go forward with the armed robbery of the
9 Kangaroo, you are also facing ten to thirty years in prison
10 and even if the life without parole did not kick in,
11 there's the possibility of a consecutive sentence to
12 whatever I sentence you here to, so that if I were to give
13 you, for example, and I'm not saying this is what I'm going
14 to do, but if I were to give you twenty years on this armed
15 robbery and Ms. Fant prosecutes the other armed robbery and
16 it comes before some other judge and you're convicted on
17 that, and it's not a life without parole situation, you
18 could get thirty to, you could get thirty years consecutive
19 to what you get here, which would be fifty years. Do you
20 understand that?

21 A: Yes sir.

22 The Court: And then there's also, if under the
23 statute, and I'm not making any ruling as to whether this
24 is correct under the statute or not, but if under the statute
25 the State, if this falls under the statute as a second most

HEARING

16

1 serious offense, the State would be required to seek life
2 without parole, do you understand that?

3 A: Yes sir.

4 The Court: Okay. All right.

5 Mr. Hayes: Mr. King I'd like to speak, if you so
6 wish.

7 The Court: I'm going to give you a chance.

8 Mr. Hayes: Okay.

9 The Court: Okay, All right. All right that
10 being the case then, Mr. Fant, I think we can go forward
11 with the armed robbery of the Young's and the drug charge.
12 All right, now to these two charges, that is the armed
13 robbery of the Young's and the criminal conspiracy with Mr.
14 McFadden with regard to the Young's as well as the
15 possession of drugs, second offense, you understand that
16 when you're pleading guilty to those charges, you're
17 admitting the truth of those charges, you understand that?

18 A: Yes sir.

19 The Court: Do you----now you may have defenses
20 to those charges, I don't know whether you do or not, but
21 do you understand that when you plead guilty you waive or
22 give up any defenses that you might have to those charges?

23 A: Yes sir.

24 The Court: You may also may have given an
25 incriminating statement in the case, I don't know whether

HEARING

17

1 you have or not, but you understand that when you plead
2 guilty you waive or give up your right to contest or
3 challenge whether that statement was freely and voluntarily
4 given?

5 A: Yes sir.

6 The Court: Plea negotiations on these two
7 charges Ms. Fant?

8 Ms. Fant: No Your Honor.

9 The Court: All right, has anyone promised you
10 anything to get you to plead guilty?

11 A: Well sir, my lawyer, he explained to me fully the
12 situation and being that, you know, I got a co-
13 defendant in which his plea was Young's Market and
14 they dropped the Kangaroo on him in which was a plea
15 recommendation. And I also understand that he
16 explained to me that, being that he got a minimal
17 required ten years and time served on that and being
18 that most likely, if I plea to it I'll probably get
19 the same thing being he was a co-Defendant and not
20 having a background or a juvenile record of anything
21 of that nature. But other than that ...

22 The Court But that's your lawyer trying to guess
23 what I'm going to do isn't it? I mean, the State hasn't
24 promised you anything and the Court hasn't promised you
25 anything right?

1 A: No sir.

2 The Court: And, of course, Mr. Sullivan can't
3 promise you anything. He can just tell you what he thinks
4 might happen.

5 A: Yes sir.

6 The Court: So I'll ask you again, has anyone
7 promised you anything or held out any hope of reward to get
8 you to plead guilty?

9 A: No sir.

10 The Court: Has anyone threatened you or used
11 force against you to get you to plead guilty?

12 A: No sir.

13 The Court: Has anyone used any pressure or
14 intimidation to cause you to plead guilty to these charges?

15 A: No sir.

16 The Court: Have you had enough time to make up
17 your mind as to whether or not you want to plead guilty?

18 A: Yes sir.

19 The Court: And are you pleading guilty of your
20 own free will and accord?

21 A: Well, I'd like to speak upon that. Well, solely I'm
22 pleading guilty, not just my guiltiness. I'm pleading
23 guilty because I believe that the representation in my
24 case wasn't to the fullest extent and the best of my
25 client, my lawyer ability and I'm also ...

HEARING

19

1 The Court: We're going to come to that in just a
2 minute.

3 A: Okay.

4 The Court: So, so the next question that I'm
5 going to ask you then is are you satisfied with the manner
6 in which your lawyer has advised and represented you?

7 A: Yes sir, yes sir.

8 The Court: All right, well tell me what you were
9 talking about.

10 A: Well, that's what I want to speak upon. I wasn't
11 really, I'm pleading guilty. I admit that I'm guilty.
12 But in the jury trial, I was willing to take a jury
13 trial, but I also know and understand that I pleading
14 due to I feel like honestly that the odds stacked
15 against me, in which that a lot of things been going
16 on with my case, certain violations and a lot of
17 conflicts of interest was ... In which, I been
18 incarcerated since August of '07 and I just received
19 my Rule 5 Brady Motion disclosing evidence February
20 24th from Catherine Fant, which was given to my
21 attorney and also I wasn't, I wasn't in possession of
22 my motion of discovery until Friday, but a incident
23 took place in which on the 24th, where my attorney
24 received my motion of discovery from the solicitor in
25 which a lot of individuals pertaining to my case was

HEARING

20

1 disclosed in my motion in which I wasn't every ... it
2 wasn't never in my possession.

3 The Court: What motion is that?

4 A: My Rule 5 Brady Motion disclosure and stuff I was
5 supposed to have.

6 The Court: Well, any motions that are made are
7 supposed to be made through your lawyer to the Court.

8 A: That's what I understand sir, but I just want to
9 stress to you is that, you know, it's been a conflict
10 of interest in doing my case because I was called to
11 Court on February 25th, on a Wednesday. My co
12 Defendant was called to Court February 24th on a
13 Tuesday, okay, in which, like I stated that Ms. Fant
14 had gave my lawyer Mr. Sullivan my motion of discovery
15 in the hallway so he said and during that time,
16 another one of his clients he was seeking to speak
17 them and consul with them in a room by court room one,
18 in which the client that he was speaking to pertains
19 to my case, in which documents and photos of that
20 individual pertaining to my case was inside my motion
21 of discovery. So upon the time, upon the time when he
22 was consulting in that meeting, with that selective
23 individual, he, my, I don't know how it came about,
24 but my motion of discover was disclosed to him and
25 this selective individual had took pictures and

HEARING

21

1 documents out of my motion of discovery and exited the
2 room. So I ain't find out about until that next day,
3 until some inmates that was in the holding cell at the
4 time, that they came into jail house and told me, but
5 my co Defendant came back also and that same
6 individual that took the documents and photos out of
7 my motion and showed me to them. I asked him where he
8 get it from, I asked the individual where he gets it
9 from Stacy Rhodes, and he said I took it from my
10 lawyer. I didn't know who his lawyer was, he said, I
11 asked him who your lawyer was and he say David
12 Sullivan, so when I went back to court that next day,
13 that Wednesday, I asked Mr. Sullivan about it. He
14 said Ms. Fant gave it to him in the hallway and he
15 ain't had time to put it in my file and when he was in
16 the room consulting with Mr. Rhodes he happened to
17 see, whatever he said Mr. Rhodes had happened to see
18 the pictures and he took the pictures and walked out
19 the courtroom, and walked out the room. So I asked
20 Mr. Sullivan, well, how did he even see, could
21 identify pictures of him in my motion of discover, I
22 mean, didn't he tell the officer? And he said yeah, he
23 told the officer and he got them back from him. I
24 said no he didn't because that same individual came
25 back to the jailhouse and start showing them around

1. with him on th pictures.

2 The Court: All right, wait just a minute, let me
3 see if I can, what are we talking about here Mr. Sullivan?
4 I'm not sure I'm following him.

5 Mr. Sullivan: I think I can explain it, Your
6 Honor.

7 The Court: Please do.

8 Mr. Sullivan: This past court term Ms. Fant gave
9 me part of Mr. Hayes' discovery. I was talking to another
10 client of mine, named Stacy Rhodes and I had part of Mr.
11 Hayes' discover in my hand and some of the photos that I
12 had were of Mr. Rhodes and they were incriminating pictures
13 of Mr. Rhodes and Mr. Rhodes reached over, who, like I said
14 is my client, or was my client, reached over and grabbed
15 those photos out of my hand and basically told me that I
16 wasn't getting them back and I went and got a CO to get
17 those photos from Mr. Rhodes and Mr. Hayes has told me on
18 numerous occasions how upset he is that Mr. Rhodes was able
19 to get some discovery that was in his file.

20 The Court: From your stand point, how does that,
21 in anyway prejudice Mr. Hayes' case?

22 Mr. Sullivan: It doesn't.

23 The Court: All right, Mr. Hayes, how does the
24 fact that some of the discovery may have inadvertently
25 gotten into the hands of another defendant prejudice your

HEARING

23

1 case here?

2 A: Because, well, speaking that I wanted to select a a
3 jury trial, and those same selective individuals, it
4 was like two or three individuals, and it was ready to
5 testify on the State behalf in which it would
6 incriminate me in the process. So a lot of things
7 that the State have, which I'm entitled to have in my
8 motion of discovery, that I didn't have, so once it
9 seek her hand, she got some things that I didn't have
10 ...

11 The Court: Whoa whoa whoa, but listen to the
12 question ...

13 A: Uh-huh.

14 The Court: What we're talking about now is the
15 things that Mr. Sullivan has explained to me that were
16 given to him by Ms. Fant on your case, they got into the
17 hands of Mr. Rhodes ...

18 Mr. Hayes: Yes sir

19 The Court: How did the fact that Mr. Rhodes got
20 those photographs, how does that prejudice, how does that
21 in any way prejudice your case here? I don't understand
22 what the prejudice is.

23 A: Well, Your Honor, the prejudice is that, that goes
24 back to saying, you know I'm pleading guilty because
25 the odds stacked against me because, in which by him

1 representing me and by him representing me and letting
2 something like that occur and the lack of interest and
3 ...

4 The Court: Well mistakes happen and I'm sure
5 that he didn't mean for that to happen and the man grabbed
6 it from him, but unless you can demonstrate to me how that
7 works to your detriment as far as this case is concerned,
8 I don't see any prejudice.

9 A: Yes sir.

10 The Court: Now if you can tell me how that
11 prejudices your case I'll be glad to consider it. Mr.
12 Sullivan doesn't see it as prejudice and I don't see any
13 prejudice.

14 A: Well I mean all I'm expressing, Your Honor, is that,
15 you know, due to my Rule 5 and before my even my
16 client, I mean my lawyer had even a chance to go over
17 it and being that he, that incident even occurred, in
18 which he took them back to the jailhouse and showed
19 them around to everybody else and I already know you
20 understand that confidential informants in which
21 individuals write statements and they write letters to
22 the Solicitor involving their own case. So all I'm
23 stating is that I feel like, I truly feel like by the
24 incident occurred and I feel like that's a reason of
25 conflict of interest and I feel like, I also wrote the

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25

1 Lawyers Conduct Board and I also wrote, I was given
2 two names, Ms. Lauren Stevens and Jack Howle as the
3 Chief Public Defenders. So, I wrote both of them. I
4 ain't never heard nothing back from them explaining to
5 them what happened and explained the incident what
6 happened and the violation and conflicts of interest.
7 You understand that I knew if I had to go to trial all
8 this stacked highly against me, just due to the
9 incident occurred and I feel like he was representing
10 me to the - to his full extent and the best of his
11 ability and I had ask him to be relieved of my case,
12 but I never heard nothing from him. I never heard
13 anything from him which I have, I had copies of the
14 letters that I wrote to Lawyer's Conduct Board, the
15 next day, and copies of the letters that I wrote to
16 Chief Public Defender Jack Howle, in which I never
17 heard nothing from him in which. But the whole sense
18 of reason for me being pleading is that I feel like a
19 lose lose situation it being that, I mean ... The
20 Court: Well, here's the whole thing.

21 This is the question. You still - you've rambled a lot and
22 I've let you talk, but as far as the actual charge that
23 you're pleading guilty to here today, and that is the
24 charge of the armed robbery of Ms. Skinner at the Young's
25 Food store, how did this incident, where the pictures, and

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1 I don't know what the pictures contained, but the pictures
2 got into the hands of somebody unrelated to this crime, but
3 somebody else out at the jail, is that right?

4 A: No, they related to them.

5 The Court: Sir?

6 A: They related to them.

7 The Court: The pictures are related to him,
8 yeah, but the fact that they got into the hands of Mr.
9 Rhodes - Mr. Rhodes doesn't have anything to do with this
10 case did he?

11 A: Yes sir.

12 The Court: What's he got to do with this case?

13 A: His testimony is damaging. As far as him testifying
14 against me on my behalf, on the State behalf in which
15 that, I got pictures in here of him. It's like he
16 took three for four pictures out of it and other
17 documents but I only had like two, three picture, but
18 I know there's way more picture than that, but what
19 I'm saying is it could go on him and got something to
20 do with him because he's the one selective individual
21 in the pictures.

22 The Court: He's what?

23 A: He's the one of the individuals that's in the pictures
24 that took out of my, took the photos out of my motion.

25 The Court: All right. Tell me what the pictures

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1 are

2 Ms. Fant: Your Honor, the pictures were taken in
3 a motel room that Mr. Hayes rented the night of the
4 robbery.

5 The Court: Okay.

6 Ms. Fant: They show four individuals with guns,
7 drugs and money, a lot of money. Those four individuals,
8 including his co-defendant Brandon McFadden, were Anthony
9 Pringle, Stacy Rhodes and Cameron Davis. They all talked
10 to the police that night and including Mr. Hayes said that
11 the five of them were in that motel room together and he
12 doesn't have a job, so obviously the photos were very
13 incriminating and the gun is the one that matches the
14 description of the gun used in the armed robberies. So Mr.
15 Rhodes saw the picture, which has him in it, obviously
16 that's what he grabbed from Mr. Sullivan because he thought
17 it had something to do with him. He's a possible witness
18 in this case, but at no point did anyone have any
19 documents. I haven't even discussed testifying with Mr.
20 Rhodes. I'm bringing him back to testify; I expect he may
21 lie, but I have not discussed that with him.

22 The Court: Are there are any charges against Mr.
23 Rhodes?

24 Ms. Fant: He pled guilty to totally unrelated ...

25 The Court: I understand, but he would too

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1 actually, under discovery, would be entitled to the same
2 photographs that this man is entitled to.

3 Ms. Fant: No, well, I mean because he wasn't
4 charged with anything related to that offense, except for
5 interfering with police, so he wasn't charged with the
6 drugs or the guns or anything like that.

7 The Court: All right. All right, now I
8 understand what you're saying as far as prejudice, what you
9 claim to be prejudice for Mr. Rhodes and I can rule on
10 that. Tell me why you think this is a conflict of interest
11 as far as Mr. Sullivan is concerned.

12 A: Well sir, Your Honor, Mr. King. All I was seeking was
13 ...

14 The Court: Don't call me mister, the title is
15 Judge, that's why I wear this black robe.

16 A: Yes sir. Judge King, with all due respect sir, I just
17 feel like by him doing that and I understand accidents
18 happen, I understand that, but it's just that a lack
19 of interest that he had in my case and a lack of
20 interest that he showed to recover the items for my
21 case that was taken out of my motion of discovery.
22 But all I'm seeking is that, like I said, I wrote the
23 Lawyer's Conduct Board and I haven't heard nothing, up
24 to date up to that. I wrote the Chief Public Defender
25 also at the spur of the moment. I haven't heard up to

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1 date from that. As far as speaking upon the topic of
2 the issue that what happened, the incident that
3 happened and things of that nature, but just due to -
4 I mean I feel like that by him. I said okay, I see
5 that happen and a lot of things as far as what going
6 on with my case and I truly felt like that he won't
7 represent me to the best of his ability and I
8 understand and I said well, that's why I entered a
9 plea of guilty because I truly feel that if I had went
10 to trial and judged by twelve I feel like the odds are
11 stacked against me so that's why I entered a plea of
12 guilty, but ...

13 The Court: You know he's your lawyer in the case
14 that you have, that we're not accepting a plea on he's
15 going to be representing you in that case.

16 A: Yes sir, I understand that, you know, I would just -
17 I was, well, I was, similar grounds, I just sent to
18 the Board and his supervisor and also sir you that the
19 grounds, in which it stands is ineffective use of
20 counsel because due to ...

21 The Court: How is he ineffective? Tell me what
22 he's done that's ineffective?

23 A: The lack of interest that he's shown, I mean ...

24 The Court: All right, lack of interest, that's
25 one. What else?

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1 A: I mean, well, I think my whole time speaking to him,
2 I think the PI, when we went to court in February and
3 Judge James ordered, well we'll try the case in June.
4 If ya'll ain't got it ready in June we'll ask for a
5 continuance, but the whole time before that I haven't
6 seen my P.I. I mean, I talked to my P.I. like two
7 weeks before, that was two weeks ago and I spoke to
8 him one time so - and a lot of things that was said,
9 from when he was speaking to my co defendant at the
10 jail house after he had got sentence, speaking to my
11 co defendant about his testimony and things of that
12 nature and a lot of things that he still stated to me
13 in which my co defendant had stated and that in which
14 wasn't really true, but if this, I just feel like my
15 confidence, and this is my life, so I ...

16 The Court: Well you're pleading guilty to the
17 charge so, you know, do you still, do you not want to plead
18 guilty because you think he's ineffective? Tell me what
19 you're talking with kind of a split tongue here Mr. Hayes.
20 You tell me that you're guilty and that you want to plead
21 guilty, but at the same time you're telling me that you
22 want Mr. Sullivan to do some other things, so I don't
23 understand.

24 A: Judge King sir, I would, like I was saying, the only
25 reason why I was ready to, why I'm willing to submit

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1 to the guilty pleas is being that the odds are stacked
2 against me with him representing me going to trial,
3 but I - all I was seeking for is to his Lawyer's
4 conduct and Chief Public Defender is grounds for him
5 to be relieved of my case. Now, but I understand, I
6 understand that I truly feel and believe what the
7 outcome will be with trial with him representing me,
8 as far as this case is concerned and a lot of things
9 that I've asked him upon our meetings at the jailhouse
10 in which don't get straight up answers and I mean ...

11 The Court: Well, this is not the time. The time
12 to tell me right now is whether you're willing to advise me
13 that you're satisfied with his representation of these
14 charges for armed robbery and this charges, and we're
15 talking about the Young's at this time and the charge of
16 the drugs and if you're not, I can tell you this as far as
17 his representation is concerned. He's representing you on
18 these charges and he's also representing you on the
19 Kangaroo. You do not get your choice of public defenders.

20 A: Yes sir.

21 The Court: So, if you wish to withdraw your plea
22 because you're not happy with Mr. Sullivan on this, don't
23 think that's going to get you a new lawyer, because it's
24 not. You don't have your choice of lawyers when it comes
25 time to try the case. I will let you withdraw your plea if

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1 you want to go to trial, but Mr. Sullivan's going to be
2 your lawyer. Is that, that's your call if you don't want
3 to plead guilty, fine. I'm sure the State is ready to go
4 forward. They got the other charges that they are going to
5 call I think shortly and you can go to trial on this
6 charge, this armed robbery, that is the Young's armed
7 robbery, or you can go to trial and go to trial on the drug
8 charges, you can go to trial on both of those and I have
9 not accepted your plea yet and if you are not comfortable
10 pleading guilty to these charges with Mr. Sullivan as your
11 lawyer, now is the time to tell me and he'll stand you
12 aside and Ms. Fant can call the case to trial and it can go
13 before a jury. It's your call, which way you want to go?
14 A: I'll go with the plea sir.

15 The Court: All right, and you understand that
16 when you plead guilty, you are admitting that the charges
17 of the robbery of the Young's food store is true?

18 A: Yes sir.

19 The Court: You understand that?

20 A: Yes sir.

21 The Court: And you understand that the charge of
22 the drugs is true. Do you understand that?

23 A: Yes, sir.

24 The Court: All right and you understand that I
25 will allow you to stand aside if you want to withdraw your

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1 plea now, but Mr. Sullivan is going to be your appointed
2 lawyer in this case, you understand that?

3 A: Yes sir.

4 The Court: All right. Now understanding then the
5 nature of the two charges or three charges: Armed Robbery,
6 Criminal Conspiracy and Possession of Crack, two, no just
7 one Armed Robbery, that's right, you took one of them out,
8 Make sure we understand this is the indictment number 646
9 for Armed Robbery and Criminal Conspiracy of the Young's
10 Foods Stores on July the 31st 2007, how do you wish to plead
11 to that charge, guilty or not guilty?

12 A: Of the Young's Market sir?

13 The Court: The Young's Market

14 A: Guilty.

15 The Court: All right and the drug charge which is
16 now being changed to the lesser included offense of
17 possession of cocaine base, second offense, guilty or not
18 guilty?

19 A: Guilty sir.

20 The Court: All right and I have handed back to
21 the solicitor the indictment on the armed robbery of the
22 Kangaroo and that matter is still pending, you understand
23 that?

24 A: Yes sir.

25 The Court: And as we have explained a while ago,

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1 the State can call that case at any time that they want to
2 and they may even proceed as a second most serious, if it
3 falls within the requirements of the statute, you understand
4 that?

5 A: Yes sir.

6 The Court: Okay and you understand that the
7 Court, whether it be me or some other judge is not locked
8 into any kind of a sentence as far as these charges that
9 are before me today, nor the charges of the Kangaroo if you
10 were to be found guilty of that, that could be the same
11 thing, ten to thirty and it could be consecutive, do you
12 understand that?

13 A: Yes sir.

14 The Court: All right. All right have you
15 understood my questions?

16 A: Yes sir.

17 The Court: Is there anything else that you would
18 like to ask me about what we've been over?

19 A: That's it.

20 The Court: Okay. And you understand that you
21 have the right to appeal the guilty plea and sentence of
22 the court and you must do so within ten days?

23 A: And I will do so at the Department of Corrections?

24 The Court: If you want to appeal my decision
25 within ten days from today, that appeal has to be filed

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1 with the office of the Clerk of Court and with the Supreme
2 Court, you understand that?

3 A: Through my lawyer?

4 The Court: Through your lawyer?

5 A: Yes sir.

6 The Court: Okay, All right, Ms. Fant tell me
7 about the fact background.

8 Ms. Fant: Your Honor, on July 31st of 2007, Ms.
9 Latasha Skinner, who was the assistant manager and clerk at
10 the Young's Market on Oswego road in Sumter County called
11 law enforcement and reported that she had just been robbed
12 by two young, black males. They had come in, one of them
13 had a gun pointed it at her told her to get the money out
14 of the register, as she backed up, the second one came in
15 and told her to open up the safe. She ultimately did open
16 up the safe and gave him the money. She was able to
17 describe the two people. One as being short, about 5'6.
18 One as being taller, about six feet. She said that they
19 were both dark skinned, black males, that they had bandanas
20 or black cloth on their face, but only below the nose. It
21 was covering the mouth area. That they were wearing all
22 black shirts and that the shorter one had on short pants,
23 but she wasn't positive about the pants on the taller one.
24 She indicated that she thought that they had been in the
25 store before and that again, the shorter one had the gun

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1 and it was an old, brown looking pistol and he held it on
2 her the whole time and in fact held it close to her while
3 the taller one was getting the money out of the safe. Law
4 enforcement responded within minutes of this incident, both
5 Mr. Fabian Hayes and his co-defendant Brandon McFadden were
6 spotted coming out of Mr. McFadden's house at [REDACTED] Loring
7 Drive. That is exactly three homes away from the Young's
8 Market going back on Bagnal Drive toward Loring. The
9 officer was Detective Curtis Hodge. He got out to question
10 them. Asked them had they seen anybody. They were not
11 wearing the same shirts and so he really had nothing to go
12 on other than the fact that the robbery was so close by, so
13 close in time and that both defendants told him that they
14 had just been dropped off at that location, despite the
15 fact that they were both sweating, which he found to be
16 very suspicious. At that time nothing was done. Law
17 enforcement began investigating the case. The next day
18 Detective Richburg, excuse me, got the surveillance video,
19 he saw who the shorter one, who he believed to be Brandon
20 McFadden, based upon the MO. Mr. McFadden, in fact, had
21 just gotten out of DJJ for a juvenile Armed Robbery about
22 two weeks before this armed robbery occurred. And
23 Detective Richburg was familiar with his history. That
24 combined with the stop of these two shortly after the armed
25 robbery led him to get search warrants for both Fabian

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1 Hayes' house and Brandon McFadden's house. Before those
2 search warrants could be executed on August the 2nd, which
3 was just two days later, Fabian Hayes was traveling with a
4 guy named Terrance Bassknight. Sergeant Calvin Fulmore
5 with the Sumter Police Department noticed that they were
6 not wearing seat belts or at least Mr. Bassknight was not.
7 He was stopped and arrested at that time because he was
8 driving under suspension. Mr. Hayes got out of the
9 vehicle. Sergeant Fulmore noticed in the waistband of his
10 pants an Advil container that Mr. Hayes attempted to hide
11 from the officer or push further into his pants. At that
12 point, the office had probable cause to search him. He did
13 and found an Advil bottle that contained what was believed
14 to be cocaine base. That is the basis of the crack cocaine
15 possession charge. That was sent to SLED for analysis and
16 it did turn out to be .76 grams of cocaine base. The
17 officer at that time, also seized, as he placed him under
18 arrest, \$382 in currency from Mr. Hayes and a key card, a
19 motel room key that belonged to the Mount Vernon Inn.
20 Officers responded to the Mount Vernon and when they did,
21 it was room 257, the door opened and four black males fled
22 out of the room. Law enforcement went scattered after them
23 chasing them. Those individuals were arrested. Stacy
24 Rhodes being one of them, his brother Anthony Pringle being
25 another. Cameron Davis being a third. All three of them

1 were detained. They indicated that Brandon and Favian
2 Hayes had let them know about the room and that they had
3 been partying there. That they had both had an excessive
4 amount of money over the past couple of days, that the guns
5 belong to Mr. Hayes, one of which was seized was a brown,
6 very old looking pistol revolver, which was used in the
7 armed robbery, or we believe was used in the armed robbery,
8 the same type as the clerk described. In addition to
9 another hand gun. They were arrested and another search
10 warrant was obtained for the room. In the room was a
11 receipt for the hotel room in Mr. Hayes' name. They talked
12 to the manager. He in fact rented the room at 11:50 pm on
13 July 31, 2007 and paid cash for three days. Several hundred
14 dollars I believe it was. He also had checked in at 11:50,
15 this robbery occurred shortly after 10:00 pm on Oswego.
16 The others indicated that they had gone there after he
17 rented the room. Seized also in the room was a disposable
18 camera. Those were the source, that is the source of the
19 pictures we're talking about. When they were developed
20 they had taken pictures of themselves. Mr. Hayes was not
21 in the pictures, but given that the other four were and
22 they all said there were only five there, it is our
23 contention that he took the pictures. But Mr. McFadden was
24 definitely in there, the others were in there. They had
25 guns, they had drugs and they had money flashing in their

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1 hands. So several pictures that were taken, probably more
2 than a dozen. Law enforcement also executed search
3 warrants at the home of Brandon McFadden and Favian Hayes.
4 At Brandon McFadden's house they found a red Bulls ball
5 cap, which matches the hat in the video that is shown from
6 the armed robbery. They also found an apron which was
7 believed to be tied around one of them's face, a black
8 bandana. In the search of Mr. Hayes' residence also found
9 a bandana and a black do rag. In addition a pair of - a
10 black shirt was found at Mr. McFadden's house. In addition
11 at Mr. Hayes' house a black shirt which matches the one
12 that you can see on the video and a pair of blue jeans or
13 black jeans that are very distinctive because they are
14 faded out on the thighs and legs in back and in front. You
15 can clearly see that on the surveillance video. Mr.
16 McFadden is - they measured him at the police department,
17 between 5'5 and 5'6 inches high. Mr. Hayes is
18 approximately 5'11 or six feet tall. At that night, Mr.
19 Hayes would not admit to the armed robbery, but admitted
20 that he was with Mr. McFadden all night long and that they
21 had gone to the room. Mr. McFadden, however, did admit to
22 the robbery, indicating that it was him and Mr. Hayes. He
23 laid it out exactly as it had happened. That he had gone
24 in first with the gun and that Mr. Hayes had come back
25 later, that they had both participated in it and they had

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1 gotten over \$4,000 which they split up between them. The
2 next day after the robbery, law enforcement was able to
3 find out that Mr. McFadden opened a bank account at SAFE
4 Federal Credit Union in which he deposited a hundred
5 dollars in cash, he was also arrested with one hundred
6 dollars in cash and had no job, no means of support and as
7 I say, had been out of detention, juvenile detention for a
8 mere two weeks at that point. Mr. Hayes had gotten out of
9 the Department of Corrections in March, had worked for
10 approximately eighteen hours at Gold-Kist and had no other
11 means of support, but had deposited one thousand dollars in
12 cash in an account that he had at SAFE on the day after the
13 robbery. Taking all these facts together, they were both
14 arrested. Mr. Hayes, excuse me, Mr. McFadden pled guilty
15 to these charges last Thursday before Judge James. As part
16 of his plea agreement, the Kangaroo armed robbery was
17 dropped and he pled guilty to a forgery at that time as
18 well. Excuse me, there was no agreement, although we did
19 anticipate him possibly testifying at this trial.

20 The Court: Has he been sentenced?

21 Ms. Fant: Yes Your Honor. That was a negotiated
22 sentence for the minimum of ten years.

23 The Court: Tell me about Mr. Hayes' record.

24 Ms. Fant: Your Honor he has an extensive
25 juvenile record beginning with damaging or tampering a

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1 vehicle, possession of an unlawful weapon, trespass after
2 notice, receiving stolen goods, petty larceny, driving
3 without a license, something in the juvenile record that
4 was listed other juvenile charges not defined, a second
5 damaging or tampering with a vehicle, a second petty
6 larceny. Then as an adult beginning in 2002 an
7 interference with police. In 2003, possession of crack
8 cocaine, two separate counts, resisting arrest, pointing
9 and presenting a firearm and possession of a stolen pistol.
10 He was released from custody of the Department of
11 Corrections in March of 07 and again these events occurred
12 in July and early August of 07. And at the appropriate time
13 Your Honor, the officer would like to speak in this case.

14 The Court: All right, I'll be glad to hear from
15 the officer and also of course, I'm going to get the
16 matter of victim notification on the record.

17 Ms. Fant: I can tell you that right now. Is Ms.
18 Skinner in the courtroom? She may be downstairs Your
19 Honor. She was obviously coming in. I told her to be here
20 at 11:00 for the trial. When I tried to phone her earlier
21 this morning to have her come in earlier for the plea, I
22 did not get a hold of her.

23 The Court: Well, before we finish this hearing
24 I'll give you a chance to check because I do want to give
25 her an opportunity to be heard if there's anything she

1 would like to say.

2 Ms. Fant: I'll send an officer down to look for
3 her.

4 The Court: All right. All right.

5 Det. Richburg: Your Honor, I'm Detective Robert
6 Richburg from the Sumter Police Department. I was the lead
7 Detective on the case. As mainly, what I was going to
8 speak on is the victim. If she comes up here it's better
9 in her words. He was only out four months and this
10 started. These two armed robberies were within two weeks
11 of each other. Both of these clerks were held at gun
12 point, while the safe was emptied or the cash register on
13 one was emptied. These ladies work out there at night and
14 they're young and I know for a fact Ms. Skinner hasn't been
15 able to return to work. She quit within the next couple of
16 days of this incident and has not returned to doing that
17 since.

18 The Court: And that is, she is the victim on...

19 Det. Richburg: Yes, the one that he's pleading to
20 today.

21 The Court: Okay

22 Det. Richburg: She has not been able to return to
23 work at that location. She hasn't been able to do that and
24 we take these ladies for granted out there all night long
25 and on patrol we're in there. They're there, that

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1 convenience store is there just out of convenience and
2 she's no longer able to do that. And this store is
3 actually now closing ... If this helped that it closes at
4 like 12:00 now, whereas at one time it was twenty-four
5 hours because of the fact that, you know, the armed robbery
6 ...

7 The Court: What time of day did this take place Ms.
8 Fant?

9 Ms. Fant: It was just after 10 pm.

10 Det. Richburg: And you know, just, she can speak
11 to you and relay that more than me, but you know this ...
12 I have to be the voice of the victim as well. In this
13 whole thing Mr. McFadden cooperated the night that he was
14 arrested. Mr. Hayes has pretty much been fighting it the
15 whole way throughout, no cooperation on his end whatsoever.
16 Not ready to accept responsibility for his actions.

17 The Court: All right.

18 Det. Richburg: He had only been out a mere four
19 months.

20 The Court: I understand. All right, thank you
21 and we'll see if the victim is downstairs, Ms. Fant and if
22 so, we'll give her a chance to speak if she would like to
23 do so before we finish this hearing. In the meantime, Mr.
24 Sullivan, before I make a decision to accept the pleas
25 after having heard the factual basis, I want you to address

1 the issue regarding Mr. Hayes' alleged conflict and I'm not
2 sure what he's alleging was the conflict, unless it was the
3 representation by you of both Mr. Hayes and of Mr. Rhodes.
4 Do you foresee that as a conflict and if so, if not, why
5 not?

6 Mr. Sullivan: I don't view that as my
7 representation of both of them as a conflict, Your Honor.

8 The Court: Did Mr. Rhodes impart any information
9 to you regarding Mr. Hayes' case? This case?

10 Mr. Sullivan: Not that I can recall Your Honor.

11 The Court: Okay.

12 Mr. Sullivan: I don't recall him saying anything
13 about this case.

14 The Court: And did you ask him anything or have
15 any conversations with him regarding his involvement in
16 this case with Mr. Hayes?

17 Mr. Sullivan: No sir. I didn't ask him anything
18 about this case.

19 The Court: And you don't feel that there was any
20 conflict in an unrelated charge that you represented Mr.
21 Rhodes on and this charge of the armed robbery or the drugs
22 in this case?

23 Mr. Sullivan: No sir. That charge was
24 completely unrelated and I didn't see a conflict.

25 The Court: I'm not talking about the conflict as

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1: far as the conflict Mr. Rhodes might have had. I'm talking
2 about the conflict that Mr. Hayes might have had with you
3 having represented Mr. Rhodes. You don't see a conflict
4 there?

5. Mr. Sullivan: No sir.

6 The Court: All right, Mister ...

7 Ms. Fant: Your Honor can I put one more fact on
8 the record ...

9. The Court: Sure.

10 Ms. Fant: ... that I forgot to mention. The
11 victim did actually pick out Mr. Hayes out of a photo
12 lineup. It was one that was not done initially. They drew
13 up a lineup, there was another detective on the case who
14 has since left the department. Detective Richburg had never
15 showed it to her, when she came in for a pretrial
16 conference with all of us before the last term of court
17 when we were thinking about trying it. She happened to
18 mention that he had been in the store before, that he had
19 been wearing glasses at the time and she thought she could
20 identify him. He then had the photo lineup that had
21 already been prepared by SLED, showed it to her and she
22 immediately picked out Mr. Hayes as the taller guy in the
23 armed robbery.

24 The Court: All right, thank you. All right Mr.
25 Sullivan, let me hear from you with regard to Mr. Hayes'

1 litigation factors.

2 Mr. Sullivan: Thank you Your Honor. Detective
3 Richburg stated that Mr. Hayes, unlike Mr. McFadden, hadn't
4 accepted responsibility, but I do think that he is
5 accepting responsibility right now. I believe that Ms.
6 Fant stated that most of his record, of course he's not
7 that old right now, but was as a juvenile and I believe
8 that arguably Mr. McFadden's record is worse. I definitely
9 agree with his decision to plea to the Young's robbery.
10 The co-defendant, last week, stated on the record in court
11 implicated Mr. Hayes and it's undisputed that the two of
12 them were together right about the time that the armed
13 robbery occurred. The fact that Mr. McFadden, early on
14 implicated him, I agree with his decision to plea guilty.
15 He, in the numerous conversations I've had with him, you
16 know, I think that he probably wants you to know, and I've
17 explained to him that this doesn't make any difference, as
18 far as the law is concerned, but he's told me over and over
19 again that he wasn't the one with the gun. I've told him
20 that he can still be convicted of armed robbery, you know,
21 it's sort of like the get-away driver is just as guilty,
22 but I think he probably would want me to tell you that.
23 His mother, I believe, would like to say a few words.

24 The Court: All right, I'll be glad to hear from
25 her. Before I do that, Mr. Hayes, I want you to

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1 understand, I'm sure Mr. Sullivan's explained to you the
2 principle of the law which we call legally accessory or
3 accomplice liability rather. Accomplice liability is the
4 formal way of saying that the hand of one is the hand of
5 all and that if two people are acting together in the
6 perpetration of a crime, one is just as guilty as the
7 other. And that was the - Mr. Hayes for example - I mean
8 Mr. Sullivan for example alluded to the fact that you could
9 have one person acting as the look out and another person
10 that went into the store and they're both equally guilty.
11 You understand that legal principle?

12 A: Yes sir.

13 The Court: All right, yes ma'am, give me your
14 name and I'll be glad to hear from you.

15 Ms. Tindal: My name is Darlene Hayes Tindal. I'm
16 Favian mother and it's like it was a tragedy back in 1997
17 went on and caused a lot of conflict like ya'll saying and
18 had emotional problems and like, I'm not saying they split
19 up, but my oldest son he had to go to DJJ and just me, my
20 daughter and Favian my youngest grandson back in 1997, we
21 were like a part for years, almost like ten years he never
22 seen his older brother and when he came out, you know it
23 was like a family reunion. We was all back together and
24 like, we didn't really keep exactly what time and what date
25 everybody, you know was there seeing one another, everybody

1 was so glad to see everybody. Him and my oldest son seeing
2 each other. And we was like, every moment of the day was
3 like a family reunion just seeing one another. And I use
4 to take my grandson to school because during that time my
5 husband had passed away in 2006 and I use to take my
6 grandson or granddaughter to school not far from Robney
7 Drive. Where that Young's Market there but going up the
8 road to the other Young's Market, so it was one Tuesday
9 that Favian had wanted to walk my grandson to school and
10 the next day would have been the Wednesday because some 13
11 year old boy had jumped on my grandson which was 11 but he
12 suffer with asthma and so Favian was going to take him to
13 school that morning and I well, I was sort of sad because
14 that was my big day of doing and so well I didn't think
15 nothing of it. One Tuesday they was saying that he was
16 doing all this right here and I know about what happened at
17 the school house and I know he was just took my grandson to
18 school, but they left him, and that's all I can say. I
19 wish at that time that police officer that was asking
20 questions, he would have asked my grandson ...

21 The Court: I'm not sure I understand. You're
22 saying that this situation with Favian taking your grandson
23 to school was at the time that this armed robbery occurred?
24 Allegedly occurred?

25 Ms. Tindal: I'm not sure. I'm not sure.

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1 The Court: Well I mean, this incident took place
2 on July the 31st, that wouldn't have been, school wouldn't
3 have been in session.

4 Ms. Tindal: This right here not --- it was like
5 the program they was in, but, what you call it?

6 The Court: What buildings were you talking
7 about?

8 Ms. Tindal: What news?

9 The Court: What Young's store?

10 Ms. Tindal: Robney Drive. It's like two Robney
11 Drives.

12 The Court: I know where it is.

13 Ms. Tindal: Okay, well Crosswell School got a
14 program going on, you know ...

15 The Court: This robbery took play at the Oswego
16 Highway store, not the one on Robney Drive, up there on ...

17 Ms. Tindal: No I don't know about that. I don't
18 know, I don't know nothing about that. I don't know
19 nothing about nobody had robbed nothing. Like I was saying
20 about, he was taking my son to school one morning on a
21 Wednesday morning ...

22 The Court: What's that got to do with this?

23 Ms. Tindal: Well, I don't really know sir.

24 The Court: Okay.

25 Ms. Tindal: All I know that I'm saying, when

1 they was saying, all that time we be together we was like,
2 didn't nobody miss nobody or going somewhere robbing no
3 stores, because we don't know nothing about nobody robbing
4 the store.

5 The Court: Okay, thank you ma'am.

6 Ms. Tindal: Okay.

7 The Court: Ms. Fant, I'm going to call on the
8 defendant in just a minute. Did you find out anything in
9 regard to the victim?

10 Ms. Fant: She had not gotten there at that
11 point, Your Honor.

12 The Court: All right Mr. Hayes, I'll be glad to
13 hear from you with regard to matters in mitigation if
14 there's anything you want to tell me.

15 Mr. Hayes: Yes sir. Well as far as Detective
16 Richburg had speak upon, you know, as far as me accepting
17 responsibility and I have accepted responsibility, you
18 know, as a man you know and I wish she was here, you know,
19 and I would sincerely apologize in which, but I never
20 really intended to hurt nobody and in which the whole MO,
21 hiding, like but I understand when you say the hand of one
22 is the hands of all, I know and understand that but how the
23 whole MO started as far as co defendant went in with a gun,
24 and you know, moments later or minutes later then I come in
25 and I grabbed money and run out the store, things of that

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1 nature, but you know, I know and understand you know, like
2 I laid off of work and I do sell drugs and, you know, not
3 even my character as far as me committing an act of that
4 nature and you know I apologize for that and you know, like
5 I said, I never intend to hurt nobody because nobody was
6 hurt. Nobody was physically hurt or physical or sexual
7 abuse or nothing of that nature and you know, I wasn't
8 armed with a deadly weapon and you know, and if it so
9 please the Court, you know, I apologize and it will never
10 happen again I know I understand that. I'm positive of
11 that, And you know, I just wanted to let you know that how
12 this whole thing took place. It wasn't my intentions but,
13 whether it matters now or now, but you know it was never my
14 intentions to like I said, I was never armed and dangerous
15 you know, I never seek to cause any harm or danger upon the
16 victim Ms. Skinner and you know. Well then, I just ask
17 that my co defendant received a maximum of ten, a minimum
18 of ten years, in which with one armed robbery or whatever
19 the forgery charge and things of that nature in which he
20 was armed with the gun. All I'm asking, Your Honor, is,
21 you know, being that I don't have an extensive record of
22 that nature, that charge of that nature, either one of my
23 juvenile or adult records and all I'm asking you is you
24 know, just take in consideration of you know, my sympathy
25 I had for the victim and the court and take into

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1 consideration all the time that I have spent in Sumter
2 County jail house ever since August 07 and you know, I'm
3 asking you can you have a lenient sentence as possible. I
4 learn from my mistakes and you know, I did receive my GED
5 upon, my last grade I attended was twelfth grade, but upon
6 me being at the County jail I have attended to my GED,
7 things of that nature you know, studying, reading and
8 occupy my time so I could prepare myself for the future
9 when I be in society again and you know, I just ask you to
10 give me as lenient sentence as possible in regards to this
11 matter.

12 The Court: Okay. All right, thank you. Mr.
13 Sullivan anything else?

14 Mr. Sullivan: I don't have anything else, Your
15 Honor.

16 The Court: Ms. Fant?

17 Ms. Fant: Your Honor I would just add that on
18 the victim's behalf, she did tell me in discussing this
19 with me that she was terrified during this experience. She
20 actually quit her job the very next day. She now works in
21 Columbia for the Department of Mental Health and thank
22 goodness doesn't have to work there anymore. But just also
23 that Mr. McFadden's statement was that they planned this
24 together and both Stacy Rhodes and Anthony Pringle said
25 that the guns belonged to Mr. Hayes.

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1 The Court: All right, All right. Let me take
2 five minutes, I want to think about all of the things that
3 have been presented.

4 Ms. Fant: I'll check down and see if she's here
5 by any chance.

6 The Court: All right.

7 (Court break taken)

8 The Court: All right be seated. All right. Back
9 on the record. With regard to the matter of the State
10 versus Hayes. Two indictments 08-646 and 07-801. I've
11 heard from everyone I believe, with the exception of the
12 victim in 08-646 and that would be Ms. Latasha Skinner who
13 I believe now is present, is that correct, Ms. Fant?

14 Ms. Fant: Yes Your Honor.

15 The Court: All right. Ms. Skinner, as the
16 victim of this armed robbery, you do have the right to be
17 kept advised of everything's that going on. You have the
18 right to be present in the court when the matter is called
19 for trial and you also have the right to address the Court,
20 so I'll be glad to hear from you if there's anything you'd
21 like to tell me.

22 Ms. Skinner: All I wanted to say was that I was
23 just traumatized by you know, stuff like I saw my life
24 flash before my eyes and I thought I'd probably never see
25 my kids again and it was a scary, scary feeling and since

1 then I've got out the retail business so it's changed my
2 life.

3 The Court: Okay, thank you ma'am. All right the
4 Court does find that there is a substantial factual basis
5 for the plea. I find that the Defendant's decision to
6 plead guilty after going very carefully with him on the
7 record in this matter is freely and voluntarily given.
8 That he has had the advice of counsel, with while he has
9 indicated some complaints about he readily admits to his
10 guilt of this crime and does advise that Mr. Sullivan has
11 represented him and has been in touch with him about this
12 matter. Specifically I want to make the finding that there
13 was no prejudice to the Defendant as a result of the
14 situation where the photographs got into the hands of
15 another individual. If I had thought that there was any
16 prejudice resulted to this Defendant, as a result to that
17 instance, my willingness to take this plea might have been
18 different, but I can perceive of no way that that resulted
19 in any prejudice to him and his counsel does not see any
20 way that that resulted in any interest to him. I also find
21 that there was no conflict of interest. Mr. Rhodes, as far
22 as this matter was concerned, was nothing more than a
23 witness whom Mr. Sullivan would have had the right to talk
24 to, to learn what he knew about this matter and the fact
25 that Mr. Sullivan represented him on a completely unrelated

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1 matter is no conflict of interest whatsoever and I could
2 find that in my view that there was no conflict of
3 interest. And the only complaints that the Defendant in
4 this case, Mr. Hayes, is articulated, as far as Mr.
5 Sullivan is concerned, would be a lack of interest that
6 he's only seen his P.I. one time. I don't know that the
7 Private Investigators are hired for the defendant. The
8 lawyers generally hire the public defenders, I mean the
9 private investigators to investigate the matter as far as
10 the evidence is concerned. I don't see that that in any
11 way affected Mr. Sullivan's representation and also the
12 fact that he complains that he didn't get his Rule 5 in a
13 timely manner, but he doesn't complain that he didn't get
14 it, so I think the State has complied with the terms of
15 Rule 5 and I don't see that as ineffective representation
16 on the part of Mr. Sullivan. Especially in view of the
17 fact that when you look at all the facts in this case and
18 that the Defendant, Mr. Hayes, made two statements during
19 the course of his presentations to me, several
20 presentations to me, one of which was that he admitted that
21 he sells drugs and he does not deny the drug charges at all
22 and has in fact has admitted in his discussions, this armed
23 robbery. Although he contends that he did not go in with a
24 weapon, he does say that he went in and took the money,
25 which would very easily make him guilty of the armed

1 robbery as well, even by his own admission. There's no
2 question in my mind that the Defendant's decision to enter
3 this plea as we have set forth is freely and voluntarily
4 given. Another factor that convinces me of the fact - of
5 that fact, is the fact that he did not admit to the armed
6 robbery of the Kangaroo store and I have not accepted that
7 plea and have handed that back to the solicitor and that
8 matter will go forward. So there's no question in my mind
9 that after having being fully advised of his rights by me
10 and his lawyer and being well represented by his appointed
11 counsel that the plea in this case is freely and
12 voluntarily given and the Court is going to accept the plea
13 with the stipulations that I have put on the record with
14 regard to or the matters that I have put on the record with
15 regard to the - any prejudice arising out of the matters
16 that he has discussed or any conflict of interest is simply
17 not there.

18 Mr. Hayes: Excuse me.

19 The Court: No sir, I've heard, you've had your
20 opportunity to speak and I've heard from you, sir.

21 Mr. Hayes: Yes sir.

22 The Court: All right, Mr. Hayes, this is going
23 to be a substantial sentence and the only reason that it is
24 not the maximum sentence is because of your age. I think
25 that the crime that you pled guilty to and have admitted to

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1 is a very serious crime. It could have very easily
2, resulted in this young lady being killed or harmed in a
3 serious way. I feel that, I see that armed robbery is one
4 of the most serious crimes in our law and I simply think
5 that the law has to, I mean, that the Court has to send out
6, a message that this kind of conduct will not be permitted
7 in our society. With regard to the Armed Robbery the
8 sentence of the Court is Defendant's committed to the State
9 Department of Corrections for a term of twenty-five years.
10 He will be given credit for time that he has served. On
11 the criminal conspiracy it's five years to run concurrent
12 and the drugs it's five years to run concurrent. All of
13 them, he will be given credit for the time that he has
14 served. Good luck to you.

CERTIFICATE

This is to certify that the hearing in the matter of State of South Carolina vs. Favian Alphonzo Hayes, consisting of Fifty-Seven (57) pages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 28th day of December, 2009.

Melissa R. Singletary
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 3-5-2014

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Favian Alfonzo Hayes, #293544,

Applicant,

v.

State of South Carolina,

Respondent.

RECORDED
2012 MAY 22 AM 11:58
CLERK OF COURT
SUMTER COUNTY S.C.

IN THE COURT OF COMMON PLEAS

2009-CP-43-2206

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 22, 2009. An evidentiary hearing into the matter was convened on March 23, 2012, at the Sumter County Courthouse. The Applicant was present at the hearing and was represented by Patrick Killen, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying were David Sullivan, Esquire ("Counsel"), investigator Christopher Hilditch, and co-defendant Brandon McFadden. This Court had before it the records of the Sumter County Clerk of Court, the guilty plea transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Applicant was indicted at the October 2007 term of the Sumter County Grand Jury for (1) count of Possession With Intent to Distribute ("PWID") Cocaine Base and (2) PWID Cocaine



Base Within One Half Mile of a School (2007-GS-43-0801). An amended indictment was then true billed at the May 2009 term of the Sumter County Grand Jury charging Applicant with (1) Armed Robbery and (2) Criminal Conspiracy (2008-GS-43-0646). David F. Sullivan, Esquire, represented the Applicant. On June 1, 2009, the Applicant pled guilty to Armed Robbery, Criminal Conspiracy, and the lesser included Possession of Cocaine Base, 2nd offense. The Honorable Howard P. King sentenced Applicant twenty-five (25) years imprisonment for Armed Robbery, to five (5) years for Criminal Conspiracy, and to five (5) years imprisonment for Possession of Cocaine Base, 2nd offense. All sentences were to be served concurrently.

A Notice of Appeal was submitted on the Applicant's behalf. The appeal was denied for failure to comply with the Rule 203(d)(1)(B), SCACR, in that it did not contain an explanation why the results of the guilty plea should be appealable and what issues would be appealed. The case was returned to the lower court by Remittitur dated October 15, 2009.

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

1. "Ineffective Assistance of Counsel/"Involuntary Guilty Plea"
 - a. "Failure to investigate possible defense..."
 - b. "Counsel gave defendant 'erroneous advice' to Client stating Client would receive a mandatory minimum 10 yrs. 'upon pleading.'"
2. "Conflict of Interest."
 - a. "Counsel represented another client that pertain to my Rule 5 & also has common knowledge of defendant case and was scheduled to testify against defendant."
3. "Judge Abuse of Discretion."
 - a. "Trial judge abuse his discretion by ignoring possible conflict of interest and not further inquiring."
4. "Ineffective of Assistance of Appellate Lawyer."



FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel’s performance was deficient. Under this prong,



attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, *supra*). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland). With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Sentence

Applicant testified that he believed he was pleading pursuant to a negotiated sentence and would receive a term of ten years. Counsel stated that Applicant's co-defendant did receive a ten year sentence, and they were hopeful that Applicant may receive the same. Counsel testified that he informed Applicant that any plea offers were off the table prior to the plea. Counsel denied promising Applicant any specific sentence.

Applicant was informed of the potential sentences he faced during the plea colloquy. (Tr. p. 7, lines 16-23; p. 9, lines 2-5 and lines 18-22; p. 15, lines 1-4.) Applicant was also informed that armed robbery was a "no parole offense," meaning that Applicant would have to serve at least 85% of the sentence before becoming eligible for parole. (Tr. p. 7, line 24 – p. 8, line 18.) Applicant also informed the plea court that Counsel told him that his co-defendant received a sentence of ten (10)



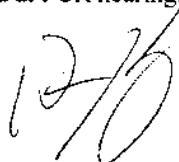
years as a result of a recommended sentence and that Applicant would likely receive the same sentence. (Tr. p. 17, lines 9-21.) While Applicant now states he believed he had a negotiated plea with the solicitor, he informed the plea judge that neither the State nor the court had promised any particular sentence. (Tr. p. 17, line 22 – p. 18, line 1.) The plea judge then stated that “[Counsel] can’t promise you anything. He can just tell you what he thinks might happen,” and Applicant stated that he understood. (Tr. p. 18, lines 2-5.)

Based on the foregoing, I find that Applicant has failed to carry his burden of demonstrating that his plea was rendered involuntary by ineffective assistance of counsel. I find Counsel’s testimony that he made no promise as to sentence to be credible. While Applicant may have hoped to receive a lesser sentence of ten years just as his co-defendant had, he was not misinformed as to the sentence he faced. Even if Counsel had provided erroneous information, any misconception Applicant may have had was cured by the plea colloquy. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

Investigation/Preparation

Applicant further asserts that Counsel was deficient in his investigation of the case. Applicant stated that the defense only received discovery two days before trial, and he did not have any opportunity to review evidence with Counsel. Applicant testified that he met with Counsel at most two times. Counsel utilized the services of an investigator, Christopher Hilditch. Hilditch prepared a report of his investigation.¹ Counsel testified as to several meetings with Applicant, providing specific dates for at least four meetings. Counsel stated that he Counsel met with and was present at the plea of co-defendant Brandon McFadden. Counsel also met with Applicant’s mother to

¹ Hilditch’s report was admitted at PCR hearing. The report was not admitted for the truth of any matter contained



investigate a potential alibi defense, but the alibi did not pan out. Counsel testified that he prepared notes for cross-examination of witnesses, prepared opening and closing arguments, and reviewed all discovery.

I find Counsel's testimony to be credible. I find that Counsel's investigation in this matter was well within reasonable professional norms. I further find that Applicant has failed to produce any credible evidence that would have affected his decision to plead guilty. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (no prejudice where claim of failure to investigate is supported only by mere speculation as to the result). For these reasons, I find that counsel was not ineffective with regard to his investigation.

Applicant specifically asserts that Counsel should have obtained a copy of a transcript from his bond hearing. Applicant recalled that at his bond hearing, an officer had specifically stated that the victim was unable to identify him. Applicant stated that he was not aware that a lineup had been conducted in which the victim had identified him until his plea. Counsel recalled that the photo lineup was done a fairly significant time after the incident and Applicant's arrest, so it would likely have been correct at the time of the bond hearing that no identification had been made. Counsel stated that had the matter gone to trial, he would have challenged the time that had passed and the accuracy of the identification given the perpetrators wore masks covering their faces below the nose in order to show that the identification was not a good one. However, Applicant chose to plead guilty. I find Counsel's performance was not unreasonable in this regard. Further, as Applicant claims that he did not know about the inculpatory lineup prior to his decision to plead guilty, I find that Applicant has failed to demonstrate prejudice from any failure by Counsel to obtain the bond

therein and was considered only toward the reasonableness of Counsel's performance.



hearing transcript.

Applicant also introduced testimony from co-defendant Brandon McFadden. McFadden claimed that Applicant had not participated in the robbery. Applicant had given a statement that he was with McFadden on the day of the robbery but no robbery had occurred. While McFadden denied the statement, law enforcement would testify that McFadden admitted that he and Applicant had committed the robbery. Counsel testified that he met with McFadden and took extensive notes. Hilditch also met with McFadden. Counsel informed Applicant about McFadden prior to the plea, and Applicant was hostile and suspicious of Counsel's motives for talking to McFadden. Counsel testified that McFadden would have been utilized by the defense at trial. Even so, Counsel reflected that McFadden's testimony may not have made for a very good defense. Counsel attempted to locate the accomplice that McFadden mentioned, an individual McFadden called "Black J," without success. McFadden would face examination on his alleged statement and the fact that he had nothing to lose in testifying. Because Counsel did investigate and prepare to present McFadden as part of the defense at trial, I find that Counsel's investigation was well within reasonable professional norms. Further, because McFadden's potential testimony was made known to Applicant before his plea, I find that Applicant has failed to demonstrate that but for any shortcoming in investigating McFadden he would not have pled guilty and would have instead proceeded to trial.

Appeal

Applicant further asserts that Counsel was ineffective in handling his direct appeal. Counsel did file a notice of appeal on Applicant's behalf. The appeal was ultimately dismissed for failure to submit a "written explanation showing that there is an issue which can be reviewed on appeal." Rule



203(d)(1)(B)(iv), SCACR. This rule was effective May 1, 2008.

Counsel testified that he filed the appeal at Applicant's request, but he did not perceive any potentially meritorious issue for appeal. Counsel ultimately wrote to Applicant on August 24, 2009, advising him that he did not believe that there were any appealable issues but Applicant could write the Court of Appeals. Applicant made no effort to do so.

Even assuming that Applicant's remonstrations to the plea court can be interpreted as a motion to relieve counsel preserved for appeal, I find that Applicant has failed to demonstrate that the outcome would have been any different had the issue been raised on appeal. "A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Graddick, 345 S.C. 383, 385-386, 548 S.E.2d 210, 211 (2001). The appellant bears the burden of demonstrating an abuse of discretion. Id. In Applicant's case, Applicant stated generally that he did not think he would be successful at trial with Counsel representing him. Applicant complained about an incident in which another client of Counsel's took photos from Counsel's file. The photos were ultimately recovered. It is unclear how this incident prejudices Applicant's case. The client who temporarily took the photos from Counsel's file (the client, not Applicant, appeared in the photos) was charged with unrelated offenses, and the solicitor had not spoken to him about testifying in Applicant's case. Therefore, when Applicant chose to enter his plea, there was no conflict of interest. "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450 (2005). Counsel also testified at the plea and at PCR hearing that he perceived no conflict. Finally, as discussed above, Counsel conducted a thorough investigation and was prepared



for trial. For all these reasons, I find that even if Applicant's request to relieve Counsel were preserved for appellate review, the outcome would have been no different. Therefore, Counsel was not ineffective.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

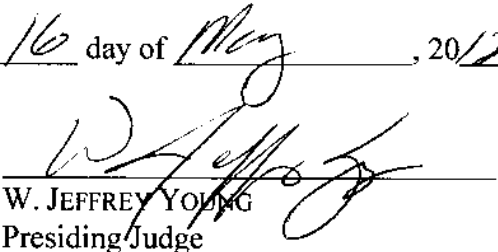
This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be DENIED AND DISMISSED WITH PREJUDICE; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 16 day of May, 2012

Sumter, South Carolina.


 W. JEFFREY YOUNG
 Presiding Judge
 Third Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
2015 NOV -5 PM 0:00
IN THE COURT OF COMMON PLEAS
THE THIRD JUDICIAL CIRCUIT

Favian Alfonzo Hayes, #293544

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Case No. 2015-CP-43-00653

Applicant,

v.

State of South Carolina,

Respondent.

FINAL ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 9, 2015. The Respondent made its return on April 2, 2015, requesting the application be summarily dismissed based upon statute of limitations, successiveness, and failure to allege sufficient evidence of newly discovered evidence.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed April 6, 2015 and filed April 24, 2015, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated August 19, 2015, serving the above mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Amendment PCR Application and Response to Motion to Dismiss and Conditional Order [of Dismissal]" and received on September 16, 2015, the Applicant argues that he received various affidavits and search warrants in 2014 because of a Brady violation. Applicant attached various affidavits and search warrant in support of his claim that his constitutional rights were violated. Applicant claims that this application should not be



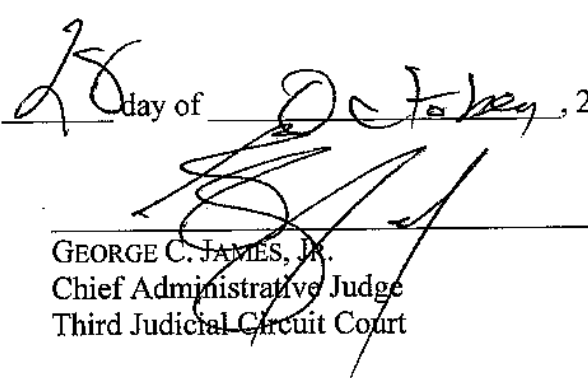
considered successive because he did not have this material in his possession during his first PCR evidentiary hearing.

This Court has reviewed the Applicant's response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court notes the Applicant pled guilty on June 1, 2009, and the South Carolina Court of Appeals affirmed his guilty plea and sentence on October 15, 2009. As this action was filed on March 9, 2015, it was clearly filed outside the expiration of the statute of limitations. See S.C. Code Ann. § 17-2745(a) (Supp.2003). This is the Applicant's second application for post-conviction relief. This Court notes successive PCR applications are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). This Court finds the Applicant had the opportunity to litigate all issues related to his case at the evidentiary hearing for his first PCR application on September 22, 2009. See Odom v. State, 337 S.C. 256, 261 523 S.E.2d 753, 755 (1999). ("[A]n Applicant is entitled to a full adjudication on the merits of the original petition, or 'one bite at the apple.'").

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 18 day of October, 2015.


 GEORGE C. JAMES, JR.
 Chief Administrative Judge
 Third Judicial Circuit Court


 _____, South Carolina.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

*

RESPONDENT,

V.

FAVIAN A. HAYES,

APPELLANT

APPELLATE CASE NO 2009-129706

FINAL BRIEF OF APPELLANT

JOHN H. STROM
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STATEMENT OF ISSUE ON APPEAL

The trial court abused its discretion in finding Hayes freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court's acceptance of the guilty plea, the trial judge improperly denied Hayes's motion to relieve counsel without conducting an adequate inquiry into Hayes's complaint that counsel had an actual conflict of interest, due to his simultaneous representation of State's witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

STATEMENT OF THE CASE

Indictment, Guilty Plea, and Direct Appeal

In October of 2007, the Sumter County Grand Jury indicted Hayes for possession with intent to distribute (“PWID”) cocaine base and PWID cocaine base within one half mile of a school. In May of 2009, the Sumter County Grand Jury indicted, in an amended indictment, Hayes for armed robbery and criminal conspiracy. R. 72 - 73.

On June 1, 2009, Hayes appeared before the Honorable Howard P. King and pled guilty to one count of armed robbery, conspiracy and the lesser included offense of possession of cocaine base, 2nd offense. David Sullivan (“defense counsel”) represented Hayes at the guilty plea. Assistant Solicitor Catherine Fant represented the State.

After denying Hayes’ motion to relieve defense counsel due to a conflict of interest, Judge King sentenced Hayes to a total sentence of thirty-five years of imprisonment. R. 56, ll. 22 – R. 57, ll. 14. Defense counsel filed a timely Notice of Appeal. However, defense counsel failed to submit an explanation pursuant to Rule 203(d)(1)(B)(iv) showing that there was an issue to be raised on direct appeal of the guilty plea.

PCR Application, Evidentiary Hearing, Order of Dismissal, and Petition for Writ of Certiorari

On September 22, 2009, Hayes filed an application for post-conviction relief. The State filed a return on February 22, 2010. On March 23, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young.

Patrick Killen represented Hayes at the PCR hearing. In a written order signed May 16, 2012, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on May 29, 2012.

Hayes filed a petition for writ of certiorari seeking review of the order of dismissal and was represented on appeal by Appellate Public Defender Katherine Hudgins. The State filed a Return and was represented by Assistant Deputy Attorney General David Spencer.

The Supreme Court transferred the appeal to the South Carolina Court of Appeals. On July 3, 2014, the Court of Appeals denied certiorari. The Remittitur was issued on June 23, 2014.

Federal Habeas Corpus Application and Grant

On September 23, 2014, Hayes filed a petition for writ of *habeas corpus* with the United States District Court, District of South Carolina. The State filed a Return to the Rule to Show Cause issued by the Honorable Thomas E. Rogers, III, United States Magistrate Judge, in response to Hayes' petition. The State then filed a motion for summary judgment on January 28, 2015.

On May 28, 2015, Magistrate Judge Rogers issued his Report and Recommendation that the State's motion for summary judgment be denied unless the State promptly allowed Hayes leave to appeal out of time and provided Hayes with the assistance of counsel and recommended the remainder of the claims be dismissed.

On June 17, 2015, the Honorable Richard Girgel, United States District Judge, entered a conditional order granting writ of *habeas corpus* and directing that the State restore Appellant's direct appeal rights. R. 58 - 59. On September 3, 2015, the South Carolina Supreme Court issued an order that the Court of Appeals recall the remittitur in Hayes' direct appeal and reinstate the appeal. R. 60 - 61.

On September 23, 2015, the Court of Appeals recalled the remittitur. R. 62. On December 2, 2015, Hayes submitted an "Explanation of Appeal Pursuant to Rule 203(d)(1)(B)(iv), SCACR". R. 63 - 70. On June 16, 2016, the Court of Appeals informed Hayes

and the State, via a signed letter from Deputy Clerk V. Claire Allen, that Hayes' appeal was to proceed. R. 71.

This appeal follows.

ARGUMENT

The trial court abused its discretion in finding Hayes freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court's acceptance of the guilty plea, the trial judge improperly denied Hayes's motion to relieve counsel without conducting an adequate inquiry into Hayes's complaint that counsel had an actual conflict of interest, due to his simultaneous representation of State's witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

Relevant Facts

During the plea colloquy, the court questioned the parties on whether Hayes understood that by pleading guilty to only one of the two armed robberies, he was exposing himself to a life sentence should the State decide to try him on the second robbery. R. 11, l. 1 - 13, l. 25. Plea counsel alleged that he had explained this possible outcome to Hayes. R. 14, ll. 15-23. The State averred that Hayes was pleading guilty to this specific armed robbery because the case had been called for trial that morning. R. 13, ll. 9-17. The State then added that it fully intended to try Hayes on the second armed robbery indictment in the coming months. *Id.*; R. 14, ll. 10-14.

Continuing with the plea hearing, the court asked Hayes if he was "pleading guilty of your own free will and accord?" R. 18, ll. 19-20. Hayes responded that he was not and that he was pleading guilty because he believed his attorney's conflicted and ineffectual representation rendered a guilty verdict at trial a foregone conclusion. R. 18, l. 21 - 19, l. 3.

Without receiving an affirmative answer, the trial court continued with the plea colloquy asking Hayes if he was satisfied with his lawyer's representation. R. 19, ll. 4-9. Hayes stated that he was not satisfied and moved to relieve counsel. R. 19, l. 10 - 22, l. 1. Hayes said that plea counsel had a conflict of interest arising from his simultaneous representation of an individual named Stacy Rhodes. *Id.*

Hayes explained that Rhodes had been among of group of people he had been with after the two armed robberies he was accused of committing and that Rhodes was preparing to testify

against him at trial. R. 23, ll. 2-10; R. 26, ll. 13-21. The State confirmed that, following Hayes's arrest, Rhodes was arrested for interfering with police arising from his conduct during the investigation into the robberies. R. 28, ll. 3-6. Hayes' attorney was appointed to represent Rhodes. The State also admitted that Rhodes had offered to testify in Hayes's case and the State was seriously considering having him testify should there be a trial. *Id.* at ll. 6-22.

In fact, the State's recitation of the facts supporting the guilty plea made clear that Rhodes was going to be called as a witness. R. 35, l. 6 - 40, l. 19. The State averred that Hayes' co-defendant, Brandon McFadden, lived near one of the robbed convenience stores and that police first came into contact with McFadden and Hayes on the day of the second robbery. *Id.* Detective Curtis Hodge of the Sumter Police Department spoke with the two as they were leaving McFadden's house only minutes after the robbery. *Id.*

Hodge was suspicious of McFadden and Hayes because they were sweating and in the area of the robbery, but did not detain them. After police reviewed the video surveillance footage, a detective who had arrested McFadden as juvenile identified McFadden as possibly being one of the two robbers. R. 36, ll. 16-25.

On August 2, 2007, two days after the second robbery, Hayes was riding in a friend's car that was pulled over. R. 37, ll. 1 - 22. Police searched Hayes and found a Advil bottle containing a small amount of cocaine base. *Id.* Police also found three hundred eighty-five dollars in cash and a key to a motel room at the Mount Vernon Inn in Sumter. *Id.*

Law enforcement then raided the Mount Vernon Inn room. When police forced open the door, four men attempted to run flee the room, including Stacy Rhodes. R. 37, l. 21 - 40, l. 19. All four were arrested. Rhodes told police that Hayes and McFadden had let the others know about the room. Rhodes also informed police that Hayes and McFadden had recently come into

“an excessive amount of money.” *Id.* Police recovered a gun matching the description of the revolver used in the July 31st robbery in the motel room.

The motel room was rented by Hayes. *Id.* A disposable camera was also seized during the search of the motel room. Hayes was not in any of the pictures, but the four men arrested at the motel room - including Rhodes - all told police that he had been with them. *Id.* When interrogated by police, McFadden admitted to committing the robbery with Hayes. Hayes denied any involvement in the robbery, but stated that he was with McFadden on the night of the robbery. *Id.*

To complicate matters, during a meeting between plea counsel and Rhodes, Rhodes saw incriminating photographs of himself and Hayes. R. 19, l. 10 - 22, l. 22. Apparently, plea counsel had inadvertently brought recently received discovery documents from Hayes’s case to his meeting with Rhodes. *Id.*

Rhodes became upset, took the photographs from plea counsel and refused to return them. *Id.* Hayes stated to the court that when Rhodes returned to pre-trial detention he still possessed some of the documents and was showing them to other inmates. *Id.* Plea counsel disputed this and claimed that he believed all of Hayes’ discovery documents were recovered prior to Rhodes being returned to detention. *Id.*

Plea counsel posited that there was no conflict of interest. *Id.* Hayes continued to argue that there was a conflict of interest and noted that he had unsuccessfully contacted the Chief Circuit Public Defender, the Chief County Public Defender, and the “Lawyer Conduct Board” in an effort to have his concerns with plea counsel addressed. R. 28, l. 16 - 39, l. 20.

The court rejected Hayes’s efforts to have plea counsel relieved:

Well, this is not the time. The time to tell me right now is whether you're willing to advise me that you're satisfied with his

representation of these, charges for armed robbery and this charges, and we're talking about the [first robbery] at this time and the charge of the drugs and if you're not, I can tell you this as far as his representation is concerned. ***He's representing you on these charges and he's also representing you on the [second robbery].*** You do not get your choice of public defenders. . . .

So, if you wish to withdraw your plea because you're not happy with Mr. Sullivan on this, don't think that's going to get you a new lawyer, because it's not. You don't have your choice of lawyers when it comes time to try the case. ***I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer.*** Is that, that's your call if you don't want to plead guilty, fine. I'm sure the State is ready to go forward. ***They got the other charges that they are going to call I think shortly and you can go to trial on this charge, this armed robbery, that is the [first] armed robbery, or you can go to trial and go to trial on the drug charges, you can go to trial on both of those and I have not accepted your plea yet and if you are not comfortable pleading guilty to these charges with Mr. Sullivan as your lawyer, now is the time to tell me and he'll stand you aside and Ms. Fant can call the case to trial and it can go before a jury. It's your call, which way you want to go?***

R. 30, l. 16 - 32, l. 14 (*emphasis added*). Hayes responded that, faced with those options, he would “go with the plea.” *Id.* The court reiterated that if Hayes wished to withdraw his plea, plea counsel would remain his lawyer and the trial would begin immediately. R. 32, l. 24 - 33, l. 3.

The court then accepted Hayes’s plea and sentenced him to 25 years for armed robbery, 5 years concurrent for conspiracy and 5 years concurrent for possession. A timely notice of intent to appeal was filed. The appeal, however, was dismissed because, pursuant to Rule 203(d)(1)(B), an explanation was not provided showing that there was an issue to be raised in the direct appeal of the guilty plea.

Discussion

Appellant raised defense counsel's conflict of interest with the plea court prior to court accepting Appellant's guilty plea. However, the court flatly refused to appoint Appellant a new, conflict free attorney or to delay Appellant's trial. "You don't have your choice of lawyers when it comes time to try the case. I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer." R. 30, l. 16 - 32, l. 14

Once Appellant objected to being represented by defense counsel and established that defense counsel had an active of conflict interest due to his representation of Rhodes, the trial court should have allowed him to withdraw his guilty plea and ordered the appointment of conflict free counsel. The court's failure to do so constitutes reversible error.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527 (1975); *accord Gideon v. Wainwright*, 372 U.S. 335, 339-40, 83 S.Ct. 792 (1963). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657, 664 (1984).

Inherent in the right to counsel is the right to conflict-free counsel. While an indigent defendant is not entitled to counsel of his choice, the state and federal constitutions guarantees of equal protection of the laws means that an indigent defendant is entitled to conflict-free representation. U.S. Const. Amend. XIV; S.C. Const. Art. I, § 3 and § 19.

Our Supreme Court has held that "[a]n actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's" interests. *Duncan v. State*, 281

S.C. 435, 315 S.E.2d 809 (1984) (holding that the interests of other client and defendant are sufficiently adverse if it is shown the attorney owes duty to the defendant to take some action that could be detrimental to his other client); *see also Edgemon v. State*, 318 S.C. 3, 455 S.E.2d 500 (1995) (finding actual conflict of interest where counsel convinced solicitor petitioner's co-defendants were less culpable).

Since courts typically will not proceed with a guilty plea when the defendant makes an objection, almost all of South Carolina's case law addressing when defense counsel's conflict of interest requires reversal arise out post-conviction relief actions. However, the logic sustaining these decisions applies with equal force to direct appeals when a timely objection has been lodged.

For example, in *Thomas v. State*, the Supreme Court held that an actual conflict of interest arose when the solicitor offered to dismiss the charges against one spouse if the other spouse pled guilty to possessing the entire amount of cocaine. 346 S.C. 140, 551 S.E.2d 254 (2001). When that offer was extended, Thomas and her husband were represented by the same attorney.

Unlike Appellant, the spouses had previously waived any conflict of interest arising from their joint representation. However, the Court held that, "at the moment the solicitor made the plea offer, Thomas' and her husband's interests became adverse to one another and counsel should have advised them accordingly." *Id.* at 144, 551 S.E.2d at 265.

Here, Appellant's defense counsel had an active conflict of interest. Stacey Rhodes, who defense counsel also represented, was going to testify for the State against Appellant. R. 37, l. 21 - 40, l. 19. Rhodes' interests were directly adverse to Appellant's interests. The State anticipated that Rhodes was going to testify that Appellant and McFadden had arranged for the motel room where Rhodes was arrested and that both men had "an excessive amount of money" in the days after the robbery. *Id.*

While defense counsel stated that his representation of Rhodes had concluded with Rhodes' guilty plea, the conflict of interest remained. The State made clear that it believed Rhodes may lie on the witness stand. *Id.* Thus, during Appellant's trial, defense counsel might have had to advise Rhodes on his Fifth Amendment right to remain silent and on the consequences of perjury in his capacity as Rhodes' attorney; while then having to cross-examine Rhodes when acting as Appellant's attorney.

Unlike in *Thomas*, far from waiving the conflict of interest, Appellant objected to it and sought relief from the trial court. R. 17, l. 9 - 30, l. 15. A non-indigent defendant could avoid the problem Appellant faced by simply exercising his right to counsel of his choice. *Cf. State v. Sanders*, 341 S.C. 386, 390, 534 S.E.2d 696, 697-698 (2000) (defendant's right to counsel of his choosing is protected by the Sixth Amendment and courts "must balance the defendant's right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility.").

Instead, by virtue of his indigence, Appellant was faced with a Hobson's choice between immediately proceeding to trial represented by an attorney with an active conflict of interest or pleading guilty while represented by an attorney with an active conflict of interest. *Ex. Parte Lexington County*, 314 S.C. 220, 228, 442 S.E.2d 589, 594 (1994) (holding that *ex parte* hearings on expert funding for indigent capital defendants should be closed to the public) (internal citations omitted)(*emphasis added*); *see also Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465 (1985) (holding that a state violates equal protection by creating arbitrary classifications among similarly-situated persons).

Appellant's situation represents a total breakdown of the adversarial system bordering on the absurd. *State v. Boykin*, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996); *see also United States v.*

Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984) (“[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”).*

Even after pleading guilty, Appellant still faced charges arising out of a second burglary. R. 12, l. 14 - 16, l. 6. The State intended to seek life without parole for the second burglary. *Id.* Presumably, had the State tried Appellant for the second burglary, Appellant would have faced the possibility of life imprisonment represented by a defense counsel, who owed a duty to Appellant to take some action that could be detrimental to State’s witness, Stacey Rhodes. *Duncan*, 281 S.C. 435, 315 S.E.2d 809.

Under these circumstances, Appellant’s guilty plea could not have been voluntarily and freely entered into. Accordingly, the trial court committed an abuse of discretion in refusing to allow Appellant to withdraw from the guilty plea. The court should have allowed Appellant to withdraw and have new, conflict-free^{*} counsel appointed to represent him.

CONCLUSION

By reason for the foregoing arguments, Appellant Favian Hayes respectfully requests this Court vacate his guilty plea and remand his case for a new trial.

Respectfully Submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of May 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 31, 2017



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FAVIAN A. HAYES,


APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of May 2017

John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of May 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
Howard P. King, Circuit Court Judge

Appellate Case No. 2009-129706

THE STATE,

Respondent,

vs.

FAVIAN ALPHONZO HAYES,

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STATEMENT OF ISSUE ON APPEAL

The plea court did not err in finding counsel did not have a conflict of interest in representing Appellant. Appellant never requested the trial court to substitute new counsel, nor did he ever complain a conflict existed because his counsel represented a potential prosecution witness. Further, no actual conflict existed as the record indicates counsel no longer represented the potential witness who never testified due to Appellant accepting the guilty plea. Appellant failed to show any adverse action or inaction by counsel as a result of the purported conflict.

STATEMENT OF THE CASE

This case comes to this Court under unusual circumstances, but it is best described as a belated appeal. Appellant Favian Hayes was indicted for two counts of armed robbery, conspiracy, possession with intent to distribute cocaine base, and possession with intent to distribute cocaine base within a half mile of a school.

Hayes pled guilty before the Honorable Howard P. King to one count of armed robbery (of Young's Market), conspiracy, and possession of cocaine base, second offense on June 1, 2009. Hayes was represented by David Sullivan, Esquire. Hayes declined to plead guilty to the second count of armed robbery (of Kangaroo Mart). The plea court accepted his plea of guilty and sentenced Hayes to twenty-five years imprisonment for armed robbery and concurrent sentences of five years imprisonment for the two other charges for an aggregate twenty-five years imprisonment. Hayes' counsel filed a notice of appeal but did not submit an explanation of issues to be raised on appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. This Court subsequently dismissed the appeal.

Hayes filed an application for post-conviction relief, which was denied. He appealed the denial of his PCR. His petition for writ of certiorari to the Supreme Court was transferred to this

Court. This Court denied his petition on July 3, 2014 and the remittitur was issued on June 23, 2014.

Hayes filed a petition for habeas corpus. On May 28, 2015, the Honorable Magistrate Judge Thomas E. Rogers, III, issued a report and recommendation that the State's motion for summary judgment be denied unless the State allowed Hayes leave to appeal his guilty plea conviction out of time, and recommended the remaining claims be dismissed. The Honorable Richard Girgel, United States District Judge, entered a conditional order granting the writ of habeas corpus and directing the State to restore Appellant's direct appeal rights. On motion by the State, the South Carolina Supreme Court issued an order for this Court to recall the remittitur in the direct appeal and reinstate the appeal. After this Court recalled the remittitur, Hayes submitted an explanation pursuant to Rule 203 (d)(1)(B)(iv), SCACR. This Court ordered the appeal to proceed on June 16, 2016.

STATEMENT OF FACTS

Hayes pled guilty on June 1, 2009. Hayes admitted he was guilty, but he was willing to take a trial, except he felt the "odds" were "stacked" against him. R. p. 19. Hayes complained he only received his discovery in February. R. p. 19. Hayes complained about what he termed a "conflict of interest" when another client, Stacy Rhodes, grabbed some pictures from Hayes' plea counsel, David Sullivan, Esquire, a public defender. R. p. 20-21.

Sullivan explained what happened to the plea court as follows:

This past court term [the prosecutor] gave me part of Mr. Hayes' discovery. I was talking to another client of mine, named Stacy Rhodes and I had part of Mr. Hayes' [discovery] in my hand and some of the photos that I had were of Mr. Rhodes and they were incriminating pictures of Mr. Rhodes and Mr. Rhodes reached over, who, like I said is my client, **or was my client**, reached over and grabbed those photos out of my hand and basically told me that I wasn't getting them back and I went and got a [correctional officer] to get those photos from Mr. Rhodes and Mr. Hayes has told me on

numerous occasions how upset he is that Mr. Rhodes was able to get some discovery that was in his file.

R. p. 22, lines 8-19 (emphasis added). Sullivan assured the plea court the incident did not prejudice Hayes' case. R. p. 22, lines 20-22. When the plea court asked Hayes how he was prejudiced, Hayes gave a rambling, incoherent explanation that failed to explain any real prejudice. R. p. 25.

The prosecutor explained the picture showed Rhodes and three other individuals with guns, money, and drugs. Hayes was not in the photograph, but Hayes apparently was with Rhodes and the others in the hotel room that night. A gun in the picture matched the description of the one used in the robbery. Hayes and his co-defendant let Rhodes and the others use the room. Rhodes and another person in the hotel room confirmed the guns belonged to Hayes. The prosecutor advised the plea court that Rhodes was a possible witness, but she had not discussed testifying with Rhodes. She intended to bring him back to testify, but expected "he may lie." R. p. 27, lines 6-21; pp. 38-39; p. 52, lines 24-25.

When the plea court asked if there were any charges against Rhodes, the prosecutor began to explain Rhodes pled to unrelated charges but before the prosecutor finished this explanation, the plea court asked the prosecutor if Rhodes was entitled to the discovery. The prosecutor explained he was not charged for the armed robbery, although he was charged for interfering with police in relation to the incident at the hotel room. R. pp. 27-28.

The plea court asked Hayes to explain the "conflict of interest." Hayes claimed Sullivan lacked interest in his case and once again talked about writing the Lawyer's Conduct Board and the Chief Public Defender. R. pp. 28-30. The plea court patiently tried to ascertain Hayes' complaint, commenting:

Well you're pleading guilty to the charge so, you know, do you still, do you not want to plead guilty because you think he's ineffective? Tell me what you're talking with kind of a split tongue here Mr. Hayes. You tell me that you're guilty and that you want to plead guilty, but at the same time you're telling me that you want Mr. Sullivan to do some other things, so I don't understand.

R. p. 30, lines 16-23.

Although Hayes did not ask for new counsel, the plea court volunteered that it would not appoint new counsel and Hayes could decide to plead guilty or go to trial. Hayes chose to plead. R. pp. 31-32. He admitted the charges in the Young's food store robbery and the drug charge were both true. R. p. 32, lines 15-23.

The plea court asked Sullivan to address the following:

In the meantime, Mr. Sullivan, before I make a decision to accept the pleas after having heard the factual basis, I want to address this issue regarding Mr. Hayes' alleged conflict and I'm not sure what he's alleging was the conflict, unless it was the representation by you of both Mr. Hayes and of Mr. Rhodes. Do you foresee that as a conflict and if so, if not, why not?

R. p. 43, line 23 – p. 44, line 5.

Sullivan did not believe a conflict existed in representing Hayes and representing Rhodes on the unrelated case. He did not recall Rhodes imparting any information about Hayes' case. He did not ask Rhodes anything about the case. Sullivan confirmed the charge was completely unrelated to the present charges: "No sir. That charge was completely unrelated and I didn't see a conflict." R. p. 44, lines 6-24.

Hayes claimed he was accepting responsibility when he addressed the plea court as follows:

Well as far as Detective Richburg had speak upon, you know, as far as me accepting responsibility, you know, as a man you know and I wish she was here, you know, and I would sincerely apologize in

which, but I never really intended to hurt nobody and in which the whole MO, hiding, like but I understand when you say the hand of one is the hands of all, I know and understand that but how the whole MO started as far as codefendant went in with a gun, and you know, moments later or minutes later then I come in and I grabbed money and run out of the store, things of that nature, but you know, I know and understand you know, like I laid off of work and I do sell drugs . .

..

R. p. 50, line 15 – p. 51, line 2.

The plea court found the following:

I also find that there was no conflict of interest. Mr. Rhodes, as far as this matter was concerned, was nothing more than a witness whom Mr. Sullivan would have had the right to talk to, to learn what he knew about this matter and the fact that Mr. Sullivan represented him on a completely unrelated matter is no conflict of interest whatsoever and I could find that in my view that there was no conflict of interest.

R. p. 54, line 20 - p. 55, line 3.

ARGUMENT

I.

The plea court did not err in finding counsel did not have a conflict of interest in representing Appellant. Appellant never requested the trial court to substitute new counsel, nor did he ever complain a conflict existed because his counsel represented a potential prosecution witness. Further, no actual conflict existed as the record indicates counsel no longer represented the potential witness who never testified due to Appellant accepting the guilty plea. Appellant failed to show any action or inaction by counsel as a result of the purported conflict.

Appellant Hayes begins his discussion with the claim, “Appellant raised defense counsel’s conflict of interest with the plea court prior to court accepting Appellant’s guilty plea.” Br. of App., p. 9. This is true to the extent that Hayes claimed a “conflict of interest.” However, Hayes did not claim a conflict of interest because counsel previously represented Rhodes on an unrelated charge. Instead, the “conflict” Hayes complained about at the plea was the incident where Rhodes stole the photographs, which were recovered by a correctional officer at Sullivan’s request. Hayes also claimed Sullivan was not interested in his case. He claimed the odds were stacked against him because he was at risk of being convicted for the robbery he committed.¹ Hayes could never articulate what more he wanted his plea counsel to do for him. Notably, Hayes never asked for substitute counsel.

Further, the record reveals counsel no longer represented Rhodes on the unrelated charge. Accordingly, Rhodes was no longer an active client at the time of Hayes’ plea and Sullivan did not represent Rhodes in the present case. R. p. 22, lines 8-19. Therefore, Hayes’ claim in his brief that

¹ See generally Satterwhite v. State, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997), (Satterwhite’s “*belief* that counsel was unprepared for trial [when Satterwhite pled guilty] is not evidence that

Sullivan would owe a duty to explain Rhodes his Fifth Amendment rights if he testified is incorrect.

Sullivan owed no duty to Rhodes, no conflict existed.

“[A]t least after the trial has begun, a mere disagreement between a defendant and his counsel as to a matter of trial tactics is not sufficient cause, in itself, to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time.” State v. Jones, 270 S.C. 587, 243 S.E.2d 461, 462 (1978). A trial judge has discretion to decline appointment of substitute counsel for a defendant who no longer desires assistance of his court-appointed counsel. See also State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001) (finding the trial court did not err in denying defendant’s motion to relieve counsel even though defendant alleged counsel was not representing his interests, was not fully prepared for the case, and the defendant claimed he was not comfortable going to court with counsel as his lawyer). A reviewing court will not interfere with the trial court’s decision regarding a request for substitute counsel absent an abuse of discretion. State v. Marshall, 273 S.C. 552, 257 S.E.2d 740 (1979). Of course, Hayes never asked for substitute counsel, the issue is not preserved for review.²

The Supreme Court noted in a pre-Strickland case:

The quality of the service rendered by counsel meets all requirements of due process when counsel is a member in good standing of the Bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and, his service is of such character as to preserve the essential integrity of the proceedings as a trial in a court of justice. He is not required to be infallible, nor to do the impossible, since the

counsel was, in fact, not prepared.”) (emphasis in original).

² “[T]he trial court’s mentioning the issue does not preserve it for appeal.” State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) *rev’d on other grounds by State v Fletcher*, 379 SC 17, 664 S.E.2d 480 (2008). Mere observations by the trial court do not enlarge the grounds upon which the motion is made. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951).

defendant is entitled to a fair trial and not a perfect one or a perfect result.

State v. Lewis, 255 S.C. 466, 471, 179 S.E.2d 616, 618 (1971).

Contrary to Hayes' claim on appeal, Hayes had Sullivan's complete loyalty and no conflict existed. "[A]n attorney's overlapping representation of two clients can compromise the Sixth Amendment guarantee of effective assistance of counsel when it creates an actual conflict of interest." United States v. Taft, 221 Fed.Appx. 277, 279 (4th Cir. 2007) (citing United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991)). The defendant must show "some real conflict of interest resulting from the representation." Id. (quoting United States v. Atkinson, 565 F.2d 1283, 1284 (4th Cir. 1977)) (additional citation and internal quotation marks omitted). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013). Contrary to Hayes' claim, Hayes failed to show an actual conflict existed.

Further, counsel rejected any contention that a conflict existed. An objection raised by counsel of a conflict of interest may be persuasive evidence of a Sixth Amendment violation because: (1) defense counsel is best positioned to evaluate a potential conflict of interest; (2) defense counsel is obligated to report conflicts of interest to the court; and (3) defense counsel are officers of the court held to ethical obligations to be forthright with the court. Mickens v. Taylor, 240 F.3d 348, 357 (4th Cir. 2001). The lack of objection by counsel in the instant case is persuasive in this direct appeal setting.

Accordingly, the plea court did not err in declining to appoint substitute counsel, especially since Hayes did not ask for new counsel. In Taft, the Fourth Circuit found no actual conflict, noting,

“The overlapping representation lasted for a brief period of time, during which neither individual was involved in the same proceeding or implicated in the same criminal conduct.” Taft, at 279. In the instant case, Hayes and Rhodes were not involved in the same proceeding or the same criminal conduct, no actual conflict existed.

Further, to the extent a possible conflict existed if Rhodes testified at Hayes’ trial, the alleged possible conflict never materialized. Even if establishing the existence of an actual conflict of interest, a defendant still must establish an adverse effect caused by the conflict. Cuyler v. Sullivan, 446 U.S. 335 (1980); Mickens at 360-61. In the instant case, it is uncertain if the case was tried, the prosecution would have even called Rhodes as a witness. The prosecutor noted she had not spoken with Rhodes and her comments reflect she did not have high hopes about his credibility or cooperation. R. p. 27, lines 17-21. Hayes claims in his brief that Rhodes offered to testify, but his citation to the transcript (R. p. 28, lines 6-22) does not support that claim, and no mention was made during the plea hearing that Rhodes did in fact offer to testify for the State. More to the point, Hayes fails to articulate any action or inaction by Sullivan as a result of the supposed conflict. Mickens at 360 (“A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another.”).

In Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993), Langford and his co-defendant, Howard, were represented by the same attorney. Langford complained a conflict arose because Howard pled guilty and would have testified against Langford. The Supreme Court found no actual conflict, explaining the following:

Trial counsel accepted the alibi given by Langford and Howard and viewed their defenses as interdependent and co-equal, thereby eliminating any concern that a conflict of interest would arise. The possible conflict that developed when Howard decided to plead guilty never ripened into an actual conflict, however, because Langford, fearing that Howard would testify against him, also decided to plead guilty. There is no evidence in the record from which it may be inferred that trial counsel advised either co-defendant to plead guilty in order to obtain more favorable consideration for the other. The mere fact that Howard would be available to testify against Langford does not establish an actual conflict of interest.

Id. at 359-60, 426 S.E.2d at 795 (citations omitted); see also Hornick v. United States, 891 F.Supp. 72, 74 (N.D.N.Y. 1995) (“Simply because an attorney previously represented a possible co-conspirator or a potential witness creates no conflict in and of itself.”); Mickens (finding petitioner failed to show an adverse effect from any actual conflict where petitioner’s lead counsel represented murder victim on a juvenile charge that was pending at the time of victim’s murder).

In the instant case, no possible conflict existed and no actual conflict materialized as Rhodes was not a current client and Sullivan owed no duty to Rhodes, nor was his duty to Hayes compromised. Accordingly, the trial court did not err in accepting the guilty plea or declining to appoint substitute counsel.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 30, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

vs.

FAVIAN ALPHONZO HAYES,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

[SIGNATURE BLOCK APPEARS ON NEXT PAGE]

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 30, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Sumter County
The Honorable William Jeffrey Young, Circuit Court Judge

Appellate Case No: 2009-129706

THE STATE,

Respondent,

v.

FAVIAN ALPHONZO HAYES,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record John H. Strom, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 30th day of May, 2017.



Anne A. Mueller
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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Favian Alphonso Hayes, Appellant.

Appellate Case No. 2009-129706

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Unpublished Opinion No. 2018-UP-025
Submitted November 6, 2017 – Filed January 17, 2018

AFFIRMED

Appellate Defenders Lara Mary Caudy and John
Harrison Strom, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Deputy Attorney General David A. Spencer, both of
Columbia, and Solicitor Ernest Adolphus Finney, III, of
Sumter, for Respondent.

PER CURIAM: Appellant Favian Alphonso Hayes appeals his guilty plea to
armed robbery, conspiracy, and drug possession. Hayes argues he did not freely,

voluntarily, and intelligently plead guilty because the plea court improperly denied his motion to relieve counsel based on an alleged conflict of interest.

We find Hayes's appellate argument unpreserved because he makes a different argument on appeal than he made during the plea hearing.¹ See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *State v. Carlson*, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005) (explaining a party "may not argue one ground below and another on appeal" (quoting *State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003))); *id.* at 595–96, 611 S.E.2d at 288 (noting "constitutional arguments are no exception to the error preservation rule").

During the plea hearing, Hayes's argument focused on plea counsel's carelessness in allowing a third party to temporarily obtain possession of photographs from Hayes's discovery materials. Hayes also made vague assertions that plea counsel lacked interest in his case. However, on appeal, Hayes's argument that plea counsel had a conflict of interest focuses on plea counsel's former representation of that third party who was a potential witness for the State against Hayes. At no time during the plea hearing did Hayes argue plea counsel had a conflict of interest due to his former representation of the third party. Thus, because Hayes makes a different argument on appeal than he made during the plea hearing, his appellate argument is unpreserved.

Additionally, to the extent the plea court noted plea counsel's former representation of the third party, the short colloquy between the plea court and plea counsel was

¹ This case has an extensive procedural history. Initially, this Court dismissed Hayes's direct appeal due to plea counsel's failure to file a guilty plea explanation as required by Rule 203(d)(1)(B)(iv), SCACR. Hayes then pursued an unsuccessful post-conviction relief (PCR) action. Following the conclusion of his PCR action, Hayes filed a petition for a writ of habeas corpus with the federal district court. The district court adopted the magistrate court's report and recommendation to grant the writ of habeas corpus. The district court found Hayes was entitled to a direct appeal and ordered our supreme court to restore his direct appeal rights. Importantly, the district court did not make any findings regarding the merits of Hayes's direct appeal issues. Thus, the posture of this appeal is as if Hayes had successfully perfected his direct appeal following his guilty plea, and all of our procedural rules, including issue preservation, are applicable.

inadequate to preserve Appellant's argument on appeal. When the plea court sua sponte inquired whether there was a conflict of interest due to plea counsel's former representation of the third party, plea counsel conceded there was no conflict. Appellant did not object to plea counsel's concession. Thus, to the limited extent this issue was discussed with the plea court, we find Appellant conceded the issue. *See State v. Gilmore*, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (explaining an issue conceded in the circuit court cannot be argued on appeal). Furthermore, a trial court's sua sponte recognition of a potential issue and subsequent conclusion, without objection, that no problem existed is not enough to preserve an issue for appellate review. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the [circuit] court and obtain a ruling before an appellate court will review those issues and arguments"). Accordingly, we affirm Appellant's guilty plea because his appellate argument is unpreserved.

AFFIRMED.²

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

FAVIAN A. HAYES,

APPELLANT

APPELLATE CASE NO. 2009-129706

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 2018-UP-025

PETITION FOR REHEARING

On January 17, 2018, this Court affirmed Appellant's convictions for armed robbery, conspiracy, and possession of cocaine base. State v. Hayes, Op. No. 2018-UP-025 (S.C. Ct. App. filed January 17, 2018). This Court held Appellant's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on a conflict of interest was unpreserved because Appellant made a different argument on appeal than he made during the plea hearing. Id. Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for rehearing in light of the significant points overlooked and misapprehended by this Court.

1. Background Facts

Towards the beginning of the hearing, the plea judge asked Appellant if he was “pleading guilty of [his] own free will and accord.” R. 18, ll. 19-20. Appellant responded that he was pleading guilty only because he believed his attorney’s ineffectual representation rendered a guilty verdict at trial a foregone conclusion. R. 18, ll. 21-25. Without receiving an affirmative answer, the judge interrupted Appellant and inquired whether Appellant was satisfied with his lawyer’s representation. R. 19, ll. 4-9. Appellant ultimately moved to relieve counsel arguing counsel had a conflict of interest arising from his simultaneous representation of an individual named Stacy Rhodes. R. 19, l. 10 – 22, l. 1; See R. 22, ll. 9-10.

Appellant explained that Rhodes had been among a group of people Appellant had been with after the armed robbery for which he was pleading guilty, and that Rhodes was expected to testify against him at trial. R. 23, ll. 2-10; R. 26, ll. 13-21. The assistant solicitor confirmed that, following Appellant’s arrest, Rhodes was arrested for interfering with police arising from his conduct during the investigation into the robbery. R. 27, ll. 2-17; App. 28, ll. 3-6. She also admitted that Rhodes was “a possible witness in this case” and that she was “bringing him back [from the Department of Corrections where he was currently incarcerated] to testify” if Appellant proceeded to trial. R. 27, ll. 6-21.

The solicitor’s recitation of the facts supporting Appellant’s plea made obvious that Rhodes was going to be called as a witness at trial and that he would be an important witness for the state. R. 35, l. 6 – 40, l. 19. The solicitor claimed that within minutes of the robbery Appellant and his codefendant, Brandon McFadden, were seen by Detective Curtis Hodge, the first responding officer, leaving McFadden’s house, which was “exactly three homes away” from the convenience store that was robbed. R. 36, ll. 3-8. Detective Hodge was suspicious of the

men because they were sweating and in the vicinity of the robbery, but he had no probable cause to detain them. After law enforcement reviewed the surveillance footage, an officer, who had arrested McFadden as juvenile, identified McFadden as a possible suspect. R. 36, ll. 9-25.

On August 2, 2007, two days after the robbery, Appellant was a passenger in a car that was stopped for a traffic violation. R. 37, ll. 1-22. During the stop, an officer searched Appellant and allegedly found an Advil bottle containing a small amount of cocaine base. R. 37, ll. 8-16. The officer also found three hundred eighty-five dollars in cash and a key to a motel room at the Mount Vernon Inn in Sumter. R. 37, ll. 16-19.

Law enforcement then raided the Mount Vernon Inn motel room. When police forced open the door, four men attempted to flee the room, including Stacy Rhodes. All four were detained. Rhodes told police that Appellant and McFadden “had let them know about the room.” R. 37, l. 20 – 38, l. 3. Rhodes also told police that Appellant and McFadden “both had an excessive amount of money over the past couple of days.” R. 38, ll. 3-4. Moreover, during a search of the motel room, law enforcement recovered a gun matching the description of the revolver used in the robbery. Rhodes claimed this firearm belonged to Appellant. R. 38, ll. 4-10.

The motel room was rented by Appellant approximately two hours after the robbery. R. 38, ll. 10-15. A disposable camera was also seized during the search of the motel room. While Appellant was not in any of the pictures developed from the camera, the four men arrested at the motel room, including Rhodes, all told police Appellant had been with them. R. 38, l. 17 – 39, l. 2. When interrogated by police, McFadden admitted to committing the robbery with Appellant. Appellant, on the other hand, denied any involvement in the robbery, but admitted he was with McFadden that night. R. 39, l. 18 – 40, l. 1.

As noted, Appellant's counsel simultaneously represented Rhodes. To complicate matters, during a meeting between plea counsel and Rhodes, which took place during the term of court immediately prior to Appellant's guilty plea, Rhodes saw a portion of Appellant's discovery materials, which counsel had just received from the assistant solicitor. These materials included incriminating photographs of Rhodes taken while he was in the motel room rented by Appellant. R. 19, l. 10 – 22, l. 19.

Rhodes became upset, took the photographs from plea counsel and refused to return them. R. 19, l. 10 – 22, l. 19. Appellant told the plea judge that when Rhodes returned to the detention center he still possessed some of his discovery materials and was showing them to other inmates. R. 19, l. 10 – 22, l. 19. Plea counsel disputed this and claimed that he believed all of the materials were recovered prior to Rhodes returning to the detention center. R. 19, l. 10 – 22, l. 19.

Plea counsel maintained that there was no conflict of interest. R. 22, ll. 20-22. Appellant continued to argue that there was a conflict of interest and noted that he had unsuccessfully contacted the circuit public defender, the chief county public defender, and the "Lawyers Conduct Board" in an effort to have his concerns with plea counsel addressed, including the conflict of interest. R. 22, l. 23 – 25, l. 19; R. 28, l. 12 – 39, l. 20.

The plea judge rejected Appellant's efforts to have plea counsel relieved. He asserted:

Well, this is not the time. The time to tell me right now is whether you're willing to advise me that you're satisfied with his representation of these charges for armed robbery and this charges, and we're talking about the Young's [robbery] at this time and the charge of the drugs and if you're not, I can tell you this as far as his representation is concerned. *He's representing you on these charges and he's also representing you on [Appellant's other pending armed robbery charge].* You do not get your choice of public defenders. . . .

So, if you wish to withdraw your plea because you're not happy with Mr. Sullivan [plea counsel] on this, don't think that's going to get you a new lawyer, because it's not. You don't have your choice of lawyers when it comes time to try the case. ***I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer.*** Is that, that's your call if you don't want to plead guilty, fine. I'm sure the State is ready to go forward. ***They got the other charges that they are going to call I think shortly and you can go to trial on this charge, this armed robbery, that is the Young's armed robbery, or you can go to trial and go to trial on the drug charges, you can go to trial on both of those and I have not accepted your plea yet and if you are not comfortable pleading guilty to these charges with Mr. Sullivan as your lawyer, now is the time to tell me and he'll stand you aside and Ms. Fant [the assistant solicitor] can call the case to trial and it can go before a jury. It's your call, which way you want to go?***

R. 31, l. 11 – 32, l. 14 (emphasis added). Appellant responded that, faced with those options, he would “go with the plea.” R. 32, l. 14. The plea judge reiterated that if Appellant wished to withdraw his plea, plea counsel would remain his lawyer and the trial would begin immediately. R. 32, l. 24 – 33, l. 3. The judge then accepted Appellant's plea and sentenced him to twenty five years for armed robbery, five years concurrent for conspiracy, and five years concurrent for possession of cocaine base.

2. *This Court Erred by Holding Appellant's Argument is Unpreserved*

Respectfully, this Court erred by holding Appellant's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on a conflict of interest is unpreserved. When the plea judge asked Appellant whether he was “satisfied with the manner in which your lawyer has advised and represented you,” Appellant immediately asserted counsel had a conflict of interest and explained how he had only recently learned from Stacey Rhodes, an important witness for the state if Appellant proceeded to trial, that *plea counsel also represented Rhodes*. R. 20, l. 8 – 21, l. 13.

Appellant complained about Rhodes obtaining a portion of his discovery materials from counsel, which only occurred because counsel simultaneously represented both Appellant and Rhodes. R. 20, l. 8 – 22, l. 1. *On at least three other occasions*, Appellant asserted plea counsel had a conflict of interest. R. 24, ll. 23-25; R. 25, ll. 4-6; R. 28, l. 7 – 29, l. 12. He also told the judge he wrote to the circuit public defender, the chief county public defender, and the “Lawyers Conduct Board” to complain about counsel’s conflict of interest in an effort to have counsel relieved. R. 24, l. 25 – 25, l. 17; R. 31, ll. 3-5. Petitioner also asked counsel before the plea hearing to move to be relieved as counsel, but counsel failed to do so. R. 25, ll. 11-12.

As seen, Appellant raised plea counsel’s conflict of interest *repeatedly* with the plea judge prior to the judge accepting Appellant’s guilty plea. However, the judge flatly refused to appoint Appellant a new, conflict free attorney or to delay Appellant’s trial, which was scheduled to begin that day. R. 30, l. 16 – 32, l. 14. The judge asserted, “You don’t have your choice of lawyers when it comes time to try the case. I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan’s going to be your lawyer.” R. 31, l. 24 – 32, l. 2.

After taking a short break to consider Appellant’s motion to relieve counsel and his argument that counsel had an actual conflict of interest, the plea judge found:

I find that the Defendant’s [Appellant’s] decision to plead guilty after going very carefully with him on the record in this matter is freely and voluntarily given. That he has had the advice of counsel, with while has indicated some complaints about he readily admits to his guilt of this crime and does advise that Mr. Sullivan [plea counsel] has represented him and has been in touch with him about this matter. Specifically, I want to make the finding that there was no prejudice to the Defendant as a result of the situation where the photographs got into the hands of another individual. If I had thought that there was any prejudice resulted to this Defendant, as a result to that instance, my willingness to take this plea might have been different, but I can perceive of no way that that resulted in any prejudice to him and his counsel does not see any way that that resulted in any [prejudice] to him. **I also find that there was no conflict of interest. Mr. Rhodes, as far as this matter was concerned, was nothing more than a witness whom Mr. Sullivan [plea counsel] would have had the right to talk to, to learn what he**

knew about this matter and the fact that Mr. Sullivan represented him on a completely unrelated matter is no conflict of interest whatsoever and I could find that in my view that there was no conflict of interest.

...

There's no question in my mind that the Defendant's [Appellant's] decision to enter this plea as we have set forth is freely and voluntarily given. Another factor that convinces me of the fact - - of that fact, is the fact that he did not admit to the armed robbery at the Kangaroo store and I have not accepted that plea and have handed that back to the solicitor and that matter will go forward. **So there's no question in my mind** that after having been fully advised of his rights by me and his lawyer and being well represented by his appointed counsel **that the plea in this case is freely and voluntarily given and the Court is going to accept the plea with the stipulations that I have put on the record** with regard to or the matter that I have put on the record with regard to . . . any prejudice arising out of the matter that he had discussed or **any conflict of interest is simply not there.**

R. 54, l. 5 – 56, l. 17 (emphasis added).

It is apparent from this ruling and from the colloquy that preceded it, that the plea judge understood the nature of Appellant's objection and his argument as to why counsel had a conflict of interest.

“Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review.” State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)). “Instead, *a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.*” Brannon, 388 S.C. at 502, 697 S.E.2d at 595-596 (citing Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939)) (emphasis added).

Appellant unequivocally argued plea counsel had a conflict of interest and explained why and how counsel had a conflict. Appellant clearly explained to the judge that counsel simultaneously represented both Appellant and an important witness for the state, who the solicitor confirmed was expected to testify against Appellant at trial. Consequently, Appellant

fairly raised the issue to the plea judge, thereby giving the judge ample opportunity to rule on the issue as required. This is further evidenced by the plea judge's detailed finding that plea counsel did not have a conflict of interest and that Appellant's guilty plea was freely and voluntarily given. See R. 54, l. 5 – 56, l. 17

Therefore, this Court erred by holding Appellant's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on an actual conflict of interest was unpreserved. This Court must have overlooked or misapprehended the portions of the record identified above where Appellant argued counsel had an actual conflict of interest and the reasons why. Appellant respectfully requests this Court grant rehearing, find the argument is preserved for appellate review, and ultimately hold the plea judge improperly denied Appellant's motion to relieve counsel because of counsel's actual conflict of interest.

3. *Appellant did not Freely, Voluntarily, and Intelligently Plead Guilty Where the Plea Judge Improperly Denied his Motion to Relieve Counsel based on an Actual Conflict of Interest*

Once Appellant objected to being represented by plea counsel and established that plea counsel had an active of conflict interest due to his representation of Rhodes, the plea judge should have allowed him to withdraw his guilty plea and ordered the appointment of conflict free counsel. The judge's failure to do so constitutes reversible error.

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Faretta v. California, 422 U.S. 806, 807 (1975); See Gideon v. Wainwright, 372 U.S. 335, 339-340 (1963). “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects

his ability to assert any other rights he may have.” United States v. Cronin, 466 U.S. 648, 654 (1984) (internal citation omitted).

Inherent in the right to counsel is the right to conflict free counsel. While an indigent defendant is not entitled to counsel of his choice, the state and federal constitutions guarantees of equal protection of the laws means that an indigent defendant is entitled to conflict free representation. U.S. Const. Amend. XIV; S.C. Const. Art. I, § 3 and § 19.

Our Supreme Court has held that an actual conflict of interest occurs when an attorney owes a duty to a party whose interests are adverse to those of the defendant. Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (citing Zuck v. Alabama, 588 F.2d 436, 43 (5th Cir. 1979)). The interests of another client and the defendant are sufficiently adverse if it is shown the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. Id.; See Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995) (finding an actual conflict of interest where counsel convinced the solicitor that Edgemon’s codefendants were less culpable).

Since trial judges typically will not proceed with a guilty plea when the defendant makes an objection, almost all of South Carolina’s case law addressing when plea counsel’s conflict of interest requires reversal arise out post-conviction relief actions. However, the logic sustaining these decisions applies with equal force to direct appeals when a timely objection has been lodged.

For example, in Thomas v. State, the Supreme Court held that an actual conflict of interest arose when the solicitor offered to dismiss the charges against one spouse if the other spouse pled guilty to possessing the entire amount of cocaine. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). When the offer was extended, Thomas and her husband were represented by the same attorney. Id. at 142-143, 551 S.E.2d at 255. Unlike Appellant, the spouses had previously waived any conflict of interest arising from their joint representation. Id. at 142, 551 S.E.2d at 255.

However, the Court held, “At the moment the solicitor made the plea offer, [Thomas’] and [her husband’s] interests became adverse to one another and counsel should have advised them accordingly.” Id. at 144, 551 S.E.2d at 265.

Here, Appellant’s plea counsel had an active conflict of interest. Stacey Rhodes, who was also represented by counsel, was going to testify against Appellant at trial. R. 27, ll. 17-21. Rhodes’ interests were directly adverse to Appellant’s interests. The assistant solicitor expected Rhodes to testify that Appellant and McFadden had arranged for the motel room where Rhodes was arrested, that both men had “an excessive amount of money” in the days after the robbery, and that the brown revolver found in the motel room, which matched the description of the weapon used in the robbery, belonged to Appellant. R. 37, l. 16 – 38, l. 8.

While plea counsel said his representation of Rhodes concluded with Rhodes’ guilty plea, the conflict of interest remained. The assistant solicitor admitted she believed Rhodes may lie on the witness stand when called to testify against Appellant. R. 27, ll. 17-21. Consequently, during Appellant’s trial, plea counsel likely would have had to advise Rhodes of his Fifth Amendment right to remain silent and of the consequences of perjury in his capacity as Rhodes’ attorney, while then having to cross examine Rhodes while acting as Appellant’s attorney.

Unlike in Thomas, far from waiving the conflict of interest, Appellant objected to the conflict and sought relief from the plea judge. R. 18, l. 19 – 32, l. 14. A non-indigent defendant could avoid the problem Appellant faced by simply exercising his right to counsel of his choice. Cf: State v. Sanders, 341 S.C. 386, 390, 534 S.E.2d 696, 697-698 (2000) (defendant’s right to counsel of his choosing is protected by the Sixth Amendment and courts “must balance the defendant’s right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility.”).

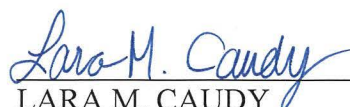
Instead, by virtue of his indigence, Appellant was faced with a Hobson's choice between immediately proceeding to trial represented by an attorney with an active conflict of interest or pleading guilty while represented by an attorney with an active conflict of interest. Appellant's situation represents a total breakdown of the adversarial system bordering on the absurd. See State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996); see also Cronin, 466 U.S. at 654 ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.").

Even after pleading guilty, Appellant still faced charges arising out of a second armed robbery. R. 3, ll. 3-13; R. 12, l. 14 – 16, l. 3. The state intended to seek a sentence of life without parole for the second armed robbery if Appellant pled guilty or was convicted of the armed robbery relevant to this appeal. R. 12, l. 14 – 16, l. 3. Presumably, had the state tried Appellant for the second robbery, Appellant would have faced the possibility of life imprisonment represented by a defense attorney, who owed a duty to Appellant to take some action that could be detrimental to state witness, Stacey Rhodes. See Duncan, 281 S.C. 435, 315 S.E.2d 809.

Under these circumstances, Appellant's guilty plea could not have been freely, voluntarily, and intelligently made. Accordingly, the plea judge committed an abuse of discretion in refusing to allow Appellant to withdraw from the guilty plea and appoint new, conflict free counsel to represent him.

In light of the factors listed above that were overlooked and misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court grant rehearing, hold the plea judge abused his discretion by refusing to allow Appellant to withdraw from the guilty plea and appoint new, conflict free counsel to represent him, and reverse Appellant's convictions and sentence.

Respectfully Submitted,


LARA M. CAUDY
Appellate Defender

This 31st day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

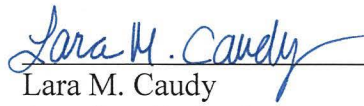
V.

FAVIAN A. HAYES,

APPELLANT

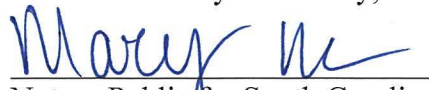
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Favian A. Hayes, #293544, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of January, 2018.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 31st day of January, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.

LME

The South Carolina Court of Appeals

The State, Respondent,

v.

Favian Alphonso Hayes, Appellant.

Appellate Case No. 2009-129706

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

<u>H B We</u>	J.
<u>Paul C. Thomas</u>	J.
<u>Stephanie P. McDonald</u>	J.

Columbia, South Carolina

cc:
John Harrison Strom, Esquire
Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
Ernest Adolphus Finney, III, Esquire

FILED

March 21, 2018

Lara Mary Caudy, Esquire *MPM*
The Honorable Howard P. King

RECEIVED

MAR 21 2018

APPELLATE DEFENSE

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
Honorable William Jeffrey Young, Circuit Court Judge

Opinion No. 2018-UP-025 (S.C. Ct. App. Filed 1/17/18)
2008-GS-43-00646

THE STATE,

RESPONDENT,

V.

FAVIAN A. HAYES,

PETITIONER

APPELLATE CASE NO 2009-129706

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H CARTER
Deputy Chief Appellate Defender

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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 The Court of Appeals erred in failing to address petitioner’s Sixth Amendment issue raised on appeal, which was properly preserved for appellate review, concerning the denial of his right to conflict free legal representation during his plea proceeding because counsel simultaneously represented petitioner **and** a potential state’s witness in the case who would have testified at petitioner’s trial had he opted to be tried by jury, and how this impacted the voluntariness of his guilty pleas.5

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was filed in the case on January 31, 2018, and denied by the Court of Appeals on March 21, 2018.

QUESTION PRESENTED

The Court of Appeals erred in failing to address petitioner's Sixth Amendment issue raised on appeal, which was properly preserved for appellate review, concerning the denial of his right to conflict free legal representation during his plea proceeding because counsel simultaneously represented petitioner **and** a potential state's witness in the case who would have testified at petitioner's trial had he opted to be tried by jury, and how this impacted the voluntariness of his guilty pleas.

STATEMENT OF THE CASE

In October of 2007, the Sumter County Grand Jury indicted petitioner for possession with intent to distribute (“PWID”) cocaine base and PWID cocaine base within one half mile of a school. In May of 2009, the Sumter County Grand Jury indicted petitioner, in an amended indictment, for armed robbery and criminal conspiracy. R. 72 - 73.

On June 1, 2009, petitioner appeared before the Honorable Howard P. King and pled guilty to one count of armed robbery, conspiracy, and the lesser included offense of possession of cocaine base, 2nd offense. David Sullivan (“defense counsel”) represented petitioner at the guilty plea. Assistant Solicitor Catherine Fant represented the State.

After denying petitioner’s motion to relieve defense counsel due to a conflict of interest, Judge King sentenced petitioner to a total sentence of thirty-five years of imprisonment. R. 56, ll. 22 – R. 57, ll. 14. Defense counsel filed a timely Notice of Appeal, however, defense counsel failed to submit an explanation pursuant to Rule 203(d)(1)(B)(iv) showing that there was an issue to be raised on direct appeal of the guilty plea.

On September 22, 2009, petitioner filed an application for post-conviction relief. The state filed a return on February 22, 2010. On March 23, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young.

Patrick Killen represented petitioner at the PCR hearing. In a written order signed May 16, 2012, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on May 29, 2012.

Petitioner filed a petition for writ of certiorari seeking review of the order of dismissal and was represented on appeal by Appellate Defender Katherine Hudgins. The state filed a return and was represented by Assistant Deputy Attorney General David Spencer.

The Supreme Court transferred the appeal to the South Carolina Court of Appeals. On July 3, 2014, the Court of Appeals denied certiorari. The Remittitur was issued on June 23, 2014.

On September 23, 2014, petitioner filed a petition for writ of *habeas corpus* with the United States District Court, District of South Carolina. The State filed a Return to the Rule to Show Cause issued by the Honorable Thomas E. Rogers, III, United States Magistrate Judge, in response to petitioner's petition. The State then filed a motion for summary judgment on January 28, 2015. On May 28, 2015, Magistrate Judge Rogers issued his Report and Recommendation that the State's motion for summary judgment be denied unless the State promptly allowed petitioner leave to appeal out of time and provided petitioner with the assistance of counsel and recommended the remainder of the claims be dismissed.

On June 17, 2015, the Honorable Richard Gergel, United States District Judge, entered a conditional order granting writ of *habeas corpus* and directing that the State restore petitioner's direct appeal rights. R. 58 - 59. On September 3, 2015, the South Carolina Supreme Court issued an order that the Court of Appeals recall the remittitur in petitioner's direct appeal and reinstate the appeal. R. 60 - 61.

On September 23, 2015, the Court of Appeals recalled the remittitur. R. 62. On December 2, 2015, Petitioner submitted an "Explanation of Appeal Pursuant to Rule 203(d)(1)(B)(iv), SCACR". R. 63 - 70. On June 16, 2016, the Court of Appeals informed petitioner and the state, via a signed letter from Deputy Clerk V. Claire Allen, that Petitioner's appeal was to proceed. R. 71. A Final Brief of Appellant was filed on May 31, 2017, by former Assistant Appellate Defender John Strom. Petitioner's convictions and sentences were affirmed on appeal on January 17, 2018, by the South Carolina Court of Appeals. See State v. Hayes, Unpublished Op. No. 2018-UP-025 (January 17, 2018). App. 1 - 3. A Petition for Rehearing

was filed by Assistant Appellate Defender Lara Caudy on January 31, 2018. App. 4-16. On March 21, 2018, the Court of Appeals issued an Order denying the Petition for Rehearing filed in the case. App. 17. This Petition for Writ of Certiorari requesting review of the Court of Appeals' decision issued in this case follows.

ARGUMENT

The Court of Appeals erred in failing to address petitioner's Sixth Amendment issue raised on appeal, which was properly preserved for appellate review, concerning the denial of his right to conflict free legal representation during his plea proceeding because counsel simultaneously represented petitioner and a potential state's witness in the case who would have testified at petitioner's trial had he opted to be tried by jury, and how this impacted the voluntariness of his guilty pleas.

FACTUAL BACKGROUND

During the plea colloquy, the court questioned the parties on whether petitioner understood that by pleading guilty to only one of the two armed robberies, he was exposing himself to a life sentence should the state decide to try him on the second robbery. R. 11, l. 1 - 13, l. 25. Plea counsel alleged that he had explained this possible outcome to petitioner. R. 14, ll. 15-23. The state averred that petitioner was pleading guilty to this specific armed robbery because the case had been called for trial that morning. R. 13, ll. 9-17. The State then added that it fully intended to try petitioner on the second armed robbery indictment in the coming months. *Id.*; R. 14, ll. 10-14.

Continuing with the plea hearing, the court asked petitioner if he was "pleading guilty of your own free will and accord?" R. 18, ll. 19-20. Petitioner responded that he was not and that he

was pleading guilty because he believed his attorney's conflicted and ineffectual representation rendered a guilty verdict at trial a foregone conclusion. R. 18, l. 21 - 19, l. 3.

Without receiving an affirmative answer, the trial court continued with the plea colloquy asking petitioner if he was satisfied with his lawyer's representation. R. 19, ll. 4-9. Petitioner stated that he was not satisfied and moved to relieve counsel. R. 19, l. 10 - 22, l. 1. Petitioner said that plea counsel had a conflict of interest arising from his simultaneous representation of an individual named Stacy Rhodes. *Id.*

Petitioner explained that Rhodes had been among of group of people he had been with after the two armed robberies he was accused of committing and that Rhodes was preparing to testify against him at trial. R. 23, ll. 2-10; R. 26, ll. 13-21. The state confirmed that following Petitioner's arrest, Rhodes was arrested for interfering with police arising from his conduct during the investigation into the robberies. R. 28, ll. 3-6. Petitioner's attorney was appointed to represent Rhodes. The State also admitted that Rhodes had offered to testify in petitioner's case and the state was seriously considering having him testify should there be a trial. *Id.* at ll. 6-22. She also admitted that Rhodes was "a possible witness in this case" and that she was "bringing him back [from the Department of Corrections where he was currently incarcerated] to testify" if Petitioner proceeded to trial. R. 27, ll. 6-21.

In fact, the state's recitation of the facts supporting the guilty plea made clear that Rhodes was going to be called as a witness. R. 35, l. 6 - 40, l. 19. The State averred that Petitioner's co-defendant, Brandon McFadden, lived near one of the robbed convenience stores and that police first came into contact with McFadden and petitioner on the day of the second robbery. *Id.* Detective Curtis Hodge of the Sumter Police Department spoke with the two as they were leaving McFadden's house only minutes after the robbery. *Id.*

Hodge was suspicious of McFadden and petitioner because they were sweating and in the area of the robbery, but did not detain them. After police reviewed the video surveillance footage, a detective who had arrested McFadden as juvenile identified McFadden as possibly being one of the two robbers. R. 36, ll. 16-25.

On August 2, 2007, two days after the second robbery, petitioner was riding in a friend's car that was pulled over. R. 37, ll. 1 - 22. Police searched petitioner and found an Advil bottle containing a small amount of cocaine base. *Id.* Police also found three hundred eighty-five dollars in cash and a key to a motel room at the Mount Vernon Inn in Sumter. *Id.*

Law enforcement then raided the Mount Vernon Inn room. When police forced open the door, four men attempted to flee the room, including Stacy Rhodes. R. 37, l. 21 - 40, l. 19. All four were arrested. Rhodes told police that petitioner and McFadden had let the others know about the room. Rhodes also informed police that petitioner and McFadden had recently come into "an excessive amount of money." *Id.* Police recovered a gun matching the description of the revolver used in the July 31st robbery in the motel room.

The motel room was rented by petitioner. *Id.* A disposable camera was also seized during the search of the motel room. Petitioner was not in any of the pictures, but the four men arrested at the motel room - including Rhodes - all told police that he had been with them. *Id.* When interrogated by police, McFadden admitted to committing the robbery with petitioner. Petitioner denied any involvement in the robbery, but stated that he was with McFadden on the night of the robbery. *Id.*

To complicate matters, during a meeting between plea counsel and Rhodes, Rhodes saw incriminating photographs of himself and petitioner. R. 19, l. 10 - 22, l. 22. Apparently, plea

counsel had inadvertently brought recently received discovery documents from petitioner's case to his meeting with Rhodes. *Id.*

Rhodes became upset, took the photographs from plea counsel and refused to return them. *Id.* Petitioner stated to the court that when Rhodes returned to pre-trial detention he still possessed some of the documents and was showing them to other inmates. *Id.* Plea counsel disputed this and claimed that he believed all of petitioner's discovery documents were recovered prior to Rhodes being returned to detention. *Id.*

Plea counsel posited that there was no conflict of interest. *Id.* Petitioner continued to argue that there was a conflict of interest and noted that he had unsuccessfully contacted the Chief Circuit Public Defender, the Chief County Public Defender, and the "Lawyer Conduct Board" in an effort to have his concerns with plea counsel addressed. R. 28, l. 16 - 39, l. 20.

The court rejected petitioner's efforts to have plea counsel relieved:

Well, this is not the time. The time to tell me right now is whether you're willing to advise me that you're satisfied with his representation of these, charges for armed robbery and this charges, and we're talking about the [first robbery] at this time and the charge of the drugs and if you're not, I can tell you this as far as his representation is concerned. ***He's representing you on these charges and he's also representing you on the [second robbery].*** You do not get your choice of public defenders. . . .

So, if you wish to withdraw your plea because you're not happy with Mr. Sullivan on this, don't think that's going to get you a new lawyer, because it's not. You don't have your choice of lawyers when it comes time to try the case. ***I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer.*** Is that, that's your call if you don't want to plead guilty, fine. I'm sure the State is ready to go forward. ***They got the other charges that they are going to call I think shortly and you can go to trial on this charge, this armed robbery, that is the [first] armed robbery, or you can go to trial and go to trial on the drug charges, you can go to trial on both of those and I have not accepted your plea yet and if you are not comfortable pleading guilty to these charges with Mr. Sullivan as your lawyer, now is the time to tell me and he'll stand you aside and***

Ms. Fant can call the case to trial and it can go before a jury. It's your call, which way you want to go?

R. 30, l. 16 - 32, l. 14 (*emphasis added*). Petitioner responded that, faced with those options, he would “go with the plea.” *Id.* The court reiterated that if petitioner wished to withdraw his plea, plea counsel would remain his lawyer and the trial would begin immediately. R. 32, l. 24 - 33, l. 3.

DIRECT APPEAL ISSUE

On direct appeal, petitioner raised defense counsel’s conflict of interest with the plea court prior to court accepting petitioner’s guilty plea. However, the court flatly refused to appoint petitioner a new, conflict free attorney or to delay petitioner’s trial. “You don’t have your choice of lawyers when it comes time to try the case. I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan’s going to be your lawyer.” R. 30, l. 16 - 32, l. 14. Once petitioner objected to being represented by defense counsel and established that defense counsel had an active of conflict interest due to his representation of Rhodes, the trial court should have allowed him to withdraw his guilty plea and ordered the appointment of conflict free counsel. The court’s failure to do so constitutes reversible error. Here, petitioner’s defense counsel had an active conflict of interest. Stacey Rhodes, who defense counsel also represented, was going to testify for the state against petitioner. R. 37, l. 21 - 40, l. 19. Rhodes’ interests were directly adverse to petitioner’s interests. The state anticipated that Rhodes was going to testify that Petitioner and McFadden had arranged for the motel room where Rhodes was arrested and that both men had “an excessive amount of money” in the days after the robbery. *Id.* While defense counsel stated that his representation of Rhodes had concluded with Rhodes’ guilty plea, the conflict of interest remained. The state made clear that it believed Rhodes may lie on the witness stand. *Id.* Thus, during petitioner’s trial, defense counsel might have had to advise Rhodes on his Fifth Amendment right to remain silent and on the

consequences of perjury in his capacity as Rhodes' attorney; while then having to cross-examine Rhodes when acting as petitioner's attorney.

COURT OF APPEALS' RULING

On January 17, 2018, this Court affirmed petitioner's convictions for armed robbery, conspiracy, and possession of cocaine base. State v. Petitioner, Op. No. 2018-UP-025 (S.C. Ct. App. filed January 17, 2018). This Court held petitioner's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel **based on a conflict of interest was unpreserved** because petitioner made a different argument on appeal than he made during the plea hearing.

PROCEDURAL ISSUE: ERROR PRESERVATION

Respectfully, this Court erred by holding petitioner's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on a conflict of interest is unpreserved. When the plea judge asked Petitioner whether he was "satisfied with the manner in which your lawyer has advised and represented you," Petitioner immediately asserted counsel had a conflict of interest and explained how he had only recently learned from Stacey Rhodes, an important witness for the state if Petitioner proceeded to trial, that *plea counsel also represented Rhodes*. R. 20, l. 8 – 21, l. 13. Petitioner complained about Rhodes obtaining a portion of his discovery materials from counsel, which only occurred because counsel simultaneously represented both petitioner and Rhodes. R. 20, l. 8 – 22, l. 1. *On at least three other occasions*, petitioner asserted plea counsel had a conflict of interest. R. 24, ll. 23-25; R. 25, ll. 4-6; R. 28, l. 7 – 29, l. 12. He also told the judge he wrote to the circuit public defender, the chief county public defender, and the "Lawyers Conduct Board" to complain about counsel's conflict of interest in an effort to have counsel relieved. R. 24, l. 25 – 25,

l. 17; R. 31, ll. 3-5. Petitioner also asked counsel before the plea hearing to move to be relieved as counsel, but counsel failed to do so. R. 25, ll. 11-12.

As seen, petitioner raised plea counsel's conflict of interest *repeatedly* with the plea judge prior to the judge accepting petitioner's guilty plea. However, the judge flatly refused to appoint petitioner a new, conflict free attorney or to delay petitioner's trial, which was scheduled to begin that day. R. 30, l. 16 – 32, l. 14. The judge asserted, "You don't have your choice of lawyers when it comes time to try the case. I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer." R. 31, l. 24 – 32, l. 2.

After taking a short break to consider petitioner's motion to relieve counsel and his argument that counsel had an actual conflict of interest, the plea judge found:

I find that the Defendant's [Petitioner's] decision to plead guilty after going very carefully with him on the record in this matter is freely and voluntarily given. That he has had the advice of counsel, with while has indicated some complaints about he readily admits to his guilt of this crime and does advise that Mr. Sullivan [plea counsel] has represented him and has been in touch with him about this matter. Specifically, I want to make the finding that there was no prejudice to the Defendant as a result of the situation where the photographs got into the hands of another individual. If I had thought that there was any prejudice resulted to this Defendant, as a result to that instance, my willingness to take this plea might have been different, but I can perceive of no way that that resulted in any prejudice to him and his counsel does not see any way that that resulted in any [prejudice] to him. **I also find that there was no conflict of interest. Mr. Rhodes, as far as this matter was concerned, was nothing more than a witness whom Mr. Sullivan [plea counsel] would have had the right to talk to, to learn what he knew about this matter and the fact that Mr. Sullivan represented him on a completely unrelated matter is no conflict of interest whatsoever and I could find that in my view that there was no conflict of interest. . .**

There's no question in my mind that the Defendant's [Petitioner's] decision to enter this plea as we have set forth is freely and voluntarily given. Another factor that convinces me of the fact - - of that fact, is the fact that he did not admit to the armed robbery at the Kangaroo store and I have not accepted that plea and have handed that back to the solicitor and that matter will go forward. **So there's no question in my mind** that after having been fully advised of his rights by me and his lawyer and being well represented by his appointed counsel **that the plea in this case is freely and voluntarily given and the Court is going to accept**

the plea with the stipulations that I have put on the record with regard to or the matter that I have put on the record with regard to . . . any prejudice arising out of the matter that he had discussed or **any conflict of interest is simply not there.**

R. 54, l. 5 – 56, l. 17 (emphasis added).

It is apparent from this ruling and from the colloquy that preceded it, that the plea judge understood the nature of petitioner's objection and his argument as to why counsel had a conflict of interest.

“Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review.” State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)). “Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.” Brannon, 388 S.C. at 502, 697 S.E.2d at 595-596 (citing Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939)) (emphasis added).

Petitioner unequivocally argued plea counsel had a conflict of interest and explained why and how counsel had a conflict. Petitioner clearly explained to the judge that counsel simultaneously represented both petitioner and an important witness for the state, who the solicitor confirmed was expected to testify against petitioner at trial. Consequently, petitioner fairly raised the issue to the plea judge, thereby giving the judge ample opportunity to rule on the issue as required. This is further evidenced by the plea judge's detailed finding that plea counsel did not have a conflict of interest and that petitioner's guilty plea was freely and voluntarily given. See R. 54, l. 5 – 56, l. 17

Therefore, this Court erred by holding petitioner's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on an actual conflict of interest was unpreserved.

SUBSTANTIVE ISSUES: CONFLICT OF INTEREST & INVOLUNTARY PLEAS

Once petitioner objected to being represented by plea counsel and established that plea counsel had an active of conflict interest due to his representation of Rhodes, the plea judge should have allowed him to withdraw his guilty plea and ordered the appointment of conflict free counsel. The judge's failure to do so constitutes reversible error.

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Faretta v. California, 422 U.S. 806, 807 (1975); See Gideon v. Wainwright, 372 U.S. 335, 339-340 (1963). “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” United States v. Cronin, 466 U.S. 648, 654 (1984) (internal citation omitted).

Inherent in the right to counsel is the right to conflict free counsel. While an indigent defendant is not entitled to counsel of his choice, the state and federal constitutions guarantees of equal protection of the laws means that an indigent defendant is entitled to conflict free representation. U.S. Const. Amend. XIV; S.C. Const. Art. I, § 3 and § 19.

Our Supreme Court has held that an actual conflict of interest occurs when an attorney owes a duty to a party whose interests are adverse to those of the defendant. Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (citing Zuck v. Alabama, 588 F.2d 436, 43 (5th Cir. 1979)). The interests of another client and the defendant are sufficiently adverse if it is shown the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. Id.; See Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995) (finding an actual conflict of interest where counsel convinced the solicitor that Edgemon's codefendants were less culpable).

Since trial judges typically will not proceed with a guilty plea when the defendant makes an objection, almost all of South Carolina's case law addressing when plea counsel's conflict of interest requires reversal arise out post-conviction relief actions. However, the logic sustaining these decisions applies with equal force to direct appeals when a timely objection has been lodged.

For example, in Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001), the Supreme Court held that an actual conflict of interest arose when the solicitor offered to dismiss the charges against one spouse if the other spouse pled guilty to possessing the entire amount of cocaine. Thomas v. State, *supra*. When the offer was extended, Thomas and her husband were represented by the same attorney. *Id.* at 142-143, 551 S.E.2d at 255. Unlike Petitioner, the spouses had previously waived any conflict of interest arising from their joint representation. *Id.* at 142, 551 S.E.2d at 255. However, the Court held, "At the moment the solicitor made the plea offer, [Thomas'] and [her husband's] interests became adverse to one another and counsel should have advised them accordingly." *Id.* at 144, 551 S.E.2d at 265. Unlike in Thomas, far from waiving the conflict of interest, Petitioner objected to the conflict and sought relief from the plea judge. R. 18, l. 19 – 32, l. 14. A non-indigent defendant could avoid the problem Petitioner faced by simply exercising his right to counsel of his choice. Cf: State v. Sanders, 341 S.C. 386, 390, 534 S.E.2d 696, 697-698 (2000) (defendant's right to counsel of his choosing is protected by the Sixth Amendment and courts "must balance the defendant's right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility.").

Here, petitioner's plea counsel had an active conflict of interest. Stacey Rhodes, who was also represented by counsel, was going to testify against Petitioner at trial. R. 27, ll. 17-21. Rhodes' interests were directly adverse to Petitioner's interests. The assistant solicitor expected Rhodes to testify that Petitioner and McFadden had arranged for the motel room where Rhodes was

arrested, that both men had “an excessive amount of money” in the days after the robbery, and that the brown revolver found in the motel room, which matched the description of the weapon used in the robbery, belonged to Petitioner. R. 37, l. 16 – 38, l. 8.

While plea counsel said his representation of Rhodes concluded with Rhodes’ guilty plea, the conflict of interest remained. The assistant solicitor admitted she believed Rhodes may lie on the witness stand when called to testify against Petitioner. R. 27, ll. 17-21. Consequently, during Petitioner’s trial, plea counsel likely would have had to advise Rhodes of his Fifth Amendment right to remain silent and of the consequences of perjury in his capacity as Rhodes’ attorney, while then having to cross examine Rhodes while acting as Petitioner’s attorney.

Instead, by virtue of his indigence, petitioner was faced with a Hobson’s choice between immediately proceeding to trial represented by an attorney with an active conflict of interest or pleading guilty while represented by an attorney with an active conflict of interest. Petitioner’s situation represents a total breakdown of the adversarial system bordering on the absurd. See State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996); see also Cronie, 466 U.S. at 654 (“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”).

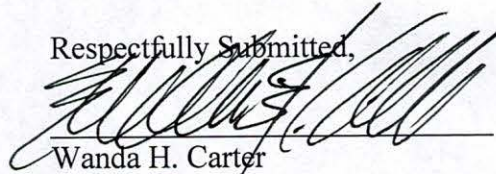
Even after pleading guilty, petitioner still faced charges arising out of a second armed robbery. R. 3, ll. 3-13; R. 12, l. 14 – 16, l. 3. The state intended to seek a sentence of life without parole for the second armed robbery if petitioner pled guilty or was convicted of the armed robbery relevant to this appeal. R. 12, l. 14 – 16, l. 3. Presumably, had the state tried Petitioner for the second robbery, petitioner would have faced the possibility of life imprisonment represented by a defense attorney, who owed a duty to petitioner to take some action that could be detrimental to state witness, Stacey Rhodes. See Duncan, 281 S.C. 435, 315 S.E.2d 809.

Under these circumstances, petitioner's guilty plea could not have been freely, voluntarily, and intelligently made. Accordingly, the plea judge committed an abuse of discretion in refusing to allow petitioner to withdraw from the guilty plea and appoint new, conflict free counsel to represent him. Petitioner's situation represents a total breakdown of the adversarial system bordering on the absurd. *State v. Boykin*, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996); *see also United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984) (“[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised Sixth Amendment violation.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR PETITIONER

This 18th day of April, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Sumter County
Honorable William Jeffrey Young, Circuit Court Judge
—————

Opinion No. 2018-UP-025 (S.C. Ct. App. filed 1/17/2018)
2008-GS-43-00646
—————

THE STATE,

RESPONDENT,

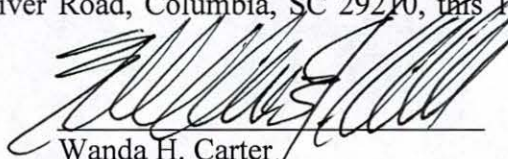
V.

FAVIAN A. HAYES,

PETITIONER

—————
CERTIFICATE OF SERVICE
—————

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Favian A. Hayes, #293544, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of April, 2018.

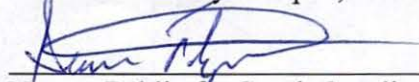


Wanda H. Carter
Deputy Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 18th day of April, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.

The Supreme Court of South Carolina

The State, Respondent,

v.

Favian Alphonso Hayes, Petitioner.

Appellate Case No. 2018-000715

Lower Court Case No. 2008-GS-43-00646

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY 
CLERK

James, J., not participating.

Columbia, South Carolina

May 24, 2018

cc:

Lara Mary Caudy, Esquire
Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
Ernest Adolphus Finney, III, Esquire
Wanda H. Carter, Esquire
The Honorable James C. Campbell
The Honorable Jenny Abbott Kitchings

RECEIVED

MAY 24 2018

APPELLATE DEFENSE

FORM 5
RECORDED

JAN 14 2019

STATE OF SOUTH CAROLINA

2019 JAN 14 PM 3:15

Referred to Paul PB
Answered _____

COUNTY OF Sumter

JAN 14 2019 CAMPBELL
CLERK OF COURT
SUMTER COUNTY S.C.

CERTIFIED TRUE COPY
OF ORIGINAL FILE

2017-CP-43-00023

William A. Hayes #293544
Full name and prison number (if any) of Applicant.

Barbara Harper
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

APPLICATION FOR

POST-CONVICTION RELIEF

v.

State of South Carolina

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McLaurin Corr Inst.
2. Name and location of Court which imposed sentence Sumter Co.
3. Name(s) of co-defendant(s) (if any) Brendon McFadden
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008 - CS - 43 - 0646 (Arm Robbery)
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) June 1, 2009 (25 yrs)
 - (b) _____

- (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____ ✓
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
 _____ *Yes* _____

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. *Court of Appeals*
 - ii. *S.C. Supreme Court*
 - iii. *Fed. Habeas Corp.*

- (b) the result in each such Court to which you appealed:
 - i. *L.D.A. (Dismissed)*
 - ii. *S.C. Supreme Court (Dismissed)*
 - iii. *Fed. Habeas Corp. (Related Appeal granted / U.S. Supreme Affirmed)*

- (c) the date of each such result:
 - i. *L.D.A. 10/09*
 - ii. *S.C. Supreme 6/14*
 - iii. *Fed Habeas Corp. 5/15 (Related Appeal granted)*

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. *Fed. Habeas Court found Guilty plea Attorney*
 - ii. *Ineffective for viol. State/Fed. Law.*
 - iii. *Granted related Appeal, Appointment of Counsel*

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____

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

- (a) Court of Appeals
- (b) Investigative Counsel on Appellate level
- (c) _____

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

- (a) United State District Court 4:14-cv-03778-RMB, ruled
- (b) that Neal/Gouldy aka Attorney, David F. Sullivan, Esq was
- (c) ineffective for violating state/fed. law; Appellant was granted belated appeal on
Such bases.

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

- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? Yes

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

- (a) the specific nature thereof:
 - i. Court of Common Plea (P.C.C.) 10/09; 6/12 writ denied;
 - ii. 5/15 Fed. Habeas Corp, granted belated appeal, App Counsel; 8/17
 - iii. oral argument granted; 12/17 oral argument Denied; 1/18
 - iv. pet. writ S.C. Supreme; 5/18 pet. S.C. Supreme Denied.
- (b) the name and location of the Court in which each was filed:
 - i. S.C. Supreme Court; Court of Appeal;
 - ii. Fed. Habeas Corp; L.O.A.; S.C. Supreme Court
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. P.C.C. (Court of Comm Plea), Dismissed; pet. filed S.C. Supreme
 - ii. Dismissed; Fed. Habeas Corp. (Granted Belated Appl. Appand Counsel. P.C.C.
 - iii. Granted oral argument; L.O.A. Denied oral argument; pet. filed

iv. S.C. Supreme; S.C. Supreme Court Denied.
 (d) the date of each such disposition:
 i. _____
 ii. _____
 iii. _____
 iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 i. _____
 ii. _____
 iii. _____
 iv. _____

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

 Yes!

15. If you answered "yes" to (14) identify:
 (a) which grounds have been presented:
 i. Ineffective Assist Appellate Level
 ii. ~~_____~~
 iii. 'Newly Discovered Evidence'
 (b) the proceedings in which each ground was raised:
 i. S.C. Supreme Court
 ii. C.D.A.
 iii. Fed. Heab. Corpus

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

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

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

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

- (a) the name and address of each attorney who represented you:
 - i. David F. Sullivan, Esq; Patrick Killen, Esq; Laura M. Laudy, Esq
 - ii. Wanda Carter, Esq; John Strom, Esq; Katherine H. Hudgins, Esq
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. David Sullivan (Guilty plea); Patrick Killen, Esq (P.C.R.); Laura Laudy, (C.O.A.);
 - ii. Katherine Hudgins (S.C. writ certiorari); John Strom (C.O.A.); Wanda
 - iii. Carter (S.C. Suprem)

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

Reverse & Remanded, New Trial!!!

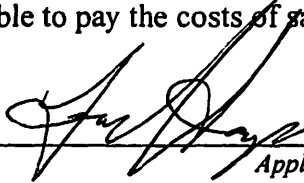
20. Are you now under sentence from any other court that you have not challenged?

N/A

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

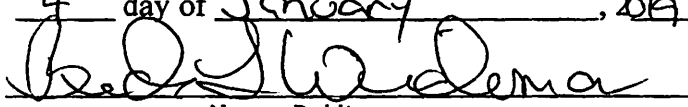
I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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



 Applicant

SWORN or affirmed to and subscribed before me this

4 day of January, 2019.


 Notary Public

My Commission Expires: 9.30.20

RECORDED
 2019 JAN - 8 PM 3:16
 JAMES C. CAMPBELL
 CLERK OF COURT
 SUMTER COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
County of)

VERIFICATION

I, , 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.



SWORN to and subscribed before me this 4
day of January, 2019.



Notary Public (L.S.)

My Commission Expires: 9-30-26

RECORDED
2019 JAN -8 PM 3:16
JAMES D. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
)	
Favian A. Hayes, #293544,	)	Case No.: 2019-CP-43-00023
Applicant,)	
)	
v.	)	RETURN, PARTIAL MOTION TO
State of South Carolina,	)	DISMISS, AND MOTION FOR A
Respondent.	)	MORE DEFINITE STATEMENT
_____)	

The State (Respondent), making its return to the application for post-conviction relief filed by Favian A. Hayes (Applicant) on January 8, 2019 and received by Respondent on January 14, 2019, would respectfully show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court.¹

On June 1, 2009, Applicant appeared in the Sumter County Court of General Sessions before the Honorable Howard P. King, circuit court judge, and pled guilty to possession of cocaine base-2nd offense (2007-GS-43-0801), criminal conspiracy (2008-GS-43-0646), and armed robbery (2008-GS-43-0646). Assistant Solicitor Catherine Fant of the Third Circuit Solicitor’s Office prosecuted the case. Assistant Public Defender David Sullivan represented Applicant. Judge King sentenced Applicant to imprisonment for five years for possession cocaine base-2nd offense, five years for criminal conspiracy, and twenty-five years for armed robbery, with all sentences to be served concurrently.

Applicant’s counsel filed a timely notice of appeal on Applicant’s behalf, but did not provide an explanation as required under Rule 203(d)(1)(B), SCACR either in his notice of

¹ Applicant is also serving sentences for threatening the life, person, or family of a public official (2010-GS-32-9932) and threatening to bomb (2010-GS-32-9986) arising out of Greenville County guilty pleas.

appeal or in response to letters from the South Carolina Court of Appeals. Accordingly, on September 3, 2009, the Court of Appeals issued an order dismissing Applicant's appeal. Applicant then filed a motion to reinstate his appeal and various other motions. By order dated October 15, 2009, the Court of Appeals denied Applicant's motion to reinstate his appeal. The remittitur was returned to the circuit court in November 17, 2009.

Applicant filed an application for post-conviction relief on September 22, 2009 (2009-CP-43-2206), alleging the following claims:

1. "Ineffective Assistance of Counsel/"Involuntary Guilty Plea"
 - a. "Failure to investigate possible defense..."
 - b. "Counsel gave defendant 'erroneous advice' to Client stating Client would receive a mandatory minimum 10 yrs. 'upon pleading.'"
2. "Conflict of Interest."
 - a. "Counsel represented another client that pertain to my Rule 5 & also has common knowledge of defendant case and was scheduled to testify against defendant."
3. "Judge Abuse of Discretion."
 - a. "Trial judge abuse his discretion by ignoring possible conflict of interest and not further inquiring."
4. "Ineffective of Assistance of Appellate Lawyer."

The State made its return, requesting an evidentiary hearing. An evidentiary hearing was convened on March 23, 2012, at the Sumter County Courthouse before the Honorable W. Jeffrey Young, circuit court judge. Applicant was present at the hearing and was represented by Patrick Killen, Esquire. Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Plea counsel Sullivan, investigator Christopher Hilditch, and co-defendant Brandon McFadden also testified. By written order signed May 16, 2012, and filed May 22, 2012, Judge Young denied and dismissed the application with prejudice.

Applicant then appealed the denial of his post-conviction relief action. (Appellate Case No. 2012-212175). Applicant was represented by Appellate Defender Kathrine H. Hudgins of

the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed a petition for writ of certiorari in the South Carolina Supreme Court raising the following allegation:

Did the PCR judge err in refusing to find counsel ineffective for failing to provide an explanation pursuant to Rule 203(d)(1)(B)(iv) showing that the plea judge's refusal to relieve counsel, based on a conflict of interest, was an issue that could be raised in a direct appeal of the guilty plea?

Respondent filed a return to the petition. Thereafter, the case was transferred to the South Carolina Court of Appeals. By Order dated July 3 2014, the Court of Appeals denied Applicant's petition for a writ of certiorari. The remittitur was returned to the circuit court on July 23, 2014.

Applicant then filed a habeas corpus petition in the United States District Court for the District of South Carolina (4:14-cv-03778-RMG), alleging the following grounds:

Ground one: Ineffective assistant of counsel

Supporting facts: Counsel David F. Sullivan, Esq., failed to investigate case; had counsel would of investigate he would found out that during an bond hearing that was conducted on 10-30-07, he would have known that lead Det. Rickburg in Robbery case stated in open court that eh victims in said case "couldn't identify, because assailants had their faces covered." Counsel could have used such trans [?] to "impeach" victim and/or Det. on cross-examination. [Ground continues, see attachment, p. 6 of Petition].

Ground two: "Conflict of Interest"

Supporting facts: David F. Sullivan, guilty plea counsel took appellate Brady motion and exposed contents of discovery to another one of his clients [?] was an potential witness for the State, one's Stacey Rhodes took several documents and photos from appellate discovery. Counsel motive - [See attachment, p. 7 of Petition].

Ground three: Involuntary guilty plea

Supporting facts: Counsel gave appellate erroneous advise to plead guilty to Robbery offense, stating that appellate was to receive an (10) year sentence same as codefendant Brandon McFadden, received, if appellate pleaded guilty. Appellate told Hon. Judge King, that coun. enlighten appellate that coun. advised him that he was to receive an (10) year sentence upon pleading. Appellate told Judge King the only reason he was pleading-[See attachment, Ground 3 page 4].

Ground four: Ineffective assistance of counsel on appellate law.

Supporting facts: Counsel David F. Sullivan, esq. filed Notice of Appeal on 6-1-09. Court of Appeals sent coun. an Notice, requesting an “written explanation,” for Appellate N.O.A., with an (14) day deadline, failure to do so would result in an Order of Dismissal, Rule 203 (d)(1)(B), on 7-23-09. Counsel failed to respond to Notice. On 8-13-09, C.O.A. sent another “Notice,” stating the same as first Notice. Counsel refused to respond to that correspondence as well. Instead sent Appellate an correspondence (11) days later out of the (14) day deadlines. [Ground continues, See attachment Ground 4, p. 11].

In response, the State filed a motion for summary judgment. On May 28, 2015, the Honorable Thomas E. Rogers, III, magistrate judge, issued a report and recommendation that the State’s motion for summary judgment be denied unless the State allowed Applicant leave to appeal his guilty plea conviction out of time and recommended the remaining claims be dismissed. The Honorable Richard Gergel, United States District Judge, entered a conditional order granting the writ of habeas corpus and directing the State to restore Applicant’s direct appeal rights.

In response to Judge Gergel’s order, on motion by the State, the South Carolina Supreme Court issued an order for the Court of Appeals to recall the remittitur in the direct appeal and reinstate the appeal. After the Court of Appeals recalled the remittitur, Applicant submitted an explanation pursuant to Rule 203 (d)(1)(B)(iv), SCACR. The Court of Appeals then ordered the appeal to proceed on June 16, 2016. Applicant, through Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense-Office of Appellate Defense filed a brief raising the following issue

The trial court abused its discretion in finding Hayes freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court’s acceptance of the guilty plea, the trial judge improperly denied Hayes’s motion to relieve counsel without conducting an adequate inquiry into Hayes’s complaint that counsel had an actual conflict of interest, due to his simultaneous representation of State’s witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

The Court of Appeals affirmed Applicant’s pleas and sentences by unpublished opinion. State v. Hayes, 2018-UP-025 (filed January 17, 2018), finding the issue was not preserved for appellate

review because Applicant argued different grounds to the plea court and conceded there was no conflict of interest when he and plea counsel were questioned by the plea court. Applicant then filed a petition for rehearing, which was denied by the Court of Appeals. Applicant then filed a petition for writ of certiorari to the South Carolina Supreme Court, which was denied on May 24, 2018. The remittitur was returned to the circuit court on May 30, 2018.

II. Factual Summary

On July 31, 2007, after 10:00 p.m., Petitioner and a co-defendant armed robbed Young's Market [convenience store] on Oswego Road in Sumter County. Petitioner and his co-defendant wore disguises, from the nose down, over their faces. Petitioner's co-defendant entered the store first with the handgun. The gun belonged to Petitioner. Petitioner came into the store after his co-defendant. Petitioner's co-defendant pointed the gun at the store clerk's head [Latasha Skinner] and demanded the store's money. The clerk was forced to give them the cash register money and to open the store safe. Petitioner emptied the store safe of its money. Petitioner and his co-defendant then fled the store with the store's money and went to a nearby house. The store clerk called the police. She was able to describe the two perpetrators, their clothing, and the gun that was used. Prior to trial, the clerk was shown a photo-graphic line-up, and she positively identified Petitioner as the second individual who entered the store and committed the armed robbery.

Petitioner and his co-defendant were arrested after a police investigation. Petitioner's co-defendant provided a statement which incriminated not only himself but also Petitioner in the armed robbery. Police also executed search warrants on Petitioner's home and that of his co-defendant where police found distinctive clothing in both locations worn by the perpetrators of the armed robbery and seen in the surveillance video of the convenience store. Police also found

where Petitioner had rented a motel room and partied with his co-defendant and friends after the armed robbery. Petitioner paid for the room for three days with cash costing several hundred dollars. Petitioner checked into the motel room shortly after the armed robbery and after being questioned by police near the crime scene. Police recovered photographs believed to have been taken by Petitioner with a disposable camera in the motel room that showed the gun used in the armed robbery and cash and drugs. Police also discovered where Petitioner deposited \$1,000 in a bank account the morning after the armed robbery, and Petitioner had no means of gainful employment at the time. Some of the young men who had been partying with Petitioner and his co-defendant informed police Petitioner and his co-defendant had excessive amounts of cash on their persons in the days following the robbery. During the investigation, Petitioner was arrested in possession of .76 grams of cocaine base/crack cocaine. The gun used in the armed robbery was also recovered by police. Petitioner would not admit to police to committing the armed robbery, but he did admit being with his co-defendant, McFadden, all night the night of the robbery. As previously stated, McFadden confessed to police and to Petitioner's involvement. McFadden told police he and Petitioner got \$4,000 from the robbery which they split. McFadden also implicated Petitioner as the other perpetrator at McFadden's guilty plea to the armed robbery. At his guilty plea, Petitioner admitted he was the taller perpetrator who emptied the store safe, but did not carry a weapon. Petitioner also apologized for committing the armed robbery of the convenience store.

III. Current Action, Allegations Raised, and Relief Requested

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

1. Conflict of Interest
2. Ineffective Assistance of Appellate Counsel

- a. “United States District Court 4:14-cv-03778-RMG ruled that trial/guilty plea attorney, David F. Sullivan, Esquire, was ineffective for violating state/fed. Law. Appellant was granted a belated appeal on that basis.

As requested relief, Applicant requests “Reverse and Remanded, New Trial!!!”

Attached to this amended return and incorporated by reference are the records of the Sumter County Clerk of Court regarding the subject convictions, the records from Applicant’s direct appeal (including 2009 dismissal pursuant to Rule 203 (d)(1)(B)(iv), SCACR and the re-opened appeal following Applicant’s federal habeas corpus action), the records for Applicant’s initial post-conviction relief action and the appeal of that action, the records from Applicant’s federal habeas corpus action, and Applicant’s records from the South Carolina Department of Corrections. Respondent reserves the right to further amend this Return upon receipt of any relevant materials.

IV. Response and Request for Summary Dismissal of Allegation of Conflict of Interest

Against Plea Counsel

Applicant asserts his allegation of conflict of interest should be summarily dismissed as barred as successive because this argument was raised in his initial post-conviction relief action and the doctrine of res judicata.

Initially, Respondent argues allegations against plea counsel’s performance must have been raised in his initial post-conviction relief action pursuant to S.C. Code § 17-27-90. As Applicant already had a fully adjudicated post-conviction relief action addressing plea counsel’s performance and enjoyed an appeal to review the dismissal of that action, he is barred from raising any claims against plea counsel’s performance, including a purported conflict of interest, now in this second post-conviction relief action.

In South Carolina, successive applications for post-conviction relief are disfavored and the burden rests firmly on an applicant to establish that any new ground raised in a subsequent application could not have been earlier raised in his or her previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised ... in the previous application.” Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. An applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

In Applicant’s case, his allegations against plea counsel’s performance must have been raised in his initial post-conviction relief action. Moreover, it is clear that his allegations pertaining to plea counsel’s purported conflict of interest were addressed in his prior post-conviction relief action and the appeal of that action, as well as addressed in his revived direct appeal. Accordingly, his current claims against plea counsel, including that a conflict of interest

existed, is successive and barred under S.C. Code Ann. § 17-27-90. Respondent requests summary dismissal of any and all allegations made against plea counsel's performance, including but not limited to the raised allegation of a conflict of interest.

Additionally, this allegation of a conflict of interest should be summarily dismissed based on the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). Applicant already adjudicated this claim in his prior post-conviction relief action, his appeal of that action, and on his revived direct appeal. In his revived direct appeal, the Court of Appeals expressly found Applicant conceded there was no conflict of interest when he and plea counsel were questioned by the plea court. Applicant then filed a petition for rehearing and a petition for writ of certiorari to the South Carolina Supreme Court challenging these findings, both of which were denied. Accordingly, as this issue was already raised and ruled upon many times, Applicant is barred from raising it again in this current action. Respondent requests summary dismissal based on the doctrine of res judicata.

V. Response to Allegations of Ineffective Assistance of Appellate Counsel

Applicant also claims he was provide ineffective assistance of appellate counsel. However, Applicant wholly fails to state with any specificity facts to support this vague allegations. Based on this, it is impossible for Respondent to discern how exactly Applicant believes counsel was ineffective. Accordingly, Respondent moves for Applicant, through his appointed counsel, to amend this allegation to include sufficient, specific facts to support his claim of ineffective assistance of counsel.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show appellate counsel's performance was deficient and he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine “whether appellate counsel failed to present significant and obvious issues on appeal.” Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test regarding either trial or appellate counsel. However, without specific allegations of ineffective assistance of counsel, it is impossible to respond to the claim of ineffective assistance of counsel. Accordingly, Respondent requests Applicant, through his appointed counsel, amends his application to include the specificity required to support an allegation of ineffective assistance of counsel.

VI. Motion for More Definite Statement

Applicant alleges he is being held in custody unlawfully based on vague allegations of ineffective assistance of appellate counsel. However, Applicant fails to set forth with specificity the facts and circumstances upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must “. . . specifically set forth the grounds upon which the application is based.” Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965).

Applicant has failed to state with any specificity the specific facts giving rise to these allegations. Additionally, this allegation is not supported by any other additional information in the application. Respondent moves pursuant to Rule 12(e), SCRPC, to require Applicant to provide a more definite statement of her allegations of ineffective assistance of counsel. The Uniform Post-Conviction Procedure Act requires applicants to “specifically set forth the grounds upon which the application is based.” S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Furthermore, Rule 8(a), SCRPC, requires all civil pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.” Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the application.

VII. Any Future Amendments and Invocation of Discovery Process

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

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

VIII. Response to Any and All Other Allegations

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

IX. Request for an Evidentiary Hearing

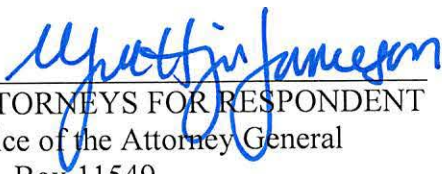
WHEREFORE, having made its return, Respondent moves to summarily dismiss the allegations pertaining conflict of interest pursuant S.C. Code Ann. § 17-27-70. As to the claim of

ineffective assistance of appellate counsel, Respondent requests applicant, through his counsel, amend the application to provide the required specificity for his allegation of ineffective assistance of counsel. Until Applicant files an amended application, Applicant has not shown sufficient cause to arrant an evidentiary hearing on this application and requests a hearing not be schedule until after an amended application is so filed.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211


March 18th, 2019

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)	
)	
	)	2018-CP-02-02395
)	
FAVIAN ALPHONSO HAYES, #293544,)	
)	
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, Partial Motion to Dismiss, and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Timothy L. Griffith, Esquire
Timothy L. Griffith, Attorney at Law
360 W. Wesmark Blvd., Second Floor
Sumter, South Carolina 29150

DATED this the 18th day of March 2019.


 Kaitlyn S. Slice, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)	
)	2019-CP-43-0023
Favian Hayes)	
Applicant,)	
)	AMENDED APPLICATION
v.)	
)	
STATE OF SOUTH CAROLINA,)	
Respondent.)	
)	

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended TO INCLUDE as follows:

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

(AS TO HIS PLEA AND PLEA ATTORNEY #1-4)

1. His attorney informed him that he would receive 10 years. He saw a recommendation in writing from the SOL that the rec would be 10 years. HIS ATTORNEY did not inform him that the Judge did not have to accept the recommendation.

Had he known that, he would not have plead guilty and would have gone to trial.

2. He did not get to see all of his discover and – HIS ATTORNEY did not go over the discovery with him.

3. His ATTORNEY Also represented a defendant that was set to testify against him were he to go to trial, and that defendant removed pictures from Mr. Hayes discovery packet. This represents a clear conflict.

4. HIS ATTORNEY did not investigate the case. There was no evidence linking Mr. Hayes to the crime (according to Mr. Hayes), and an investigation would have shown that.

(AS TO HIS APPEAL)

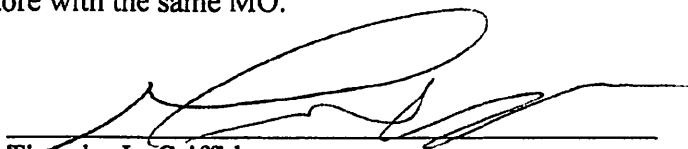
5. His first attorney was replaced when that attorney took a job in DC. He was later appointed an attorney that was pregnant at the time and who later was also replaced by a last minute attorney who did not have time to prepare for the appeal to be heard.

(OTHER ISSUES)

His PCR Judge was Judge Young, whose father had previously owned the store that was robbed, which Mr. Hayes believes was a conflict and prejudiced Judge Young in his case.

ALSO – (AS TO NEW EVIDENCE)

Mr. Hayes' co-defendant received 10 years (the recommendation by the SOL) while Mr. Hayes received 25. That same person was later released after serving his sentence, and (according to Mr. Hayes) robbed the same store with the same MO.

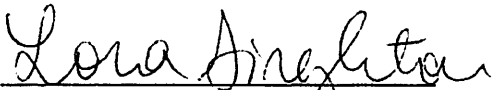


Timothy L. Griffith
Attorney for Applicant
2338 Mount Vernon Drive
Sumter SC 29154
803 499-2012
tlgriffith@tlgriffith.com

Sumter, South Carolina
This 25th day of February 2021

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)	
)	2019-CP-43-0023
Favian Hayes)	
Applicant,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
STATE OF SOUTH CAROLINA,)	
Respondent.)	
_____)	

I Lora Singleton, an employee for Timothy L. Griffith, Attorney at Law, Attorney for the Plaintiff in the above captioned case, do swear and affirm that I did cause the Amended Application for PCR to be served upon the State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. mail at Post Office Box 11549, Columbia, South Carolina 29211-1549 AND BY email to Ms. Schill of the AG office, this 25th day of February, 2021.


 Lora Singleton, Paralegal
 Notary for the State of SC

My commission expires April 9, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
)	
Favian A. Hayes, #293544,	)	Case No.: 2019-CP-43-00023
Applicant,)	
)	
v.	)	AMENDED RETURN AND PARTIAL
State of South Carolina,	)	MOTION TO DISMISS
Respondent.)	
_____)	

The State (Respondent), making its return to the application for post-conviction relief filed by Favian A. Hayes (Applicant) on January 8, 2019, and received by Respondent on January 14, 2019, would respectfully show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court.¹

On June 1, 2009, Applicant appeared in the Sumter County Court of General Sessions before the Honorable Howard P. King, circuit court judge, and pled guilty to possession of cocaine base-2nd offense (2007-GS-43-0801), criminal conspiracy (2008-GS-43-0646), and armed robbery (2008-GS-43-0646). Assistant Solicitor Catherine Fant of the Third Circuit Solicitor’s Office prosecuted the case. Assistant Public Defender David Sullivan represented Applicant. Judge King sentenced Applicant to imprisonment for five years for possession cocaine base-2nd offense, five years for criminal conspiracy, and twenty-five years for armed robbery, with all sentences to be served concurrently.

Applicant’s counsel filed a timely notice of appeal on Applicant’s behalf, but did not

¹ Applicant is also serving sentences for threatening the life, person, or family of a public official (2010-GS-32-9932) and threatening to bomb (2010-GS-32-9986) arising out of Greenville County guilty pleas.

provide an explanation as required under Rule 203(d)(1)(B), SCACR either in his notice of appeal or in response to letters from the South Carolina Court of Appeals. Accordingly, on September 3, 2009, the Court of Appeals issued an order dismissing Applicant's appeal. Applicant then filed a motion to reinstate his appeal and various other motions. By order dated October 15, 2009, the Court of Appeals denied Applicant's motion to reinstate his appeal. The remittitur was returned to the circuit court in November 17, 2009.

Applicant's First PCR Action: 2009-CP-43-2206

Applicant filed an application for post-conviction relief on September 22, 2009 (2009-CP-43-2206), alleging the following claims:

1. "Ineffective Assistance of Counsel/"Involuntary Guilty Plea"
 - a. "Failure to investigate possible defense..."
 - b. "Counsel gave defendant 'erroneous advice' to Client stating Client would receive a mandatory minimum 10 yrs. 'upon pleading.'"
2. "Conflict of Interest."
 - a. "Counsel represented another client that pertain to my Rule 5 & also has common knowledge of defendant case and was scheduled to testify against defendant."
3. "Judge Abuse of Discretion."
 - a. "Trial judge abuse his discretion by ignoring possible conflict of interest and not further inquiring."
4. "Ineffective of Assistance of Appellate Lawyer."

The State made its return, requesting an evidentiary hearing. An evidentiary hearing was convened on March 23, 2012, at the Sumter County Courthouse before the Honorable W. Jeffrey Young, circuit court judge. Applicant was present at the hearing and was represented by Patrick Killen, Esquire. Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Plea counsel Sullivan, investigator Christopher Hilditch, and co-defendant Brandon McFadden also testified. By written order signed May 16, 2012, and filed May 22, 2012, Judge Young denied and dismissed the application with prejudice.

Applicant then appealed the denial of his post-conviction relief action. (Appellate Case No. 2012-212175). Applicant was represented by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed a petition for writ of certiorari in the South Carolina Supreme Court raising the following allegation:

Did the PCR judge err in refusing to find counsel ineffective for failing to provide an explanation pursuant to Rule 203(d)(1)(B)(iv) showing that the plea judge's refusal to relieve counsel, based on a conflict of interest, was an issue that could be raised in a direct appeal of the guilty plea?

Respondent filed a return to the petition. Thereafter, the case was transferred to the South Carolina Court of Appeals. By Order dated July 3 2014, the Court of Appeals denied Applicant's petition for a writ of certiorari. The remittitur was returned to the circuit court on July 23, 2014.

Applicant's Second PCR Action: 2015-CP-43-653

On March 9, 2015, Applicant filed a second PCR application alleging "newly discovered evidence." Respondent subsequently filed a Return and Motion to Dismiss requesting the action be summarily dismissed as successive, untimely, and for failing to meet the newly discovered evidence standard. By Order signed April 6, 2015, and filed April 24, 2015, this Court conditionally dismissed Applicant's PCR application, while giving Applicant twenty days from the date of service to respond to the Conditional Order of Dismissal. Applicant subsequently filed a response to the Court's Conditional Order of Dismissal. After considering Applicant's response to the Conditional Order of Dismissal, this Court issued a Final Order of Dismissal, signed October 28, 2015, and filed November 5, 2015, denying and dismissing Applicant's second PCR application with prejudice.

Federal Habeas Petition: 4:14-cv-03778-RMG

Applicant also filed a habeas corpus petition in the United States District Court for the District of South Carolina (4:14-cv-03778-RMG), alleging the following grounds:

Ground one: Ineffective assistant of counsel

Supporting facts: Counsel David F. Sullivan, Esq., failed to investigate case; had counsel would of investigate he would found out that during an bond hearing that was conducted on 10-30-07, he would have known that lead Det. Rickburg in Robbery case stated in open court that eh victims in said case “couldn’t identify, because assailants had their faces covered.” Counsel could have used such trans [?] to “impeach” victim and/or Det. on cross-examination. [Ground continues, see attachment, p. 6 of Petition].

Ground two: “Conflict of Interest”

Supporting facts: David F. Sullivan, guilty plea counsel took appellate Brady motion and exposed contents of discovery to another one of his clients [?] was an potential witness for the State, one’s Stacey Rhodes took several documents and photos from appellate discovery. Counsel motive – [See attachment, p. 7 of Petition].

Ground three: Involuntary guilty plea

Supporting facts: Counsel gave appellate erroneous advise to plead guilty to Robbery offense, stating that appellate was to receive an (10) year sentence same as codefendant Brandon McFadden, received, if appellate pleaded guilty. Appellate told Hon. Judge King, that coun. enlighten appellate that coun. advised him that he was to receive an (10) year sentence upon pleading. Appellate told Judge King the only reason he was pleading-[See attachment, Ground 3 page 4].

Ground four: Ineffective assistance of counsel on appellate law.

Supporting facts: Counsel David F. Sullivan, esq. filed Notice of Appeal on 6-1-09. Court of Appeals sent coun. an Notice, requesting an “written explanation,” for Appellate N.O.A., with an (14) day deadline, failure to do so would result in an Order of Dismissal, Rule 203 (d)(1)(B), on 7-23-09. Counsel failed to respond to Notice. On 8-13-09, C.O.A. sent another “Notice,” stating the same as first Notice. Counsel refused to respond to that correspondence as well. Instead sent Appellate an correspondence (11) days later out of the (14) day deadlines. [Ground continues, See attachment Ground 4, p. 11].

In response, the State filed a motion for summary judgment. On May 28, 2015, the Honorable Thomas E. Rogers, III, magistrate judge, issued a report and recommendation that the State’s motion for summary judgment be denied unless the State allowed Applicant leave to appeal his guilty plea conviction out of time and recommended the remaining claims be dismissed. The Honorable Richard Gergel, United States District Judge, entered a conditional order granting the writ of habeas corpus and directing the State to restore Applicant’s direct appeal rights.

In response to Judge Gergel's order, on motion by the State, the South Carolina Supreme Court issued an order for the Court of Appeals to recall the remittitur in the direct appeal and reinstate the appeal. After the Court of Appeals recalled the remittitur, Applicant submitted an explanation pursuant to Rule 203 (d)(1)(B)(iv), SCACR. The Court of Appeals then ordered the appeal to proceed on June 16, 2016. Applicant, through Then-Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense-Office of Appellate Defense filed a brief raising the following issue

The trial court abused its discretion in finding Hayes freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court's acceptance of the guilty plea, the trial judge improperly denied Hayes's motion to relieve counsel without conducting an adequate inquiry into Hayes's complaint that counsel had an actual conflict of interest, due to his simultaneous representation of State's witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

The Court of Appeals affirmed Applicant's pleas and sentences by unpublished opinion. State v. Hayes, 2018-UP-025 (filed January 17, 2018), finding the issue was not preserved for appellate review because Applicant argued different grounds to the plea court and conceded there was no conflict of interest when he and plea counsel were questioned by the plea court. Applicant then filed a petition for rehearing, which was denied by the Court of Appeals. Applicant then filed a petition for writ of certiorari to the South Carolina Supreme Court, which was denied on May 24, 2018. The remittitur was returned to the circuit court on May 30, 2018.

II. Factual Summary

On July 31, 2007, after 10:00 p.m., Applicant and a co-defendant armed robbed Young's Market [convenience store] on Oswego Road in Sumter County. Applicant and his co-defendant wore disguises, from the nose down, over their faces. Applicant's co-defendant entered the store first with the handgun. The gun belonged to Applicant. Applicant came into the store after his co-

defendant. Applicant's co-defendant pointed the gun at the store clerk's head [Latasha Skinner] and demanded the store's money. The clerk was forced to give them the cash register money and to open the store safe. Applicant emptied the store safe of its money. Applicant and his co-defendant then fled the store with the store's money and went to a nearby house. The store clerk called the police. She was able to describe the two perpetrators, their clothing, and the gun that was used. Prior to trial, the clerk was shown a photo-graphic line-up, and she positively identified Applicant as the second individual who entered the store and committed the armed robbery.

Applicant and his co-defendant were arrested after a police investigation. Applicant's co-defendant provided a statement which incriminated not only himself but also Applicant in the armed robbery. Police also executed search warrants on Applicant's home and that of his co-defendant where police found distinctive clothing in both locations worn by the perpetrators of the armed robbery and seen in the surveillance video of the convenience store. Police also found where Applicant had rented a motel room and partied with his co-defendant and friends after the armed robbery. Applicant paid for the room for three days with cash costing several hundred dollars. Applicant checked into the motel room shortly after the armed robbery and after being questioned by police near the crime scene. Police recovered photographs believed to have been taken by Applicant with a disposable camera in the motel room that showed the gun used in the armed robbery and cash and drugs. Police also discovered where Applicant deposited \$1,000 in a bank account the morning after the armed robbery, and Applicant had no means of gainful employment at the time. Some of the young men who had been partying with Applicant and his co-defendant informed police Applicant and his co-defendant had excessive amounts of cash on their persons in the days following the robbery. During the investigation, Applicant was arrested in possession of .76 grams of cocaine base/crack cocaine. The gun used in the armed robbery was also recovered

by police. Applicant would not admit to committing the armed robbery, but he did admit being with his co-defendant, McFadden, all night the night of the robbery. As previously stated, McFadden confessed to police and to Applicant's involvement. McFadden told police he and Applicant got \$4,000 from the robbery which they split. McFadden also implicated Applicant as the other perpetrator at McFadden's guilty plea to the armed robbery. At his guilty plea, Applicant admitted he was the taller perpetrator who emptied the store safe, but did not carry a weapon. Applicant also apologized for committing the armed robbery of the convenience store.

III. Current Action, Allegations Raised, and Relief Requested

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

1. Conflict of Interest²
2. Ineffective Assistance of Appellate Counsel

As requested relief, Applicant requests "Reverse and Remanded, New Trial!!!"

On February 25, 2021, Applicant served upon Respondent an amended application alleging the following:

A. Ineffective Assistance of Plea Counsel:

1. "His attorney informed him that he would receive 10 years. He saw a recommendation in writing from the SOL that the rec would be ten years. HIS ATTORNEY did not inform him that the Judge did not have to accept the recommendation...Had he known that, he would not have plead guilty and would have gone to trial."
2. "He did no[t] get to see all of his discovery and – HIS ATTORNEY did not go over the discovery with him."
3. "His ATTORNEY Also represented a defendant that was set to testify against him were he to go to trial, and that defendant removed pictures from Mr. Hayes' discovery packet. This represents a clear conflict."

² This allegation pertains to an alleged conflict of interest of Applicant's plea counsel.

4. "HIS ATTORNEY did not investigate the case. There was no evidence linking Mr. Hayes to the crime (according to Mr. Hayes), and an investigation would have shown that."

B. Ineffective Assistance of Remand Appellate Counsel

5. "His first attorney was replaced when that attorney took a job in DC. HE was later appointed an attorney that was pregnant at the time and later was also replaced by a last minute attorney who did not have time to prepare for the appeal to be heard."

C. Alleged PCR Judge Conflict

6. "His PCR Judge was Judge Young, whose father had previously owned the store that was robbed, which Mr. Hayes believes was a conflict and prejudiced Judge Young in his case."

D. "Newly Discovered Evidence"

7. Mr. Hayes' co-defendant received 10 years (the recommendation by the SOL) while Mr. Hayes received 25. The same person was later released after serving his sentence, and (according to Mr. Hayes) robbed the same store with the same MO."

Attached to this amended return and incorporated by reference are the records of the Sumter County Clerk of Court regarding the subject convictions, the records from Applicant's direct appeal (including 2009 dismissal pursuant to Rule 203 (d)(1)(B)(iv), SCACR and the re-opened appeal following Applicant's federal habeas corpus action), the records for Applicant's initial post-conviction relief action and the appeal of that action, records pertaining to Applicant's second PCR action, the records from Applicant's federal habeas corpus action, and Applicant's records from the South Carolina Department of Corrections. Respondent reserves the right to further amend this Return upon receipt of any relevant materials.

IV. Response and Request for Summary Dismissal of Original Allegation of Conflict of Interest Against Plea Counsel, and Amended Allegations 1-4

Respondent renews its motion to dismiss as to Applicant's "Conflict of Interest" allegation from Applicant's original PCR application, and hereby incorporates the same defenses to amended allegations one through four alleging ineffective assistance of plea counsel. Respondent asserts these allegations should be summarily dismissed as successive because this argument was raised in his initial post-conviction relief action, barred by the doctrine of res judicata, and as untimely.

Successiveness

Initially, Respondent argues allegations against plea counsel's performance must have been raised in his initial post-conviction relief action pursuant to S.C. Code § 17-27-90. As Applicant already had a fully adjudicated post-conviction relief action addressing plea counsel's performance and enjoyed an appeal to review the dismissal of that action, he is barred from raising any claims against plea counsel's performance, including a purported conflict of interest, now in this successive post-conviction relief action.

In South Carolina, successive applications for post-conviction relief are disfavored and the burden rests firmly on an applicant to establish that any new ground raised in a subsequent application could not have been earlier raised in his or her previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised ... in the previous application.” Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. An applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

In Applicant’s case, his allegations against plea counsel’s performance must have been raised in his initial post-conviction relief action. Moreover, it is clear that many of these allegations of ineffective assistance of plea counsel were addressed in his prior post-conviction relief action. Accordingly, his current claims against plea counsel, including that a conflict of interest existed, is successive and barred under S.C. Code Ann. § 17-27-90. Respondent requests summary dismissal of any and all allegations made against plea counsel’s performance.

Res Judicata

Additionally, the allegations of ineffective assistance of plea counsel should be summarily dismissed based on the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). Applicant already adjudicated these claims in his prior post-conviction relief action, his appeal of that action, and/or on his revived direct appeal. Alternatively, these allegations could have been brought in his initial PCR action. With respect to his original conflict of interest allegation, in his

revived direct appeal, the Court of Appeals expressly found Applicant conceded there was no conflict of interest when he and plea counsel were questioned by the plea court. Applicant then filed a petition for rehearing and a petition for writ of certiorari to the South Carolina Supreme Court challenging these findings, both of which were denied. Accordingly, as this issue was already raised and ruled upon many times, Applicant is barred from raising it again in this current action. Respondent requests summary dismissal based on the doctrine of *res judicata*.

Statute of Limitations

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

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

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

In the present case, Applicant is alleging he is entitled to post-conviction relief based on various allegations of ineffective assistance of plea counsel. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Based on Peloquin, Applicant had until November 18, 2010, to timely file an application challenging his convictions based on such claims – which are not based on a change of law or statute and is not newly discovered evidence. The current application was not filed until 2019, well after the statutory filing period expired. Therefore, the application should be summarily dismissed as barred by the statute of limitations. Accordingly, this application is untimely pursuant to Section 17-27-45 and should be dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

For the aforementioned reasons, Applicant’s allegations of ineffective assistance of plea counsel should be summarily dismissed with prejudice.

V. Response to Applicant's Allegations of Ineffective Assistance of Appellate Counsel³

Applicant alleges his appellate counsel on remand was ineffective by way of a general claim of failure to prepare Applicant's case. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show appellate counsel's performance was deficient and he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test regarding appellate counsel. However, these allegations of ineffective assistance of appellate

³ This section addresses allegations pertaining to appellate counsel on remand, after the U.S. District Court of South Carolina reinstated Applicant's direct appeal rights following Applicant's Federal Writ of Habeas Corpus. Then-Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense-Office of Appellate Defense filed the brief on behalf of Applicant.

counsel probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI. Response and Request for Summary Dismissal of Amended Allegation 6

In his amended application, Applicant alleges his original PCR judge, Judge Young, had a conflict that prejudiced his PCR evidentiary hearing. Respondent submits this is not a cognizable claim for post-conviction relief. Moreover, Respondent further submits that any objection pertaining to Applicant's PCR judge should have been alleged and addressed at the time of his first PCR evidentiary hearing, as this allegation could have been discovered by Applicant at that time, and likewise, does not constitute newly discovered evidence. Finally, nevertheless, this allegation would be barred by the statute of limitations.

Pursuant to the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160, an applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

[*Emphasis supplied.*] S.C. Code Ann. § 17-27-20 (1976).

As mentioned above, Applicant's claim of an alleged conflict of the PCR judge is not a cognizable claim for post-conviction relief. Moreover, even if this could plausibly be construed as valid PCR claim, which it cannot, this allegation would still be barred by the statute of limitations as Applicant filed this application over seven years after his PCR evidentiary hearing. Accordingly, this allegation must be summarily dismissed with prejudice.

VII. Response and Request for Summary Dismissal of Amended Allegation 7

Finally, in his amended application, Applicant alleges "newly discovered evidence" in the form of information pertaining to his co-defendant's sentence and crimes subsequently allegedly committed by his co-defendant. Applicant's assertion that he should be granted post-conviction relief as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentence, is without merit and fails to make a prima facie claim of newly discovered evidence. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. State v. Rice, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that;

“(1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.”

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). The information pertaining to Applicant's co-defendant is not relevant or material to Applicant's guilt and does not constitute newly discovered evidence. Accordingly, Applicant has failed to make a *prima facie* showing of newly discovered evidence and he is not entitled to an evidentiary hearing in the matter. Accordingly, this allegation must be summarily dismissed with prejudice.

VIII. Any Future Amendments and Invocation of Discovery Process

Applicant must specify any claims he intends to raise at the evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. *Pro se* filings will not be considered at the PCR hearing.

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCF.

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

IX. Response to Any and All Other Allegations

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

X. Request for an Evidentiary Hearing


WHEREFORE, having made its amended return, Respondent moves to summarily dismiss all allegations pertaining ineffective assistance of plea counsel, “conflict of PCR judge”, and “newly discovered evidence.” As to the claim of ineffective assistance of appellate counsel as it pertains to Applicant’s direct appeal on remand, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BRIANNA L. SCHILL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

March 3, 2021

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)	
)	
	)	2019-CP-43-00023
)	
FAVIAN ALPHONZO HAYES, #293544,)	
)	
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 **Amended Return and Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Timothy L. Griffith, Esquire
Timothy L. Griffith, Attorney at Law
2338 Mount Vernon Drive
Sumter, South Carolina 29154

DATED this the 3rd day of March, 2021.


 Kaitlyn S. Slice, Legal Assistant
 For Respondent

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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF SUMTER

-----x

FAVIAN A. HAYES,)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)

Defendant.)

Transcript of Record
2019-CP-43-00023

-----x

March 11, 2021
Virtual Courtroom

B E F O R E:

The Honorable R. Kirk Griffin, Presiding Judge

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

Timothy L. Griffith, Esq.
Attorney for the Applicant

Brianna L. Schill, Esq.
Attorney for the Defendant/State

Transcribed by Bobbi Fisher, RPR, for DCRP, Digital
Courtroom Project

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I N D E X

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E X H I B I T S

(None.)

1 P R O C E E D I N G S

2 (Whereupon, the following proceedings commenced as follows:)

3 THE COURT: Before we get started with the procedural
4 history of the case, I do need to go over the video
5 conferencing questions with Mr. Hayes.

6 So, Mr. Hayes, if you'll raise your right hand for me,
7 please.

8 FAVIAN A. HAYES,

9 the defendant, after having been duly sworn, was examined and
10 testified to as follows:

11 THE COURT: And, Mr. Hayes, as you can see, we are
12 proposing to conduct your hearing this morning via video
13 conferencing. Do you consent to this hearing being held via
14 video conference?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: And do you likewise consent for all parties
17 who will appear before the Court this morning to appear via
18 video conference?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Thank you, Mr. Hayes. You may
21 put your hands down -- your hand down.

22 Ms. Schill, if you'll go ahead and put the caption on the
23 record and give me the procedural history of the case. And,
24 Ms. Schill, we can't hear you.

25 MS. SCHILL: Sorry about that; I was on mute.

1 Anyway, the procedural history is a little long, so bear
2 with me.

3 THE COURT: Yes, ma'am.

4 MS. SCHILL: This case is Favian Hayes versus the State
5 of South Carolina, Case No. 2019-CP-43-00023. Applicant is
6 presently confined in the South Carolina Department of
7 Corrections. June 1st, Applicant appeared in Sumter County
8 Court of General Sessions before the Honorable Howard P. King
9 and pled guilty to possession of cocaine base, second offense;
10 criminal conspiracy; and armed robbery. Assistant Solicitor,
11 Katherine Fant (ph) of the Third Circuit Solicitor's Office
12 prosecuted the case. Assistant public defender, David
13 Sullivan, represented Applicant.

14 Judge King sentenced Applicant to imprisonment for five
15 years for possession of cocaine base, second offense; five
16 years for criminal conspiracy; and 25 years for armed robbery,
17 with all sentences to run concurrently.

18 Applicant's counsel filed a timely notice of appeal on
19 Applicant's behalf but did not provide an explanation as
20 required under Rule 203(d)(1)(b)(4) of South Carolina
21 appellate court rules.

22 Accordingly, on September 3rd, 2009, the Court of Appeals
23 issued an order dismissing Applicant's appeal. Applicant then
24 filed a motion to reinstate his appeal on (indiscernible)
25 motions by order dated October 15th, 2009. The Court of

1 Appeals denied Applicant's motion to reinstate his appeal, and
2 the remittitur was sent on November 17th, 2009.

3 Applicant filed an application for postconviction relief
4 on September 22nd, 2009, alleging (indiscernible) claims,
5 ineffective assistance of counsel -- of plea
6 counsel/involuntary guilty plea, quote, conflict of interest,
7 quote, judge abuse of discretion, and also ineffective
8 assistance of appellate counsel.

9 The State made its return. An evidentiary hearing was
10 convened on March 23rd, 2012, before the Honorable W. Jeffrey
11 Young. Applicant was present at the hearing and represented
12 by Patrick Killen, Esquire, at the hearing. Applicant
13 testified on his own behalf, and plea counsel Sullivan,
14 investigator Christopher Hillditch (ph), and his co-defendant,
15 Braden (ph) McFadden also testified by written order filed May
16 22nd, 2012. Judge Young denied and dismissed the application
17 with prejudice.

18 He then filed a PCR appeal and was represented by
19 appellant defender Katherine V. Hudgins of the South Carolina
20 commission of -- on indigent defense, opposite of appellate
21 defense. He filed a PWC in South Carolina Supreme Court.
22 Respondent failed to return the petition. Thereafter, the
23 case was transferred to the South Carolina Court of Appeals by
24 order dated July 3rd, 2014. The Court of Appeals denied
25 Applicant's petition and a remittitur was sent on July 23rd,

1 2014.

2 And then on March -- or, excuse me, March 9th, 2015,
3 Applicant filed a second PCR application, alleging newly
4 discovered evidence by way of a fourth amendment -- alleged
5 fourth amendment violation. Respondent timely filed a return
6 to a motion to dismiss by order filed April 24th, 2015. This
7 Court conditionally dismissed Applicant's PCR application.

8 Applicant subsequently filed a response to the Court's
9 conditional order of dismissal. After considering Applicant's
10 response, this Court issued a final order of dismissal signed
11 October 20th, 2015, and filed it November 5th, 2015, denying
12 and dismissing the second PCR application with prejudice.

13 Applicant also filed a petition for habeas corpus in the
14 United States District Court for the District of South
15 Carolina, alleging four grounds. In response, the State filed
16 a motion for summary judgment on May 28th, 2015. The
17 Honorable Thomas E. Rogers, III, issued a report and
18 recommendation of the State's motion for summary judgment be
19 denied unless the State allowed Applicant leave to appeal his
20 (indiscernible) conviction out of time and recommended that
21 the remaining claims be dismissed. And the Honorable Richard
22 Gergel entered an order granting the writ of habeas corpus,
23 directing the State to restore Applicant's direct appeal
24 rights.

25 And then in response to Judge Gergel's order, a motion by

1 the State of South Carolina Supreme Court issued an order for
2 the Court of Appeals to recall the remittitur and on direct
3 appeal and reinstate the appeal. After the Court of Appeals
4 recalled the remittitur, Applicant submitted an application --
5 an explanation pursuant to Rule 203(d) (1) (b) (4) of the South
6 Carolina appellate court rules. The Court of Appeals then
7 ordered the appeal to proceed on June 16th, 2016.

8 Applicant, through an appellant defender, John H. Shilham
9 (ph) of the South Carolina Commission of Indigent Defense,
10 Office of Appellate Defense, filed a brief. The Court of
11 Appeals affirmed Applicant's pleas and sentences by
12 unpublished opinion.

13 Applicant then filed a petition for rehearing, which was
14 denied. And then Applicant filed a PODC to the South Carolina
15 Supreme Court, which was denied on May 24th, 2018. And the
16 remittitur was returned to the Court on May 30th, 2018.

17 And then Mr. Hayes filed this PCR action on January 8th,
18 2019. And then the State subsequently filed a return and
19 partial motion to dismiss. And then, in February of 2021, the
20 Applicant filed an amended application for postconviction
21 relief, alleging essentially four allegations of ineffective
22 assistance of plea counsel, one allegation of ineffective
23 assistance of appellate counsel as it pertains to his
24 restorative direct appeal, and then, quote, other issue with
25 regard to the PCR judge and also, quote, new evidence.

1 The State filed an amended return and partial motion to
2 dismiss, Your Honor, and the Applicant's present today and
3 represented by Mr. Timothy L. Griffith. It's the State's
4 understanding and intention to go forward only on this
5 allegation by his amended application, which is the
6 ineffective assistance of appellate counsel as it pertains to
7 the restored direct appeal, as his other allegations are
8 procedurally barred, Your Honor.

9 So I can go into further detail on that if you'd like
10 or...

11 THE COURT: Yeah, and just so everybody is clear, the
12 issues with regard to trial counsel raised in the most recent
13 PCR application, those matters have already been ruled on in
14 prior PCR orders. That's correct?

15 MS. SCHILL: Yes, Your Honor, that's my understanding.

16 THE COURT: And, Mr. Griffith, what is your intention
17 with regard to the issues before the Court? It appears to me
18 that the ineffective assistance of appellate counsel is the
19 only issue raised in the most recent PCR application that has
20 not been addressed. Is that your understanding as well?

21 MR. GRIFFITH: It is, Your Honor; however, if I may
22 elaborate just a little bit, Mr. Hayes would like to briefly
23 cover the issues of his first PCRs in the trial courts because
24 those issues would be a part of any appeal that he may be
25 granted to present so the underlying issues denied at the

1 first PCR have a direct bearing as to whether or not the PCR,
2 as to appeal, should be granted, if the Court finds merit to
3 grant the PCR. Therefore, he would ask that the issues that
4 needs to be read into the record, basically, so that they can
5 be a part of the decision-making process, Your Honor.

6 THE COURT: Well, I mean, I'll let him kind of set the
7 background for what happened, and of course the PCR -- or,
8 excuse me, the plea transcript is a part of the record in this
9 matter, but I'll give him -- I'll give you and Mr. Hayes some
10 leeway in sort of setting the stage for where we are today,
11 but I would think it's -- based on my review of the packet
12 that's been sent to me, those issues have been ruled on, and I
13 don't believe that I have jurisdiction to hear or make a
14 determination on the ineffectiveness or effectiveness of his
15 plea counsel, but he can kind of go into some background as --
16 on direct examination. But the only issue that will be before
17 the Court in terms of this most recent application is the
18 performance of appellate counsel.

19 MR. GRIFFITH: Yes, Your Honor, I agree and I understand.
20 Thank you, Your Honor.

21 MS. SCHILL: Your Honor, real quick, just so it's clear
22 on the record, I only mainly discussed his ineffective
23 assistance of PCR -- or, I'm sorry, ineffective assistance of
24 plea counsel claims, but there were the other two at the end,
25 the State also contends are procedurally barred and not -- the

1 PCR Court today cannot go forward on. So I just wanted to
2 make that clear. The PCR judge issue and then there was an
3 alleged newly discovered evidence that isn't newly discovered
4 evidence, so...

5 THE COURT: I understand, Ms. Schill.

6 MS. SCHILL: Okay. Thank you.

7 THE COURT: If we get -- if we get into irrelevant issues
8 of -- or things that you may feel are irrelevant or
9 procedurally barred, just make an objection and we'll take
10 those as they come.

11 MS. SCHILL: Thank you.

12 THE COURT: Mr. Griffith, if you'll call your first
13 witness, please.

14 MR. GRIFFITH: Thank you, Your Honor. If it please the
15 Court, I would call Mr. Favian Hayes.

16 THE COURT: All right. Mr. Hayes, answer any questions
17 that Mr. Griffith may have for you. Remember that you are
18 still under oath.

19 THE DEFENDANT: Yes, sir.

20 FAVIAN HAYES,

21 the defendant, after having been previously duly sworn, was
22 examined and testified to as follows:

23 DIRECT EXAMINATION

24 BY MR. GRIFFITH:

25 Q Mr. Hayes, can you hear me okay?

1 **A** Yes, sir, I can hear you.

2 **Q** Okay. And where are you incarcerated now?

3 **A** Lee Corrections.

4 **Q** And how long have you been incarcerated altogether on
5 this charge?

6 **A** Almost maybe 14 years. I did (indiscernible).
7 Ultimately, 14 years.

8 **Q** Okay. And as far as your incarceration, you did have a
9 PCR already, which was denied as to your trial, but you're now
10 working with another PCR based on your appeal counsel. And
11 you and I have talked about this a bit but I just wanted to
12 read into the record and have you confirm, if you would, the
13 underlying issues that got you to that -- the place where we
14 are now.

15 So your attorney informed you that you would receive ten
16 years, and you saw the recommendation in writing from the
17 solicitor that the recommendation be ten years but your
18 attorney didn't inform you that the judge didn't have to
19 accept the recommendation, and had you known that, you would
20 not have pled guilty.

21 MS. SCHILL: Your Honor, sorry. For the record, I think
22 I should just object.

23 THE COURT: I understand. And your objection is noted.
24 I'm going to give him some leeway with regard to making his
25 point for the PCR, but I understand your objection. I'm going

1 to give him a little leeway to get into the procedural
2 history.

3 Mr. Griffith, just remember the issues that are -- or the
4 issue that's before the Court.

5 MR. GRIFFITH: Yes, Your Honor. Just wanted to get it
6 into the record. He claims, of course --

7 BY MR. GRIFFITH:

8 Q Mr. Hayes, you claim that you never saw all of your
9 discovery and your attorney didn't go over with it with you.
10 Did you claim a conflict of interest with your attorney
11 representing one of your [background
12 announcement/interruption]?

13 That must be, like, a speaker.

14 THE COURT: It's apparently a speaker that is in the room
15 where he is. We'll just have to -- this is one of the
16 challenges of video conferencing, so we'll just have to deal
17 with those interruptions as they come.

18 BY MR. GRIFFITH:

19 Q And so you're also claiming the claim that your attorney
20 had a conflict of interest because he represented someone who
21 was supposed to testify against you in your trial and that
22 you --

23 MS. SCHILL: For the record -- I'm sorry. For the
24 record, I object.

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

1 Mr. Griffith, as I stated before, you know, I don't mind
2 a brief recitation of how we got to where we are, but those
3 matters are all included in the prior PCR applications, and
4 Judge King covered the conflict of interest matter in great
5 detail in the plea. So all of that stuff is before the
6 record, so if we could kind of hit the highlights and move to
7 the issue that is before the Court this morning.

8 MR. GRIFFITH: Yes, Your Honor. The last one just had to
9 do with the attorney not doing an investigation.

10 THE COURT: Yes, sir.

11 BY MR. GRIFFITH:

12 **Q** Now, Mr. Hayes, we're right here at the reason we're here
13 for the appeal process. Mr. Strom represented you initially
14 in your appeal; isn't that correct?

15 **A** Yes, he did.

16 **Q** Okay. And then why don't you tell the Court what
17 happened with him.

18 **A** (Indiscernible) 15 and I was read -- I was ready to
19 leave --

20 **Q** Mr. Hayes, I can't understand what you're saying. Can
21 you move closer to the computer?

22 **A** Can you hear?

23 THE COURT: Yes, sir.

24 BY MR. GRIFFITH:

25 **Q** That's better.

1 **A** Okay. Like around late 2015, (indiscernible) relieved on
2 grounds of -- that a lawyer -- he didn't meet constitutional
3 standards by him not (indiscernible) interview. They granted
4 him leave of appeal, appointed me counsel, and sent it back to
5 the Court of Appeals being that (indiscernible) fair chance
6 for appeal.

7 They appointed Mr. Strom here around, like, I believe
8 like the following year or beginning of that year. I was at
9 another institution at Lee Corrections and, you know, we was
10 conversing back and forth, corresponding in regards to my case
11 of what -- how -- about certain issues. And he wrote me while
12 (indiscernible). I have the paperwork here, the letter, and
13 he explained to me -- he was like, you know what I'm saying,
14 like three out of five judges are court judges from the Court
15 of Appeals was interested in hearing your case and wanted to
16 grant you oral argument. Okay. That's positive. That's
17 great.

18 Two or three weeks later, I got a notice from appellate
19 defense that whether Josh Strom was (indiscernible) over my
20 case that he took July (indiscernible). And your new attorney
21 will be contacting you.

22 So a few months went by. I got notification or
23 correspondence from Laurie Caudy saying that she was my
24 attorney of record. For now, she'll take over Mr. Strom's
25 practice.

1 At the time, Ms. -- she was pregnant. She was about to
2 go on, I think, maternal leave. She didn't really have too
3 much experience. She was, like, 30 years old. So it seemed
4 like that, when Mr. Strom left or went to another job, my case
5 got in a hot potato -- a hot potato thing because it went from
6 her, Ms. Caudy, and then she go on maternal leave till Wanda
7 Carter. Then, all of a sudden, you know, quote,
8 (indiscernible) wasn't interested in any of my case at all.
9 He filed an appeal. He denied it. He didn't even back it on
10 a PCR.

11 But that was one of the grounds on my ineffective
12 assistance of counsel due to the fact that, you know, I really
13 didn't have no adequate communications with her because, as
14 soon as she got appointed to my case, she went straight on
15 maternal leave. And Wanda Carter, her position where she had
16 to appeal it against, that counsel just wasn't inside because
17 (indiscernible) Constitution, I feel as though.

18 But the thing about -- the thing about the new discovery
19 was this right here, man, with Mr. (Indiscernible). I never
20 received my discovery --

21 MS. SCHILL: I'm going to object for the record, Your
22 Honor.

23 **A** Okay. I never received my discovery at all --

24 THE COURT: Hold on, Mr. Hayes. Hold on one second.

25 Ms. Schill, I note your objection. I'm going to allow

1 him to assert what he believes to be newly discovered
2 evidence, so I'm going to overrule that objection.

3 Mr. Hayes, you can testify as to what you believe is
4 newly discovered evidence which would be relevant in this
5 matter and certainly it will be up to the Court to determine
6 whether what you feel is newly discovered evidence has been
7 ruled on in prior PCR applications. So you can testify about
8 it. Go ahead.

9 **A** All right. Thank you, sir.

10 I didn't receive my discovery, I think, like two years.
11 I never received my discovery. We had other individuals in my
12 case. They were, like, (indiscernible) from the first date,
13 etc., etc. One day, my lawyer went to the courthouse --
14 excuse me, one day, my lawyer was in the courthouse. He had
15 another individual named Stacy Rhodes. He had an unrelated
16 case, but however, (indiscernible) that when he was in the
17 attorney-client room, the Solicitor gave (indiscernible), gave
18 my attorney, David Sullivan, my discovery in the hallway. He
19 took it in the room -- the (indiscernible) room with this
20 Stacy Rhodes. The individual, I guess he was showing him or
21 whatever. However it seems, he took pictures and documents
22 out of my discovery, goes on back, has them on the floor,
23 (indiscernible), stuffed some in his pants. I knew nothing
24 about it (indiscernible) him in court -- me and him was in the
25 court on the same day. He came back to the county jail, and

1 he was showing them around to everyone who was in
2 (indiscernible) tour. That's how I found out about it. I
3 didn't even have discovery of that date.

4 So, therefore, the very next day when I went up to there,
5 he called me to the courthouse in regards to the plea, and I
6 asked him about it. He said that, you know, he got them back
7 and when he get up there, he going to give it to me. And he
8 basically, like, brushed it off. So, you know, all those
9 (indiscernible), I brought them to Judge King's recognition in
10 regards of potential conflict, in regards of the ten years or
11 50 years. It was assault with two charges -- excuse me, two
12 armed robbery, two criminal conspiracies. The plea deal was
13 they was going to drop the armed robbery, drop the conspiracy,
14 ten-year maximum (indiscernible). That's what my attorney
15 told me. I told -- my co-defendant had got -- he found out
16 two weeks prior. Once he got his ten years, and then I went
17 up, and then I was supposed to get mine.

18 When I went in there, Judge King told me that that's not
19 (indiscernible) statement. That's just your lawyer telling
20 you what you might get. Well, if my lawyer is to get me
21 advice, then I was going on the advice of my lawyer
22 (indiscernible), (indiscernible) the law, and I don't know
23 what's going on so I'm relying on his effectiveness.

24 THE COURT: Mr. Hayes, this -- Mr. Hayes, I don't -- I'm
25 not trying to limit your ability to testify in any respect,

1 but all of these matters are included. I have read the
2 transcript of your guilty plea, Mr. Hayes, and all of these
3 matters were discussed at length in front of Judge King on the
4 day that you entered your guilty plea. So what I'm trying to
5 tell you is all of these issues are already included in your
6 record so I struggle to see how any of this is newly
7 discovered when there is a lengthy record that's been made of
8 these issues.

9 So if you have got any -- and maybe Mr. Griffith could
10 ask you some questions which might lead you towards anything
11 that would be considered newly discovered, but those matters
12 have already been addressed and are certainly a part of your
13 record in this matter.

14 So Mr. Griffith, if you have got some more questions for
15 Mr. Hayes, I think that would get us moving in the right
16 direction.

17 BY MR. GRIFFITH:

18 Q Mr. Hayes, first let me have kind of get headed in the
19 right direction for the Court. We want the Court to
20 understand what you're doing. We want him to understand
21 what's going on but help me -- let me help you guide you a
22 little bit.

23 Now, you and I talked about this, and you told me that
24 there were some things that you discovered after your plea
25 that were not mentioned in your previous PCR, and one of the

1 things that you discovered was something about your
2 co-defendant. And what was that?

3 **A** I was getting to that. What -- this is what I discovered
4 happened. Like I stated, I never received my discovery.
5 After I went to my PCR, I got my case file. Upon searching my
6 case file, that's when I came across the actual -- not just me
7 roughly speaking that "Well, this is what my lawyer told me."
8 This right here is documentation from the Solicitor's Office
9 on a plea agreement -- on the plea engagement where the
10 Defendant, Favian Hayes, Solicitor Katherine (indiscernible),
11 defense attorney, David Sullivan, on the pending charges of
12 armed robbery co-conspiracy, (indiscernible) cocaine
13 (indiscernible). Pleading to all the negotiations and they
14 was going to drop the Kangaroo, plea to the ten years, five
15 years running concurrent with the criminal conspiracy, all in
16 the hole.

17 This was signed and that -- by the Solicitor's Office,
18 but I didn't have -- I didn't have this at the time. I
19 received these documentations after I got the case file or
20 after my first PCR in March of 2012.

21 **Q** Okay. So that was known and could have been presented at
22 your first trial. What we need to know -- what I'd like you
23 to tell us is you told me something about your co-defendant
24 that you discovered after he was released. What's going on
25 with that?

1 **A** My co-defendant maxed out in 2016. (Indiscernible) since
2 then. 2007. I was speaking to my sister one day, and she
3 said she got a call from his sister and saying that -- that --
4 I believe they work in the same environment. But, however, he
5 had gotten locked up and charged and now convicted on the same
6 (indiscernible), the same (indiscernible), the same race, same
7 MO.

8 So my thing is this right here that you -- they go in
9 there, we go all the way back to the investigation of our
10 first, you know, (indiscernible) years like they were saying
11 that I was the one convicted of some things, I was convicted
12 of this; however, but that individual that went back out did
13 the same thing but they're saying that I was the one convicted
14 of it. That was discovered after.

15 **Q** I got you. Now, as far as your appeal, were you happy
16 with Mr. Strom's representation when he was representing --

17 **A** Mr. Strom? Mr. Strom -- this Mr. Strom?

18 **Q** Yes.

19 THE COURT: Mr. Strom is present.

20 **A** I was until I never spoke to him. I wanted to tell him
21 that I appreciated the representation because you very, very
22 seldom have pro bono attorney that will put a full extent or
23 interest in your case other than that he was getting paid.
24 And when he was representing me, our communication was
25 adequate. He was consistent on what he was doing. He was

1 filing the motions. He was doing what he was supposed to be
2 doing. And once he got me the understanding that the Court of
3 Appeals was interested in hearing my case through oral
4 argument, that was like a breath of fresh air.

5 And then, all of a sudden, he left, and my case started
6 going into a hot potato process.

7 **Q** So after your representation by Mr. Strom, you told the
8 Court -- you testified that Ms. Carter -- attorney Wanda
9 Carter -- was appointed to your case. Isn't that correct?

10 **A** Yes, sir.

11 **Q** And so did you communicate with her?

12 **A** I ain't talk to her on the phone. She wrote me once to
13 let me know that she's taking over the case when Laurie Caudy
14 won't because she's on maternal leave. And she wrote me
15 again, basically telling me that she filed an appeal, she
16 already got it processed. And the last time I was responded
17 to her or got any kind of communication with her was she told
18 me that my appeal was denied.

19 **Q** Okay. So after Ms. Caudy was appointed, when she left to
20 go on maternity leave, were you appointed a different
21 attorney, a new one?

22 **A** After -- after Ms. Caudy?

23 **Q** Yes, sir.

24 **A** Yeah, that's Ms. Wanda Carter. She took over. And you
25 know her title is, like, deputy chief of public defenders, so

1 she got a lot of -- she got a lot of (indiscernible) my job
2 description, so I know, like, my case ain't going to get her
3 full attention, represented to the best of the extent as is
4 Mr. Strom did. So, you know...

5 **Q** And so how do you -- can you kind of explain how you feel
6 that your case was not handled properly after Mr. Strom left
7 and you got your new attorney?

8 **A** Say that first part again, sir.

9 **Q** Well, I want you to tell the Court, I want you to
10 elaborate on what you believed was the ineffective -- you
11 know, what didn't work for you or your attorney after
12 Mr. Strom left, your new attorney, how come you feel that that
13 was an ineffective representation?

14 **A** I feel as though the communication -- communication was
15 poor. It was like -- it was like a one-sidedness. Well, this
16 is what we're going to do, and I just go what happened. I
17 write letters, called him. Can't get in contact with him.
18 Phone going to voicemail. I'm writing letters. No
19 communication.

20 So the last time I spoke with him, like, maybe denied and
21 that's it. It was no interest. The lack of interest in my
22 case, once they had it, it wasn't -- it wasn't to the extent
23 that Mr. Strom was initially before he had left.

24 I believe if he was still on my case or any respective
25 attorney that showed any type of interest in my case or was on

1 my case, I don't think would have been -- we would have been
2 here today.

3 **Q** All right. Can you tell us anything else about why you
4 feel that your appeals case was denied because of ineffective
5 counsel? Can you tell us anything more about that?

6 **A** Well, yes, sir. Well, furthermore, we're here because I
7 was granted, I believe, (indiscernible) because I was
8 (indiscernible) the appeal (indiscernible). But you also got
9 to look at the grounds and the reasons that was raised and the
10 grounds on why I was granted leave for the appeal. See, the
11 same grounds that I raised in my first PCR in regards to
12 ineffective assistance of counsel, if they had to acknowledge
13 what their aids had acknowledged when (indiscernible), we
14 wouldn't have been here today.

15 See, they -- what they did was they said my attorney feel
16 and me constituting the standards because he didn't meet -- he
17 didn't file an amicus brief. So if he didn't be constituting
18 the standards, that means what? He's ineffective. So if he's
19 ineffective, then I shouldn't have to go through years and
20 years and years and years to get to a certain stage and a
21 (indiscernible) just to see the proper relief that I'm
22 entitled to have by law -- entitled to have by law.

23 And upon my further research after my hearing in 2012 was
24 I discovered some things in regards to my hearing. See, I'm
25 not going to go into too much time but just for

1 (indiscernible), I was accused of committing larceny against a
2 company in the county of Sumter County, which is Jones Food
3 Market. Upon further research -- and I have the documentation
4 showing proof that Judge Young and the family wants --
5 (indiscernible).

6 MS. MOORE: Your Honor, I'm going to object for the
7 record.

8 THE COURT: Mr. Griffith, this is outside the scope of
9 the matter before the Court. The conflict -- any potential
10 conflict with regard to whether or not Judge Young's family --
11 whether or not Judge Young had any bias based on his family's
12 prior ownership of that -- of that corporate entity is not
13 relevant to ineffective assistance of appellate counsel.

14 MR. GRIFFITH: Yes, Your Honor. Thank you.

15 BY MR. GRIFFITH:

16 **Q** Mr. Hayes, what I'm trying to get you to focus on and try
17 to help us to understand is, when you were represented by
18 Wanda Carter, what did she do or not do that you believe
19 caused her to be an ineffective counsel?

20 **A** Well, like I said, her communication wasn't adequate. I
21 just -- I never spoke to her at all but only when she -- when
22 she spoke to me either (indiscernible). I feel as though that
23 if she had more communicated with me and see more -- see my
24 point of view, see my issues that had been raised on my appeal
25 in my case, I don't think that -- I think we would have much

1 better results. But that wasn't the case. Like, they just
2 was doing what was required by law. They just hearing out the
3 motion or whatever it is and drag it and get it through
4 documentation.

5 So, you know, if I was represented -- I don't know his
6 name, but if Mr. Strom had never had left and took the job
7 that he took, I really believe that I wouldn't be in prison in
8 2021. And that was 2017.

9 **Q** Okay. Thank you. Thank you, Mr. Hayes. I have no
10 further questions. I want you to please answer any questions
11 the State or the judge, Ms. Attorney Schill may ask you or
12 Judge Griffith. Thank you.

13 THE COURT: Ms. Schill, cross-examination?

14 CROSS-EXAMINATION

15 BY MS. SCHILL:

16 **Q** Sure, just a couple of questions, Mr. Hayes. So I guess
17 it's fair to say you're happy with Mr. Strom's representation
18 of you? Is that fair to say?

19 **A** I'm not -- I'm happy with any attorney with effective
20 representation. As long as he's effective, I'm very
21 appreciated of it. I wish he had never left.

22 **Q** Okay. And your complaint about Ms. Caudy is that she did
23 not communicate with you adequately; is that right?

24 **A** Hell, yeah. She was only on my case like a month at the
25 most.

1 MS. MOORE: Okay. Those are all the questions I have,
2 Your Honor.

3 THE COURT: Any redirect, Mr. Griffith?

4 MR. GRIFFITH: No redirect, Your Honor.

5 THE COURT: All right. Thank you, Mr. Griffith.

6 Mr. Griffith, you may call your next witness.

7 MR. GRIFFITH: I have no further witnesses, Your Honor.

8 THE COURT: All right. Thank you, Mr. Griffith.

9 Ms. Schill, if you would call your first witness, please.

10 MS. SCHILL: Yes, Your Honor. The State would call
11 Mr. John H. Strom.

12 THE COURT: All right. Mr. Strom, if you will raise your
13 right hand for me, please.

14 JOHN H. STROM,

15 the witness, after having been duly sworn, was examined and
16 testified to as follows:

17 THE COURT: Ms. Schill, whenever you're ready.

18 DIRECT EXAMINATION

19 BY MS. Schill:

20 Q Thank you, Mr. Strom. I'm going to try to keep this
21 brief.

22 How long have you been practicing law?

23 A I have been practicing law since 2013, so it's a little
24 bit over seven years.

25 Q Okay. And you worked on Mr. Hayes's case as an assistant

1 appellate defender for the Office of the Appellate Defense; is
2 that right?

3 **A** I did, yes.

4 **Q** Okay. And how long did you work for the Office of
5 Appellate Defense?

6 **A** A little bit over three years.

7 **Q** And do you remember when you started there?

8 **A** It would have been the fall of 2014.

9 **Q** Okay. And then you left OAD and went straight to move to
10 DC; is that right?

11 **A** Yes.

12 **Q** Okay. And you were responsible -- or what was your
13 involvement in Mr. Hayes's appeal?

14 **A** I was assigned his appeal following his successful
15 federal case corpus, and so that's where it started.

16 **Q** Okay. So you wrote the briefs for his appeal; is that
17 right?

18 **A** Yes.

19 **Q** Okay. So you were not involved in a petition for
20 rehearing or the petition to the Supreme Court of South
21 Carolina; is that right?

22 **A** No. I was the appellant defense by that point,
23 (indiscernible) by that point.

24 **Q** Okay. Do you typically raise each and every single
25 potential issue in a brief on a direct appeal?

1 **A** So I certainly raise every issue I feel is meritorious.
2 I mean, there's no reason to not raise an issue that has a
3 chance of winning.

4 **Q** Okay. But is it fair to say you evaluate the record and
5 the law and make a decision on what to raise after you make
6 that evaluation?

7 **A** Yes.

8 **Q** Okay. And did you have any communications with Mr. Hayes
9 about his appeal while you represented him?

10 **A** Yeah. My recollection is in line with Mr. Hayes's
11 testimony, is that he was a fairly active and engaged client
12 so we had regular communications.

13 **Q** Okay. Do you recall sort of the -- well, never mind.

14 And do you think you spent enough time evaluating
15 Mr. Hayes's case and spent enough time writing the briefs for
16 his case?

17 **A** Yes.

18 MS. MOORE: Okay. Those are all the questions I have,
19 Your Honor.

20 THE COURT: Mr. Griffith, cross-examination?

21 MR. GRIFFITH: Thank you, Your Honor, if it please the
22 Court.

23 CROSS-EXAMINATION

24 BY MR. GRIFFITH:

25 **Q** Mr. Strom, you obviously come highly recommended by

1 Mr. Hayes. I have just one question. Had the Court of
2 Appeals indicated that they wanted to have oral arguments
3 while you were representing Mr. Hayes or did they ever do
4 that, that you know?

5 **A** So in preparation for the hearing, I reviewed the public
6 record it looks like in August of '17 (indiscernible) accept
7 oral argument in December and were asking for a conflict date
8 or conflicts on a series of dates. But I represented him in a
9 bit of those oral arguments scheduled.

10 **Q** Okay. To your knowledge, was an oral argument ever held?

11 **A** I don't believe so.

12 MR. GRIFFITH: I have no further questions, Your Honor.

13 THE COURT: Thank you, Mr. Griffith.

14 Any redirect, Ms. Schill?

15 MS. MOORE: Just one brief question, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. MOORE:

18 **Q** Mr. Strom, did the appellate courts ever notice for an
19 oral argument and then decide not to have one?

20 **A** My recollection is that's unusual. I could speculate
21 that in the case I have it occasionally happens, but, yeah, I
22 don't know one way or the other how frequently that occurs.

23 **Q** Okay. But it can happen occasionally, to your knowledge;
24 is that right?

25 **A** (No audible response.)

1 MS. MOORE: Okay. That's it, Your Honor.

2 THE COURT: All right. Thank you, Ms. Schill.

3 Mr. Strom, you are -- unless someone objects, Mr. Strom,
4 you are free to leave the video conference. Any objection
5 from you, Mr. Griffith?

6 MR. GRIFFITH: No objection, Your Honor.

7 THE COURT: Any objection from you, Ms. Schill?

8 MS. MOORE: No, Your Honor.

9 THE COURT: All right. Mr. Strom, thank you for being
10 here.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: Ms. Schill?

13 MS. MOORE: Your Honor, the State would briefly call
14 Ms. Wanda Carter.

15 THE COURT: All right. Ms. Carter, if you could raise
16 your right hand for me, please.

17 WANDA CARTER,

18 the witness, after having been duly sworn, was examined and
19 testified to as follows:

20 THE COURT: Thank you, ma'am.

21 Ms. Schill, whenever you're ready.

22 DIRECT EXAMINATION

23 BY MS. SCHILL:

24 Q Thank you, Ms. Carter. I'll try to keep this brief.

25 How long have you been practicing law?

1 **A** For about the last 30 or so years.

2 **Q** Okay. And you still are employed by the Office of
3 Appellate Defense; is that correct?

4 **A** That's correct.

5 **Q** And that's how you represented -- you came to represent
6 Mr. Hayes; is that correct?

7 **A** That is correct.

8 **Q** Okay. At what point did you enter the process of
9 Mr. Hayes's direct appeal?

10 **A** So the case was originally handled by Mr. Strom, and when
11 he left the office, the case was transferred to Ms. Laura
12 Caudy.

13 THE COURT: Okay. Spell her last name for me because I
14 think -- I know I was a little bit confused about how similar
15 y'all's names are. Just for the record, let's get an
16 appropriate spelling of her name just so we're all clear.

17 THE WITNESS: Certainly, Your Honor. Laura, L-a-u-r-a,
18 Caudy, C-a-u-d-y.

19 THE COURT: Okay. So Caudy and not Carter. All right.
20 I'm clear now. That -- I thought there was a person between
21 you and Mr. Strom, but I wanted to make sure that the record
22 was clear on that fact. So thank you. Go ahead.

23 **A** Yes, Your Honor. So Ms. Caudy inherited the case from
24 Mr. Strom after Mr. Strom left our office and filed a petition
25 for the hearing after the Court of Appeals affirmed the case.

1 After Ms. Caudy departed temporarily for maternity leave,
2 I inherited the case. And the petition that I filed was the
3 last petition filed for the case. I petitioned for writ of
4 certiorari to take the exact same issue to the South Carolina
5 Supreme Court.

6 The issue raised by Mr. Strom is the first brief, the
7 first document that was filed on appeal, was excellent. It
8 had merit and it was the only issue really in the case. So
9 Ms. Caudy and I continued with that same issue, which was the
10 conflict of counsel issue from that direct appeal for the
11 Court of Appeals to the South Carolina Supreme Court.

12 So Ms. Caudy handled the petition for the (indiscernible)
13 on the conflict of counsel issue, and I handled the petition
14 for summary for the Court of Appeals to the state Supreme
15 Court on the very same issue after the Court of Appeals
16 dismissed the case.

17 And no argument was ever had in the case, and ultimately,
18 we were unsuccessful on direct appeal.

19 **Q** Okay. Does your office file petition for rehearings for
20 each and every single case you lose on direct appeal?

21 **A** Absolutely not. If there is a reason to file a petition
22 for -- I'm sorry, a petition for rehearing, we file that. And
23 there was a reason in this case. I believe the Court of
24 Appeals indicated that the issue was not preserved for
25 appellate review. Ms. Caudy believed that she was preserved

1 for appellate review, that issue being the conflict of counsel
2 issue.

3 I also believed that the conflict of counsel issue was
4 preserved for appellate review. So Ms. Caudy and I both
5 argued. She did in the petition for rehearing and I did in
6 the petition for cert that this issue was preserved and that
7 the issue had merit based on the same argument that Mr. Strom
8 made initially in the initial appellate brief.

9 **Q** Okay. And just to take that question, I guess, a step
10 further, do you -- does your office file a cert petition to
11 the Supreme Court of South Carolina every time a petition for
12 rehearing is denied?

13 **A** No, we do not. If we firmly believe that there is a
14 reason to take the case further, then we will. And there was
15 a reason to take this case further, which is why Ms. Caudy
16 filed the petition for rehearing, and that's why I continued
17 on with the same issue and filed the petition for cert.

18 This case had merit. To this day, this was a conflict of
19 counsel issue clearly, and I believe that it was preserved for
20 appellate review and so did Ms. Caudy. So the same issue that
21 Mr. Strom raised, we carried forward to the entirety of the
22 direct appeal. And I still don't understand the ruling, but
23 that was the ruling in the case. We were disappointed. It
24 was a good appeal. It was a good issue. It had merit.

25 There are times when no petition for rehearing is filed,

1 and there are times when no petition for cert is filed. That
2 was (indiscernible) here.

3 **Q** Okay. And did you have any communications with Mr. Hayes
4 while you were drafting the cert petition to the Supreme
5 Court?

6 **A** You know, honestly, I get a lot of calls, and I don't
7 remember talking to Mr. Hayes. It's hard for me to recollect,
8 especially with a case that I have inherited. If he says he
9 called me, then he did, because I can't remember who called
10 and who didn't, so I'll just take Mr. Hayes at his word.

11 **Q** Okay.

12 **A** If I get a call, I explain the appellate process. And,
13 in this case, I would have sent him a letter indicating the
14 procedural history of the case and the outcome. So I'm pretty
15 sure that I sent a letter.

16 **Q** Okay. So does your office frequently communicate with
17 the inmates regarding the status of their appeal?

18 **A** Of course. Yes, you do.

19 **Q** Okay. And, generally, are the inmates able to assist you
20 in writing a petition to the Supreme Court or is that mainly
21 (indiscernible) do you do any legal research?

22 **A** So we make the final decision as to what legal issue will
23 be raised on appeal, but we welcome all input and all comments
24 from our clients, whether it's over the phone or if it's on
25 paper. We make the final decision, and, in this case, that

1 decision was made by Mr. Strom and that was the only issue in
2 the case, the conflict of (indiscernible).

3 **Q** Okay. Just one final question: Do you think you spent
4 adequate time on Mr. Hayes's case?

5 **A** Yes. Yes. Because I filed the petition for the writ of
6 certiorari, yes.

7 **Q** Okay. That's it. Thank you.

8 **A** Thank you.

9 THE COURT: Mr. Griffith, cross-examination?

10 CROSS-EXAMINATION

11 BY MR. GRIFFITH:

12 **Q** Thank you, Attorney Carter [verbatim]. It sounds like
13 you put a lot of work into the case like I'm sure you always
14 do.

15 And so your testimony was that the case was never
16 actually heard in oral argument; isn't that correct?

17 **A** That's correct.

18 **Q** Okay. And so the communication -- when you were assigned
19 the case, along with Ms. Caudy -- she's not here to testify,
20 but to your knowledge did she -- was she able to communicate
21 with Mr. Hayes or did she or -- to your knowledge?

22 **A** I can't speak (indiscernible). I can't answer that
23 question.

24 **Q** Okay. But you yourself don't recall ever any
25 communication with Mr. Hayes; is that correct?

1 THE COURT: Ms. Carter, as far as the timeline goes, so
2 the Court of Appeals had issued their opinion prior to
3 Mr. Strom leaving the Office of Indigent Defense? Just
4 straighten that out in my mind as far as when his -- when his
5 representation ceased and when the case was transferred to
6 Ms. Caudy.

7 THE WITNESS: All right. So this is what I have.
8 November 28, 2016, was when Mr. Strom filed the initial brief.

9 THE COURT: Okay.

10 THE WITNESS: January 17th, 2018, was when the Court of
11 Appeals issued the opinion upholding Mr. Hayes's convictions
12 and sentences.

13 January 31st, 2018, is when Ms. Caudy filed the petition
14 for rehearing.

15 And April 18th, 2018, is when I filed the petition for
16 writ of certiorari in the South Carolina Supreme Court.

17 January 17th, 2018, (indiscernible) Court of Appeals. So
18 that's (indiscernible).

19 THE COURT: Okay. I just wanted to have notes of that
20 and have it in order when I go to evaluate this. So I
21 appreciate it. Thank you very much, Ms. Carter.

22 Ms. Schill, do you have any other witnesses?

23 MS. SCHILL: No, Your Honor.

24 THE COURT: All right, folks. I will take this matter
25 under advisement. I will review the packet I received.

1 Again, I'll review my notes, and I will issue a decision by
2 next Friday, which is March 19th, by means of a memo to each
3 side, and I will direct the prevailing party to draft the
4 appropriate order. Thank you-all very much for being here
5 this morning, and this matter is adjourned.

6 (At 10:33 a.m., the above hearing concluded.)

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1 CERTIFICATE OF TRANSCRIBER

2 CASE/NO.: Favian A. Hayes v. State of SC

3 2019-CP-43-00023

4 DATE OF PROCEEDING: March 11, 2021

5
6 I, Bobbi J. Fisher, do hereby certify that the
7 foregoing transcript is a true and correct record of the
8 recorded proceedings; that said proceedings were transcribed
9 to the best of my ability from the audio recording and
10 supporting information, and that I am neither counsel for,
11 related to, nor employed by any of the parties to this case,
12 and I have no interest, financial or otherwise, in its
13 outcome.

14
15 

16
17 _____
18 Bobbi J. Fisher, RPR

19 NCRA Registered Professional Reporter (RPR)

20 Prepared: May 16, 2021

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STATE OF SOUTH CAROLINA)
 COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS
 FOR THE THIRD JUDICIAL CIRCUIT

RECORDED
 2021 APR 15 PM 1:57

Favian A. Hayes, #293544,)
 Applicant,)


Case No.: 2019-CP-43-00023

JAMES C. CAMPBELL
 CLERK OF COURT
 SUMTER COUNTY, S.C.

v.)

**ORDER GRANTING RESPONDENT'S
 PARTIAL MOTION TO DISMISS, AND
 ORDER OF DISMISSAL**

State of South Carolina,)
 Respondent.)

CERTIFIED TRUE COPY
 OF ORIGINAL FILED

 DEPUTY CLERK OF COURT
 SUMTER COUNTY
 SOUTH CAROLINA

This matter comes before this Court by way of an application for post-conviction relief filed on January 8, 2019, by Applicant Favian A. Hayes (Applicant) alleging he was entitled to post-conviction relief based on constitutionally ineffective assistance of plea counsel and ineffective assistance of appellate counsel. In response, Respondent filed its Return. Thereafter, Applicant, through appointed counsel Timothy L. Griffith, Esquire, filed a supplemental application dated February 25, 2021, also alleging allegations of ineffective assistance of plea counsel, PCR judicial conflict, “newly discovered evidence”, and allegations of ineffective assistance of appellate counsel. Respondent subsequently filed an Amended Return and Partial Motion to Dismiss.

A hearing on Applicant’s partial motion to dismiss and a subsequent evidentiary hearing convened on March 11, 2021, before this Court via the WebEx Virtual Courtroom platform. Applicant was present and was represented by counsel Griffith. Respondent was represented by Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General’s Office. At the outset of the hearing, Respondent made its Partial Motion to Dismiss, arguing Applicant’s allegations of ineffective assistance of plea counsel, PCR judicial conflict, and newly discovered evidence warranted summary dismissal, and that Applicant could only go forward on his allegation

of ineffective assistance of appellate counsel at the evidentiary hearing. As discussed below, this Court granted Respondent's partial motion to dismiss on the basis that Applicant's application, with the exception of allegation against appellate counsel, are barred by the statute of limitations, barred as successive, barred by the doctrine of res judicata, fail to state cognizable PCR claims, and fail to make a prima facie case of newly discovered evidence. This Court proceeded on an evidentiary hearing only as to Applicant's allegations of ineffective assistance of appellate counsel. At the evidentiary hearing, testimony was taken from Applicant and Applicant's revived direct appeal attorneys: former Assistant Appellate Defender John H. Strom, Esquire and Deputy Chief Appellate Defender Wanda H. Carter, Esquire.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to post-conviction relief and denies this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections.¹ On June 1, 2009, Applicant appeared in the Sumter County Court of General Sessions before the Honorable Howard P. King, circuit court judge, and pled guilty to possession of cocaine base-2nd offense (2007-GS-43-0801), criminal conspiracy (2008-GS-43-0646), and armed robbery (2008-GS-43-0646). Assistant Solicitor Catherine Fant of the Third Circuit Solicitor's Office prosecuted the case. Assistant Public Defender David Sullivan represented Applicant. Judge King sentenced Applicant to imprisonment for five years for possession cocaine base-2nd offense, five years for

¹ Applicant is also serving sentences for threatening the life, person, or family of a public official (2010-GS-32-9932) and threatening to bomb (2010-GS-32-9986) arising out of Greenville County guilty pleas.

criminal conspiracy, and twenty-five years for armed robbery, with all sentences to be served concurrently.

Applicant's counsel filed a timely notice of appeal on Applicant's behalf, but did not provide an explanation as required under Rule 203(d)(1)(B), SCACR either in his notice of appeal or in response to letters from the South Carolina Court of Appeals. Accordingly, on September 3, 2009, the Court of Appeals issued an order dismissing Applicant's appeal. Applicant then filed a motion to reinstate his appeal and various other motions. By order dated October 15, 2009, the Court of Appeals denied Applicant's motion to reinstate his appeal. The remittitur was returned to the circuit court in November 17, 2009.

Applicant's First PCR Action: 2009-CP-43-2206

Applicant filed an application for post-conviction relief on September 22, 2009 (2009-CP-43-2206), alleging the following claims:

1. "Ineffective Assistance of Counsel/"Involuntary Guilty Plea"
 - a. "Failure to investigate possible defense..."
 - b. "Counsel gave defendant 'erroneous advice' to Client stating Client would receive a mandatory minimum 10 yrs. 'upon pleading.'"
2. "Conflict of Interest."
 - a. "Counsel represented another client that pertain to my Rule 5 & also has common knowledge of defendant case and was scheduled to testify against defendant."
3. "Judge Abuse of Discretion."
 - a. "Trial judge abuse his discretion by ignoring possible conflict of interest and not further inquiring."
4. "Ineffective of Assistance of Appellate Lawyer."

The State made its return, requesting an evidentiary hearing. An evidentiary hearing was convened on March 23, 2012, at the Sumter County Courthouse before the Honorable W. Jeffrey Young, then-circuit court judge. Applicant was present at the hearing and was represented by Patrick Killen, Esquire. Respondent was represented by Assistant Attorney General Mary S. Williams of the South Carolina Attorney General's Office. At the hearing, Applicant testified on

his own behalf. Plea counsel Sullivan, investigator Christopher Hilditch, and co-defendant Brandon McFadden also testified. By written order signed May 16, 2012, and filed May 22, 2012, Judge Young denied and dismissed the application with prejudice.

Applicant then appealed the denial of his post-conviction relief action. (Appellate Case No. 2012-212175). Applicant was represented by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed a petition for writ of certiorari in the South Carolina Supreme Court raising the following issue:

Did the PCR judge err in refusing to find counsel ineffective for failing to provide an explanation pursuant to Rule 203(d)(1)(B)(iv) showing that the plea judge's refusal to relieve counsel, based on a conflict of interest, was an issue that could be raised in a direct appeal of the guilty plea?

Respondent filed a return to the petition. Thereafter, the case was transferred to the South Carolina Court of Appeals. By Order dated July 3 2014, the Court of Appeals denied Applicant's petition for a writ of certiorari. The remittitur was returned to the circuit court on July 23, 2014.

Applicant's Second PCR Action: 2015-CP-43-653

On March 9, 2015, Applicant filed a second PCR application alleging "newly discovered evidence." Respondent subsequently filed a Return and Motion to Dismiss requesting the action be summarily dismissed as successive, untimely, and for failing to meet the newly discovered evidence standard. By Order signed April 6, 2015, and filed April 24, 2015, this Court conditionally dismissed Applicant's PCR application, while giving Applicant twenty days from the date of service to respond to the Conditional Order of Dismissal. Applicant subsequently filed a response to the Court's Conditional Order of Dismissal. After considering Applicant's response to the Conditional Order of Dismissal, this Court issued a Final Order of Dismissal, signed October 28, 2015, and filed November 5, 2015, denying and dismissing Applicant's second PCR application with prejudice.

Federal Habeas Petition: 4:14-cv-03778-RMG

Applicant also filed a habeas corpus petition in the United States District Court for the District of South Carolina (4:14-cv-03778-RMG), alleging the following grounds:

Ground one: Ineffective assistant of counsel

Supporting facts: Counsel David F. Sullivan, Esq., failed to investigate case; had counsel would of investigate he would found out that during an bond hearing that was conducted on 10-30-07, he would have known that lead Det. Rickburg in Robbery case stated in open court that eh victims in said case “couldn’t identify, because assailants had their faces covered.” Counsel could have used such trans [?] to “impeach” victim and/or Det. on cross-examination. [Ground continues, see attachment, p. 6 of Petition].

Ground two: “Conflict of Interest”

Supporting facts: David F. Sullivan, guilty plea counsel took appellate Brady motion and exposed contents of discovery to another one of his clients [?] was an potential witness for the State, one’s Stacey Rhodes took several documents and photos from appellate discovery. Counsel motive – [See attachment, p. 7 of Petition].

Ground three: Involuntary guilty plea

Supporting facts: Counsel gave appellate erroneous advise to plead guilty to Robbery offense, stating that appellate was to receive an (10) year sentence same as codefendant Brandon McFadden, received, if appellate pleaded guilty. Appellate told Hon. Judge King, that coun. enlighten appellate that coun. advised him that he was to receive an (10) year sentence upon pleading. Appellate told Judge King the only reason he was pleading-[See attachment, Ground 3 page 4].

Ground four: Ineffective assistance of counsel on appellate law.

Supporting facts: Counsel David F. Sullivan, esq. filed Notice of Appeal on 6-1-09. Court of Appeals sent coun. an Notice, requesting an “written explanation,” for Appellate N.O.A., with an (14) day deadline, failure to do so would result in an Order of Dismissal, Rule 203 (d)(1)(B), on 7-23-09. Counsel failed to respond to Notice. On 8-13-09, C.O.A. sent another “Notice,” stating the same as first Notice. Counsel refused to respond to that correspondence as well. Instead sent Appellate an correspondence (11) days later out of the (14) day deadlines. [Ground continues, See attachment Ground 4, p. 11].

In response, the State filed a motion for summary judgment. On May 28, 2015, the Honorable Thomas E. Rogers, III, magistrate judge, issued a report and recommendation recommending that the State’s motion for summary judgment be denied unless the State allowed Applicant leave to

appeal his guilty plea conviction out of time and recommended the remaining claims be dismissed. The Honorable Richard Gergel, United States District Judge, entered a conditional order granting the writ of habeas corpus only as to Applicant's direct appeal rights and directing the State to restore Applicant's direct appeal rights.

In response to Judge Gergel's order, on motion by the State, the South Carolina Supreme Court issued an order for the Court of Appeals to recall the remittitur in the direct appeal and reinstate the appeal. After the Court of Appeals recalled the remittitur, Applicant submitted an explanation pursuant to Rule 203 (d)(1)(B)(iv), SCACR. The Court of Appeals then ordered the appeal to proceed on June 16, 2016. Applicant, through then-Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense-Office of Appellate Defense filed a brief raising the following issue:

The trial court abused its discretion in finding Hayes freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court's acceptance of the guilty plea, the trial judge improperly denied Hayes's motion to relieve counsel without conducting an adequate inquiry into Hayes's complaint that counsel had an actual conflict of interest, due to his simultaneous representation of State's witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

The Court of Appeals affirmed Applicant's pleas and sentences by unpublished opinion. State v. Hayes, 2018-UP-025 (filed January 17, 2018), finding the issue was not preserved for appellate review because Applicant argued different grounds to the plea court and conceded there was no conflict of interest when he and plea counsel were questioned by the plea court. Applicant, through Appellate Defender Lara M. Caudy, Esquire, filed a petition for rehearing, which was denied by the South Carolina Court of Appeals. Applicant, through Deputy Chief Appellate Defender Wanda H. Carter, then filed a petition for writ of certiorari to the South Carolina Supreme Court, which was denied on May 24, 2018. The remittitur was returned to the circuit court on May 30, 2018.

SUMMARY OF EVIDENCE

On July 31, 2007, after 10:00 p.m., Applicant and a co-defendant armed robbed Young's Market [convenience store] on Oswego Road in Sumter County. Applicant and his co-defendant wore disguises, from the nose down, over their faces. Applicant's co-defendant entered the store first with the handgun. The gun belonged to Applicant. Applicant came into the store after his co-defendant. Applicant's co-defendant pointed the gun at the store clerk's head [Latasha Skinner] and demanded the store's money. The clerk was forced to give them the cash register money and to open the store safe. Applicant emptied the store safe of its money. Applicant and his co-defendant then fled the store with the store's money and went to a nearby house. The store clerk called the police. She was able to describe the two perpetrators, their clothing, and the gun that was used. Prior to trial, the clerk was shown a photo-graphic line-up, and she positively identified Applicant as the second individual who entered the store and committed the armed robbery.

Applicant and his co-defendant were arrested after a police investigation. Applicant's co-defendant provided a statement which incriminated not only himself but also Applicant in the armed robbery. Police also executed search warrants on Applicant's home and that of his co-defendant where police found distinctive clothing in both locations worn by the perpetrators of the armed robbery and seen in the surveillance video of the convenience store. Police also found where Applicant had rented a motel room and partied with his co-defendant and friends after the armed robbery. Applicant paid for the room for three days with cash costing several hundred dollars. Applicant checked into the motel room shortly after the armed robbery and after being questioned by police near the crime scene. Police recovered photographs believed to have been taken by Applicant with a disposable camera in the motel room that showed the gun used in the armed

robbery and cash and drugs. Police also discovered where Applicant deposited \$1,000 in a bank account the morning after the armed robbery, and Applicant had no means of gainful employment at the time. Some of the young men who had been partying with Applicant and his co-defendant informed police Applicant and his co-defendant had excessive amounts of cash on their persons in the days following the robbery. During the investigation, Applicant was arrested in possession of .76 grams of cocaine base/crack cocaine. The gun used in the armed robbery was also recovered by police. Applicant would not admit to police to committing the armed robbery, but he did admit being with his co-defendant, McFadden, all night the night of the robbery. As previously stated, McFadden confessed to police and to Applicant's involvement. McFadden told police he and Applicant got \$4,000 from the robbery which they split. McFadden also implicated Applicant as the other perpetrator at McFadden's guilty plea to the armed robbery. At his guilty plea, Applicant admitted he was the taller perpetrator who emptied the store safe, but did not carry a weapon.

CURRENT ACTION BEFORE THE COURT

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

1. Conflict of Interest²
2. Ineffective Assistance of Appellate Counsel

As requested relief, Applicant requests "Reverse and Remanded, New Trial!!!" Respondent subsequently filed a Return, Partial Motion to Dismiss, and Motion for a More Definite Statement dated March 18, 2019. On February 25, 2021, Applicant served upon Respondent an amended application alleging the following:

² It appears this allegation pertains to the alleged conflict of interest of Applicant's plea counsel.

A. Ineffective Assistance of Plea Counsel:

1. "His attorney informed him that he would receive 10 years. He saw a recommendation in writing from the SOL that the rec would be ten years. HIS ATTORNEY did not inform him that the Judge did not have to accept the recommendation...Had he known that, he would not have plead guilty and would have gone to trial."
2. "He did no[t] get to see all of his discovery and – HIS ATTORNEY did not go over the discovery with him."
3. "His ATTORNEY Also represented a defendant that was set to testify against him were he to go to trial, and that defendant removed pictures from Mr. Hayes' discovery packet. This represents a clear conflict."
4. "HIS ATTORNEY did not investigate the case. There was no evidence linking Mr. Hayes to the crime (according to Mr. Hayes), and an investigation would have shown that."

B. Ineffective Assistance of Remand Appellate Counsel

5. "His first attorney was replaced when that attorney took a job in DC. He was later appointed an attorney that was pregnant at the time and later was also replaced by a last minute attorney who did not have time to prepare for the appeal to be heard."

C. PCR Judge Conflict

6. "His PCR Judge was Judge Young, whose father had previously owned the store that was robbed, which Mr. Hayes believes was a conflict and prejudiced Judge Young in his case."

D. "Newly Discovered Evidence"

7. Mr. Hayes' co-defendant received 10 years (the recommendation by the SOL) while Mr. Hayes received 25. The same person was later released after serving his sentence, and (according to Mr. Hayes) robbed the same store with the same MO."

In response, Respondent filed an Amended Return and Partial Motion to Dismiss dated March 3, 2021. At the evidentiary hearing, Applicant indicated he would be proceeding on the allegations contained in his amended application. The State renewed its partial motion to dismiss and this Court found the allegations of ineffective assistance of plea counsel, PCR judicial conflict, and

“newly discovered evidence” were procedurally barred and must be summarily dismissed. The evidentiary hearing proceeded only as to Applicant’s allegation of ineffective assistance of revived direct appeal counsel. Applicant testified on his own behalf, and Respondent presented testimony from appellate counsels, John H. Strom, Esquire, and Wanda H. Carter, Esquire.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Respondent’s Partial Motion to Dismiss

With respect to Respondent’s partial motion to dismiss, this Court reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court summarily dismisses the allegations of ineffective assistance of plea counsel, PCR judicial conflict, and newly discovered evidence, as there is no genuine issue of material fact which would necessitate an evidentiary hearing. See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Respondent moved for partial summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

Successiveness

This Court finds allegations against plea counsel’s performance are barred as successive as they must have been raised in his initial post-conviction relief action pursuant to S.C. Code § 17-27-90. As Applicant already had a fully adjudicated post-conviction relief action addressing plea counsel’s performance and enjoyed an appeal to review the dismissal of that action, he is barred from raising any claims against plea counsel’s performance, including a purported conflict of

interest, now in this successive post-conviction relief action. Moreover, Applicant's allegation regarding the alleged PCR judicial conflict could have been brought in his 2015 PCR application.

In South Carolina, successive applications for post-conviction relief are disfavored and the burden rests firmly on an applicant to establish that any new ground raised in a subsequent application could not have been earlier raised in his or her previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. An applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

In Applicant's case, his allegations against plea counsel's performance must have been raised in his initial post-conviction relief action. Moreover, it is clear that many of these allegations of ineffective assistance of plea counsel were addressed in his prior post-conviction relief action.

Accordingly, his current claims against plea counsel, including that a conflict of interest existed, is successive and barred under S.C. Code Ann. § 17-27-90. Applicant's allegation regarding the initial PCR judge's alleged conflict is also successive, as he could have brought this allegation in his 2015 PCR application, as that application was the first PCR application filed after his adjudicated PCR application in 2012.³ This Court finds the allegations of ineffective assistance of plea counsel and alleged conflict of PCR judge are barred as successive to Applicant's prior PCR applications.

Res Judicata

Additionally, the allegations of ineffective assistance of plea counsel are summarily dismissed based on the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id. Thus, a successive claim, pursuant to Rule 12(b)(6), SCRPC, can be dismissed as barred by *res judicata*.

Applicant already adjudicated many of these claims in his prior post-conviction relief action, his appeal of that action, and/or on his revived direct appeal. Alternatively, these allegations could have been brought in his initial PCR action. With respect to his original conflict of interest allegation, in his revived direct appeal, the Court of Appeals expressly found Applicant conceded there was no conflict of interest when he and plea counsel were questioned by the plea court. Applicant then filed a petition for rehearing and a petition for writ of certiorari to the South

³ However, as discussed below the allegation regarding an alleged conflict of the PCR judge is not a valid PCR allegation.

Carolina Supreme Court challenging these findings, both of which were denied. Accordingly, as this issue was already raised and ruled upon many times, Applicant is barred from raising it again in this current action. Moreover, although his allegation of a PCR judicial conflict is not a proper PCR claim, it also should have been brought in his 2015 PCR application, as that was the first PCR application brought after his initial adjudicated PCR application. Therefore, this Court finds Applicant's allegations of ineffective assistance of plea counsel and PCR judicial conflict must be summarily dismissed based on the doctrine of *res judicata*.

Statute of Limitations

This Court also finds the allegations of ineffective assistance of plea counsel, alleged conflict of PCR judge, and Applicant's allegation of "newly discovered evidence" must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

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

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this

chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

In the present case, Applicant is alleging he is entitled to post-conviction relief based on various allegations of ineffective assistance of plea counsel. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Based on Peloquin, Applicant had until November 18, 2010, to timely file an application challenging his convictions based on his claims of ineffective assistance of plea counsel – which are not based on a change of law or statute and is not newly discovered evidence. The current application was not filed until 2019, well after the statutory filing period expired.

Additionally, as discussed above, even if Applicant’s allegation of an alleged PCR judicial conflict constituted a cognizable PCR claim, which it does not, this allegation should have been brought, at least, within one year of the adjudication of his initial PCR application. Applicant’s allegation of alleged “newly discovered” evidence is likewise barred because Applicant has failed to show how why he could not have brought the claim, at the very least, within one year of when he could have discovered the evidence with due diligence pursuant to S.C. Code Ann. § 17-27-

45(C). Accordingly, these allegations are untimely pursuant to Section 17-27-45 and must be dismissed with prejudice for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Allegation of Judicial Conflict of Initial PCR Judge Is Summarily Dismissed for Failure to State a Cognizable PCR Claim

In his amended application, Applicant alleges his original PCR judge, Judge Young, had a conflict that prejudiced his PCR evidentiary hearing. This Court finds this is not a cognizable claim for post-conviction relief. Moreover, this Court finds that any objection pertaining to Applicant's PCR judge should have been alleged and addressed at the time of his first PCR evidentiary hearing, as this allegation could have been discovered by Applicant at that time, and likewise, does not constitute newly discovered evidence.

Pursuant to the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160, an applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20 (1976).

As mentioned above, Applicant's claim of an alleged conflict of the PCR judge is not a cognizable claim for post-conviction relief. Moreover, even if this could plausibly be construed as valid PCR claim, which it cannot, this allegation would still be barred by the statute of limitations as Applicant filed this application over seven years after the PCR evidentiary hearing, and would likewise be barred as successive and by the doctrine of *res judicata*. Accordingly, this Court summarily dismisses this allegation with prejudice.

Applicant's Allegation of "Newly Discovered Evidence" Fails to Meet the Newly Discovered Evidence Standard

Finally, in his amended application, Applicant alleges "newly discovered evidence" in the form of information pertaining to his co-defendant's sentence and crimes subsequently allegedly committed by his co-defendant. Applicant's assertion that he should be granted post-conviction relief as a result of newly-discovered evidence is without merit and fails to make a *prima facie* claim of newly discovered evidence. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. State v. Rice, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore,

an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that;

“(1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.”

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). The information pertaining to Applicant's co-defendant is not relevant or material to Applicant's guilt and does not constitute newly discovered evidence. Accordingly, Applicant has failed to make a *prima facie* showing of newly discovered evidence and he is not entitled to an evidentiary hearing in the matter. Accordingly, this Court summarily dismisses this allegation with prejudice.

B. Evidentiary Hearing Regarding Allegation of Ineffective Assistance of Remand Appellate Counsel

As to the evidentiary hearing concerning Applicant's allegation of ineffective assistance of revived direct appeal counsel, this Court has thoroughly reviewed the record in its entirety, including the plea transcript, Applicant's records from the South Carolina Department of Corrections, applicable records from the Sumter County Clerk of Court, direct appeal records (both original and revived direct appeals), prior PCR records, federal habeas corpus records, and the

records for this current action. Additionally, this Court heard the testimony presented at the evidentiary hearing, and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. 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):

Testimony from PCR Hearing

Applicant's Testimony

Applicant testified he is currently housed at Lee Correctional Institution, and that he has been incarcerated for thirteen years. Applicant testified he previously filed an application for post-conviction relief, and his application was denied after an evidentiary hearing. Applicant testified he did not see all of the discovery related to his case. Applicant testified he was offered a ten year plea offer and was not informed that the judge could accept a different offer. Applicant also testified he believed his attorney had a conflict of interest because he at some point represented a witness who was anticipated to testify against him had he taken his case to trial. Applicant testified this other witness took documents pertaining to Applicant's case from Applicant's trial counsel, when trial counsel went to visit the witness. Applicant testified his co-defendant maxed out in 2016 or 2017. Applicant testified his sister received a phone call from the co-defendant's sister, during which the co-defendant's sister indicated the co-defendant was arrested again for committing the same type of crime.

Applicant testified he was granted a belated appellate review around May of 2015. Applicant testified he was first represented by then-Assistant Appellate Defender Strom. Applicant testified he and Strom discussed Applicant's issues with his case, and that Applicant

was subsequently sent a letter indicating an oral argument would be held. Applicant testified two-to-three weeks later he received a notice from the office of appellate defense that Strom was no longer his attorney because Strom moved to Washington D.C. due to his new job. Applicant testified he was informed he would be represented by Lara Caudy, Esquire, who was pregnant at the time. Applicant testified Caudy was about to start maternity leave and did not have “much” experience. Applicant testified when Strom left the Office of Appellate Defense, his case became a “hot potato thing.” Applicant testified when Caudy left for maternity leave, Carter became his appellate attorney. Applicant testified he did not have much communication with Carter regarding his case. Applicant testified he thought Carter and Caudy did not provide him with adequate representation.

Applicant testified Strom provided him great representation. He testified he believed if Strom had represented him during the entirety of his appeal, he ultimately would have won his appeal and ultimately released from prison. Applicant testified he felt his case would not get adequate representation from Carter due to Carter’s “high title.” Applicant testified he received “inadequate” communication from Carter, and that he only communicated with her when she would send him letters. Applicant testified he did not receive frequent phone calls from Carter. Applicant testified Carter and Caudy did not do what was required of them by law.

On cross-examination, Applicant reiterated that he was very happy with Strom’s representation of him. Applicant testified his complaint about Carter was that she did not communicate with him enough and that she was assigned to his case for two months at most.

Strom’s Testimony

Strom testified he has been practicing law since 2013, and that he worked at the Office of Appellate Defense for three years from 2014 to 2017. Strom testified he was assigned to

Applicant's appeal after he received belated appellate review by way of his federal writ of habeas corpus. Strom testified he raised all meritorious issues on appeal, but first evaluates the record and makes a decision about what issues he should bring after a full evaluation of the record on the law. Strom testified he communicated back and forth with Applicant during his representation of Applicant.

Strom testified the South Carolina Court of Appeals indicated it wished to hold an oral argument for Applicant's appeal. Strom testified ultimately no oral argument was held in this case. Storm also testified that the appellate courts occasionally send a letter indicating they wish to hold an oral argument but ultimately decide not to hold one.

Carter's Testimony

Carter testified she has been practicing law for thirty years. Carter testified that she was still employed by the Office of Appellate Defense, and that is how she came to represent Applicant. Carter testified she became involved in Applicant's appeal after Strom left the Office of Appellate Defense. Carter testified the case was transferred to Caudy after Strom left, but Caudy went on maternity leave thereafter. Carter testified Caudy drafted and filed the Petition for Rehearing that followed Strom's Briefs of Appellant. Carter testified her involvement was primarily concerned with the last petition in Applicant's case: the petition for writ of certiorari to the South Carolina Supreme Court. Carter testified that they were ultimately unsuccessful with Applicant's appeal. Carter testified the appellate defenders do not file a petition for writ of certiorari to the South Carolina Supreme Court for each and every direct appeal, but they will do so if it is appropriate, as they felt it was in this case. Carter testified she and her colleagues felt the issue was preserved for appellate review, which is why they filed the petition for rehearing and petition for writ of

certiorari to the Supreme Court. Carter testified they were disappointed by the ruling and believe the issue was preserved for appeal, and that the issue had merit.

Carter testified it was hard to recollect to the extent she communicated with Applicant while she was working on his case. Carter testified her office communicated with inmates regarding the status of their appeals, but the inmates are not necessarily heavily involved in the writing of the petitions directly, unless they wish to provide input. Carter testified the lawyers ultimately decide what issues are raised in the appellate filings, but they welcome any input from the inmates.

Carter testified no oral argument was held in Applicant's direct appeal. Carter testified she did not specifically recollect the extent of her communications with Applicant, but that when an inmate calls her, she will return their phone call.

Applicant's Allegation of Ineffective Assistance of Appellate Counsel⁴

Applicant alleges an allegation of ineffective assistance of counsel for failure to properly prepare Applicant's case and communicate with him. This Court disagrees with Applicant and denies and dismisses the allegation with prejudice.

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. U.S. Const. amend. VI; 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 counsel was constitutionally ineffective, he must prove that "counsel's

⁴ This allegation states: "His first attorney was replaced when that attorney took a job in DC. He was later appointed an attorney that was pregnant at the time and later was also replaced by a last minute attorney who did not have time to prepare for the appeal to be heard."

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 counsel in a guilty plea proceeding, the applicant must demonstrate that there exists at minimum a reasonable probability that, but for plea counsel’s errors, he would not have plead guilty and would have instead insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

With respect to prejudice, an applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect

on the outcome of the proceeding.” Id. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687. See Harrington, 562 U.S. 86.

A defendant is similarly constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). To prevail on an ineffective assistance of appellate counsel claim, “[f]irst, the burden of proof is upon petitioner to show that appellate counsel’s performance was deficient as measured by the standard of reasonableness under prevailing professional norms.” Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). “[...] [A]ppellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). With respect to appellate counsel, the petitioner must then prove that because of appellate counsel’s deficient performance there is a reasonable probability that, but for appellate counsel’s unprofessional errors, the result of the appeal would have been different. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999) (citing Strickland, v. Washington, 466 U.S. 668 (1984)).

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009);

Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. Id. at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693. Harrington, 562 U.S. 86.

“The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). An applicant must present evidence to show how additional time spent in consultation would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 404 S.C. at 500-01, 745 S.E.2d at 382 (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)). Because the analysis for ineffective assistance of appellate counsel generally mirrors the analysis for ineffective assistance of trial counsel, this Court analyzes Applicant’s claim in this context.

Applicant testified several times he was happy with Strom’s representation of him and even testified he believed he would have won his appeal and would have been released from prison had Strom represented him during the entirety of his appeal. Applicant testified he spoke to Strom regarding the appellate issues in his case. Applicant testified Caudy represented him for a short period of time after Strom until she left for maternity leave. Applicant testified Carter only represented him for a couple of months. Applicant testified he felt his case would not get adequate representation from Carter due to Carter’s “high title.” Applicant testified Caudy and Carter did

not communicate with him to the degree Strom communicated with him. Applicant testified he received “inadequate” communication from Carter, and that he only communicated with her when she would send him letters. Applicant testified he did not receive frequent phone calls from Carter.

Strom testified he communicated with Applicant on several occasions regarding issues in his case. Strom testified he raises all meritorious issues on appeal after a review of the record and the law. Carter testified she became involved in Applicant’s appeal after Strom left the Office of Appellate Defense and after Caudy went on maternity leave thereafter. Carter testified she drafted the Petition for Writ of Certiorari to the South Carolina Supreme Court after the South Carolina Court of Appeals affirmed Applicant’s conviction and sentence and after the Court of Appeals denied Applicant’s Petition for Rehearing filed by Caudy. Carter testified the Office of Appellate Defense does not file a petition for rehearing or a petition for writ of certiorari to the South Carolina Supreme Court for every criminal direct appeal. Carter testified the attorneys will review the record and the law to determine whether they should pursue a petition for rehearing or subsequent petition to the Supreme Court. Carter testified she could not recall exactly the extent of her communications with Applicant, but she testified that as a matter of course, her office contacts inmates regarding the status of their appeals. Carter testified the Office of Appellate defense always accept input from inmates, however, as appeals are based upon specific standards of review, the case records, and the law, the decision is ultimately up to the attorneys as to what issues will be presented on appeal.

This Court finds Strom’s and Carter’s testimony very credible. This Court finds Applicant’s testimony on this issue credible only to the extent he testified he was happy with Strom’s representation of him, that Strom communicated with him frequently, that Applicant believed Carter and Caudy did not communicate with him as frequently as Strom, and that he

received letters from Carter regarding the status of his case. It is clear based upon Applicant's testimony that he was not only satisfied with Strom's representation of him, but he wished Strom represented him throughout the entirety of his appeal. Applicant specifically commended Strom's representation of him several times and raved about his performance and communication. Moreover, to the extent he makes a general allegation that he was not pleased with Caudy and Carter because his case was a "hot potato thing" and because they did not communicate with him as frequently as Strom, this Court finds the allegation is without merit and, even if true, would not require this Court to grant post-conviction relief based upon any constitutional deprivations based upon the standard set forth above. Applicant is entitled to a constitutionally effective lawyer, not a lawyer specifically of his choosing.

Applicant failed to even allege how additional preparation or communication would have helped his case, and how specifically they should have prepared more. This court also notes that there is no obligation to file either a petition for rehearing or a petition for writ of certiorari to the Supreme Court of South Carolina. See Douglas v. State, 369 S.C. 213, 631 S.E.2d 542 (2006) (declining to impose a duty on appellate counsel to file a petition for rehearing or certiorari from a decision of the Court of Appeals in a criminal matter). All of Applicant's appellate attorneys reviewed the file and the law, and appropriately pursued what they felt was a potentially meritorious claim, albeit unsuccessfully. Accordingly, this Court finds neither Strom, Caudy, or Carter were deficient.

Moreover, Applicant has failed to meet his requisite burden as to how any alleged deficiency prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the appeal would have been different." Southerland, 337 S.C. at 616); Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. An applicant must present evidence to

show how additional time spent in consultation would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 404 S.C. at 500-01, 745 S.E.2d at 382 (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)). Moreover, Applicant has made no allegation whatsoever that his appellate lawyers failed to raise a particular argument that they should have in Applicant's view. This Court finds Applicant has wholly failed to meet his requisite burden of proof as to his allegation of ineffective assistance of appellate counsel, and therefore, denies and dismisses this allegation with prejudice.

CONCLUSION

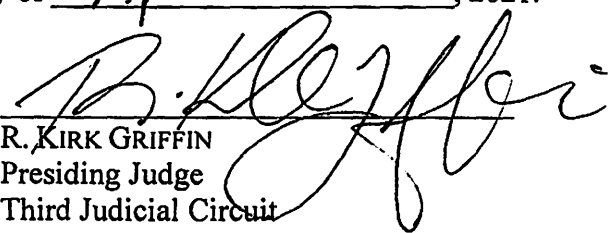
Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes that if Applicant wishes to appeal this order, Applicant, though his counsel of record, must file and serve a notice of appeal within thirty days from the receipt of this Order. 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), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief 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 remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15th day of April, 2021.


 R. KIRK GRIFFIN
 Presiding Judge
 Third Judicial Circuit

Sumter, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER) ARMED ROBBERY, CRIMINAL CONSPIRACY

INDICTMENT FOR

At a Court of General Sessions, convened on May 21, 2009, the Grand Jurors of

SUMTER County present upon their oath:

CERTIFIED TRUE COPY
 ORIGINAL FILE
Barbara Harper
 DEPUTY CLERK OF COURT
 SUMTER COUNTY
 SOUTH CAROLINA

COUNT ONE – ARMED ROBBERY

That FAVIAN ALPHONZO HAYES AND BRANDON McFADDEN did in Sumter County on or about July 31, 2007, violate Section 16-11-330 of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, to-wit: a handgun, did feloniously take from Latasha Skinner in the presence of Latasha Skinner, by means of force or intimidation goods or monies of the said Latasha Skinner, such goods or monies being described: U.S. currency at Young's, 96 Oswego Highway.

COUNT TWO – CRIMINAL CONSPIRACY

That FAVIAN ALPHONZO HAYES AND BRANDON McFADDEN did in Sumter County on or about July 31, 2007, violate Section 16-17-410 of the Code of Laws of South Carolina (1976), as amended, in that they did unite, combine, conspire, confederate and/or agree with one another for the purpose of committing the crime of armed robbery.

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

P. Kelly Jackson

 SOLICITOR

WITNESSES

SPD

Richburg

AMENDED
DOCKET NO. 2008-GS-43- 646

The State of South Carolina

County of SUMTER

COURT OF GENERAL SESSIONS

MAY TERM 2009

THE STATE

vs.

~~FAVIAN ALPHONZO HAYES~~

BRANDON McFADDEN

ARREST WARRANT NUMBER

J302832, J302834; J302836, J302838

D/A: 08/03/07

ACTION OF GRAND JURY

True Bill



Foreperson of Grand Jury

Date: *21 MAY 2009*

VERDICT

Indictment for

ARMED ROBBERY, CRIMINAL
CONSPIRACY

Foreperson of Petit Jury

Date:

C. KELLY JACKSON, SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER) POSSESSION WITH INTENT TO DISTRIBUTE
) COCAINE BASE, POSSESSION WITH INTENT
) TO DISTRIBUTE COCAINE BASE WITHIN 1/2
) MILE OF A SCHOOL

At a Court of General Sessions, convened on October 25, 2007, the Grand Jurors of SUMTER County present upon their oath:

COUNT ONE – POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE

That FAVIAN HAYES did in Sumter County on or about August 2, 2007, possess with intent to distribute a quantity of cocaine base, a controlled substance under the provisions of Act No. 445, Acts of 1971, General Assembly of South Carolina, as amended [Section 44-53-375 et. seq., 1976 Code of Laws of South Carolina, as amended], such possession not having been authorized by law.

COUNT TWO – POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE
 WITHIN ½ MILE OF A SCHOOL

That FAVIAN HAYES did in Sumter County on or about August 2, 2007, possess with intent to distribute a quantity of cocaine base, a controlled substance under the provisions of Act No. 445, Acts of 1971, General Assembly of South Carolina, as amended (Section 44-53-445 (A) and (B)(2) et. seq., 1976 Code of Laws of South Carolina, as amended), such possession with intent to distribute having occurred within one-half mile radius of the grounds of a public or private elementary, middle or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university, to-wit: Morris College.

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


 SOLICITOR

WITNESSES

SPD

Coker

DOCKET NO. 2007-GS-43- 801

The State of South Carolina

County of SUMTER

COURT OF GENERAL SESSIONS

OCTOBER TERM 2007

THE STATE

vs.

FAVIAN HAYES

ARREST WARRANT NUMBER

J295589; J295588

D/A: 08/04/07

ACTION OF GRAND JURY

True Bill

Lynn Holloman

Foreperson of Grand Jury

Date: *10/25/07*

VERDICT

Foreperson of Petit Jury

Date:

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE COCAINE BASE,
POSSESSION WITH INTENT TO
DISTRIBUTE COCAINE BASE WITHIN
1/2 MILE OF A SCHOOL

C. KELLY JACKSON, SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SUMTER

INDICTMENT/CASE#: 2008-GS-43-0646

STATE VS.

FAVIAN ALPHONZO HAYES

AW#: J302832

AKA:

Date of Offense: July 31, 2007

Race: Black

Sex: Male

Age:

S.C. Code §: 16-11-0330(A)

DOB: [REDACTED]

SS#: [REDACTED]

CDR Code #: 0139

Address: [REDACTED]

DL#

SID#

CERTIFIED TRUE COPY OF ORIGINAL FILE

Barbara Shaper DEPUTY CLERK OF COURT SUMTER COUNTY

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was [] CONVICTED OF or [X] PLEADS

TO: armed robbery

in violation of § 16-11-339(A) of the S.C. Code of Laws, bearing CDR Code # 0, 1, 1, 3, 9

[] NON-VIOLENT [X] VIOLENT [] SERIOUS [X] MOST SERIOUS [] Mandatory GPS (CSC w/minor 1st or Lewd Act) [] §17-25-45

The charge is: [X] As Indicted, [] Lesser Included Offense, [] Defendant Waives Presentment to Grand Jury. (Defendant initial)

The plea is: [X] Without Negotiations or Recommendation, [] Negotiated Sentence, [] Recommendation by the State.

ATTEST:

Catherine Santa Solicitor 1402

Defendant

Attorney for Defendant 74908

WHEREFORE, the Defendant is committed to the [X] State Department of Corrections, [] County Detention Center,

for a determinate term of 25 days/months/years or [] under the Youthful Offender Act not to exceed _____ years

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

costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South

Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

[X] CONCURRENT or [] CONSECUTIVE to sentence on: _____

[X] The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

[] The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

[] RESTITUTION: [] Deferred, [] Defendant Waives Hearing, [] Ordered

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

Payment Terms:

[] set by SCDPPPS

Recipient:

*Fine: \$ _____

§14-1-206 (Assessments 107.5%) \$ _____

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$100.00

§14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

§35.13 (Public Def/Prob) \$500 \$ _____

§73.3, 1B TP (Law Enforce. Funding) \$25 \$25.00

§33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§50-21-114(BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) plus 5.00 \$3.90

TOTAL \$133.90

PTUP

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

[] Appointed PD or appointed other counsel, §35.13 TP Requires \$500 be paid to Clerk during probation.

James C. Campbell Clerk of Court/Deputy Clerk

Court Reporter: M. Singletary

PRESIDING JUDGE

Judge Code: 2, 1, 1, 0, 9/7

Sentence Date: June 1, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SUMTER

INDICTMENT/CASE#: 2008-GS-43-0646

STATE VS.

FAVIAN ALPHONZO HAYES

AW#: J302836

AKA:

Date of Offense: July 31, 2007

Race: Black

Sex: Male

Age:

S.C. Code §: 16-17-0410

DOB: [REDACTED]

SS#: [REDACTED] 3

CDR Code #: 0049

Address: [REDACTED]

SENTENCE SHEET

DL# SID#

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: Criminal Conspiracy

in violation of § 16-17-410 of the S.C. Code of Laws, bearing CDR Code # 0, 0, 4, 9

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS (CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (Defendant initial)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

Catherine Jant
Solicitor 14021

[Signature]
Defendant

[Signature] 74908
Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of 5 days/months/years or under the Youthful Offender Act not to exceed _____ years

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

costs and assessments as applicable*; the balance is suspended with probation for _____ 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: about one.

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

RESTITUTION: Deferred, Defendant Waives Hearing, Ordered

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

Payment Terms: _____

set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) plus 500 \$ 3.90

TOTAL \$ 133.90

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Appointed PD or appointed other counsel, §35.13 TP Requires \$500 be paid to Clerk during probation.

James C. Campbell
Clerk of Court/Deputy Clerk

Court Reporter: Ms. Singletary

PRESIDING JUDGE [Signature]

Judge Code: 2111017

Sentence Date: June 1, 2008

10F1

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SUMTER

INDICTMENT/CASE#: 2007-GS-43-0801

STATE VS.

FAVIAN ALPHONZO HAYES

A/W#: J295589

AKA:

Date of Offense: August 02, 2007

Race: Black

Sex: Male

Age:

S.C. Code §: 44-53-0370(b)(2)

DOB: [REDACTED]

SS#: [REDACTED]

CDR Code #: 0188

Address: [REDACTED] Robney Drive Sumter, SC 29150

SENTENCE SHEET

DL# SID#

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: RWID Cocaine base 2nd Possession of Cocaine base 2nd offense

in violation of § 44-53-370 of the S.C. Code of Laws, bearing CDR Code # 3, 0, 1, 1, 7

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS (CSC w/minor 1st or Lewd Act) §17-25-45

The charge is As Indicted Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (Defendant initial)

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

ATTEST:

Catherine Jane Taylor
Solicitor 14021 Defendant

[Signature] 74908
Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of 5 days/months/0 years or under the Youthful Offender Act not to exceed _____ years

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

costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South

Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 00-GS-43-646

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

RESTITUTION: Heard, Waived, Ordered

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

Payment Terms: _____

set by SCDPPS _____

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 \$ _____

§35.13 (Public Def/Prob) \$500 \$ _____

§73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§33.7, 1B TP (Drug Court Surcharge) \$100 \$ 100.00

§50-21-114(BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) plus 5.00 \$ 60.90

TOTAL \$ 236.90

PTUP _____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation.

James C. Campbell II
Clerk of Court/Deputy Clerk

Court Reporter: M. Sulejany

PRESIDING JUDGE Howard P King
Judge Code: 2110919
Sentence Date: June 1, 2009