

Exhibit (F)

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State of South Carolina )  
County of Sumter )

In the Court of Common Pleas  
Third Judicial Circuit  
2015-CP-43-2134

David A. Duren, Jr., )  
Applicant, )

vs. )

State of South Carolina, )  
Respondent. )

Transcript of Record

July 26, 2016  
Sumter, South Carolina

B E F O R E:

The Honorable Jocelyn Newman, Judge

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

David A. Duren, Jr.  
Self-represented Litigant

Julie A. Coleman, Esquire, Assistant Attorney General  
Attorney for the Respondent

ALSO PRESENT:

Timothy L. Griffith, Esquire

*Complete*

**RECEIVED**

**FEB 18 2022**

**S.C. SUPREME COURT**

Elizabeth B. Harris, CVR-M-CM  
Circuit Court Reporter

I N D E X

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<u>Witness/Description</u>	<u>Page No.</u>
Jacob M. Smith	
Direct Examination by Ms. Coleman . . . . .	28
Cross-examination by Mr. Duren . . . . .	32
Certificate Page . . . . .	70

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>
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No Exhibits Introduced.

1 MS. COLEMAN: This is *David Duren vs. The State of*  
2 *South Carolina*, 2015-CP-43-2134, and he's present today and  
3 represented by Mr. Griffith, and I believe they have a  
4 motion before the court.

5 THE COURT: Yes, sir.

6 MR. GRIFFITH: Your Honor, Mr. Duren has submitted a  
7 motion, along with certificate of service handwritten. I'm  
8 not sure if Your Honor has see it -- seen it. It was sent  
9 out July 8th asking for the court to relieve counsel so  
10 that he may either seek other counsel or represent himself.

11 This would be the third time that he's sent in a  
12 request to relieve counsel. I certainly consent to being  
13 relieved, but I would leave that up to the court, and Mr.  
14 Duren, of course, presented the motion. You may want to  
15 hear from him as well.

16 THE COURT: Yes, sir, I do, but I have not seen the  
17 motion. Do you have a copy that I can look at?

18 MR. GRIFFITH: This is the latest one.

19 THE COURT: Okay.

20 (A PAUSE.)

21 THE COURT: Mr. Duren, if you would raise your right  
22 hand and be placed under oath?

23 BAILIFF: Raise your right hand, please.

24 MR. DUREN: Excuse me, Your Honor, with all due  
25 respect, Your Honor, before we get started I would like to

1 put the -- is this being recorded?

2 THE COURT: Yes, sir.

3 MR. DUREN: Okay. For the record, and the court shall  
4 take judicial notice I, a human being, a living soul of  
5 flesh and blood, reserve all my rights and waiver not. Do  
6 you understand?

7 THE COURT: Yes, sir.

8 MR. DUREN: For the record, and the court shall take  
9 judicial notice I, a human being, a living soul of flesh  
10 and blood, do not wish to represent a corporate entity  
11 named David A. Duren, Jr., and I have never consent to  
12 represent that corporate entity, and I have no intention of  
13 representing that corporate entity.

14 THE COURT: Okay. What is your opposition to being  
15 placed under oath, whether ---

16 MR. DUREN: Because ---

17 THE COURT: --- you swear or affirm to tell the truth?

18 MR. DUREN: Please place under oath, Your Honor, the  
19 holy Bible simply said thou shalt not swear by nothing on  
20 heaven or the earth.

21 THE COURT: And let me interrupt you, sir, and let you  
22 know that affirming that you will tell the truth ---

23 MR. DUREN: To ---

24 THE COURT: --- is an option.

25 MR. DUREN: To, to affirm, Your Honor, would be a

1 legal, binding contract with the court, and I do not wish  
2 to contract with this court, Your Honor.

3 THE COURT: Well, unless I know that you're giving  
4 me ---

5 MR. DUREN: I ---

6 THE COURT: --- truthful testimony, then how can I ---

7 MR. DUREN: I will let my ---

8 THE COURT: --- trust anything ---

9 MR. DUREN: I will let my ---

10 THE COURT: --- you say?

11 MR. DUREN: --- yes be yes and ney be ney.

12 THE COURT: Well, that's what everybody says, but we  
13 have a procedure in which people have to tell me that they  
14 are going to tell me the truth.

15 MR. DUREN: Well, Your Honor, at this -- yes, sir --  
16 yes, ma'am, excuse me. No disrespect to the court, Your  
17 Honor, but at this time, Your Honor, I would like to invoke  
18 UCC1-302/3-305(a) (1) (iii).

19 THE COURT: Which says what?

20 MR. DUREN: Under prejudice and I am under no  
21 obligation if I affirm, Your Honor.

22 THE COURT: What does the Uniform Commercial Code have  
23 to do with this matter?

24 MR. DUREN: Because ---

25 MR. GRIFFITH: Pardon me, Your Honor. I believe what

1 he's stating is that he may affirm to tell the truth. He  
2 just will not swear to it but, Your Honor, I believe that  
3 he may affirm to tell the truth.

4 Would you -- is that what you're talking about?

5 MR. DUREN: Yes.

6 THE COURT: That's all I'm asking.

7 MR. GRIFFITH: And so if you were to raise your hand  
8 and so affirm to tell the truth, then that would, I think,  
9 be acceptable by the court.

10 THE COURT: That's all I'm asking, sir.

11 MR. DUREN: Okay.

12 THE COURT: And he's going to ask you if you swear or  
13 affirm.

14 MR. DUREN: I'll affirm.

15 DAVID A. DUREN, JR., DULY AFFIRMS

16 AND TESTIFIES AS FOLLOWS:

17 THE COURT: Perfect. Now, Mr. Duren, I want you to  
18 tell me why you don't want Mr. Griffith to represent you.

19 MR. DUREN: Because, Your Honor, it would be a  
20 conflict of interest because the state is paying, the state  
21 is paying Mr. Griffith to represent me, and he took a  
22 solemn oath, and he is a member of the South Carolina Bar  
23 Association, along with the state, and that is a conflict  
24 of interest, Your Honor.

25 THE COURT: So, who do you want to represent you?

1 MR. DUREN: I'm representing myself, Your Honor.

2 THE COURT: All right. Well, then if he consents to  
3 be relieved and you're going to represent yourself, are you  
4 ready to go forward today?

5 MR. DUREN: Yes, ma'am.

6 THE COURT: All righty. Well, we'll just relieve Mr.  
7 Griffith, and you can represent yourself, sir.

8 MR. DUREN: Yes, ma'am. Thank you.

9 MR. GRIFFITH: Thank you, Your Honor, and, Your Honor,  
10 just to inform the court, this is Mr. Duren's file, and I'm  
11 going to give it to him so that he does have all the  
12 information that I have. And I know he has this plus  
13 others, but I just wanted to be sure that everything is in  
14 here today.

15 THE COURT: All righty.

16 MR. GRIFFITH: Thank you, Your Honor.

17 THE COURT: Well, let me ask before we begin. Is the  
18 state ready to proceed on this case today?

19 MS. COLEMAN: Yes, Your Honor, we are ready to  
20 proceed.

21 THE COURT: Okay. All right.

22 MR. GRIFFITH: Thank you, Your Honor.

23 THE COURT: Thank you, sir.

24 MS. COLEMAN: Your Honor, would you like me to read  
25 the procedural history?

1 THE COURT: Yes, please.

2 MS. COLEMAN: Okay. We'll start with -- do you have  
3 that list of factors that we were looking at yesterday? I  
4 can pull them up to qualify him as pro se.

5 THE COURT: I did not.

6 MS. COLEMAN: Okay.

7 MR. GRIFFITH: Excuse me, Your Honor.

8 THE COURT: Yes, sir.

9 MR. GRIFFITH: Will you be giving him the *Faretta*  
10 warning?

11 MS. COLEMAN: The state would request that you will.

12 THE COURT: If somebody has that list? I haven't  
13 brought it ---

14 MS. COLEMAN: Yeah, we can pull that.

15 MR. GRIFFITH: Okay. Thank you, Your Honor.

16 THE COURT: Yes, I will.

17 MS. COLEMAN: Your Honor, would you mind if we did the  
18 other case before we begin with this one in order to get  
19 our witnesses out?

20 THE COURT: I hate to shuffle the inmates around too  
21 much.

22 MS. COLEMAN: Yes, Your Honor.

23 THE COURT: But I do recognize that ---

24 MS. COLEMAN: Just while we pull up those factors  
25 maybe to give us a chance to find those.

1 THE COURT: Well, I mean, Mr. Duren has been through  
2 this before. I understand you filed motions to relieve  
3 other attorneys before, right?

4 MR. DUREN: Yes, ma'am.

5 THE COURT: And you've come to court on those. I  
6 mean, you understand that representing yourself, you don't  
7 have any legal training. You know that, right, any formal  
8 legal training? I'm not assuming that you don't know  
9 anything about the law, but you've not been to law school,  
10 correct?

11 MR. DUREN: No, ma'am.

12 THE COURT: Okay. You feel qualified to represent  
13 yourself?

14 MR. DUREN: Ma'am?

15 THE COURT: You feel qualified to represent yourself?

16 MR. DUREN: Yes, ma'am, because the reason I'm  
17 representing me, I called Mr. Griffith the other day,  
18 right, and this has been going on, and I asked him. I said  
19 what are we arguing at my PCR hearing? He asked me who is  
20 this. I said this is Duren. He didn't even know we were  
21 having a ---

22 THE COURT: Well, I understand. Mr. Griffith is gone.

23 MR. DUREN: Yeah.

24 THE COURT: He's not your lawyer anymore; I've taken  
25 care of that. I'm just worried about you representing

1 yourself.

2 MR. DUREN: Well.

3 THE COURT: But, of course, the problem is if you  
4 believe that any member of the South Carolina Bar has some  
5 allegiance to the State of South Carolina, then I can't  
6 appoint anybody to represent you because they'd all be paid  
7 by the taxpayer dollars, by the bar, or Indigent Defense.

8 MR. DUREN: Your Honor, the State of South Carolina is  
9 a corporation.

10 THE COURT: Okay.

11 MR. DUREN: Sumter County is a corporation.

12 THE COURT: Okay.

13 MR. DUREN: This courtroom is a corporate court.

→ 14 THE COURT: All right. I just want to make sure you  
15 know what you're doing representing yourself.

16 MR. DUREN: Yes, ma'am.

17 THE COURT: All right.

18 MR. DUREN: Yes, ma'am.

→ 19 THE COURT: All right. I think we should, while you  
20 pull those things up -- unless you have them before you  
21 right now.

→ 22 MS. COLEMAN: Not yet, Your Honor.

23 THE COURT: We're going to hear one more case before  
24 we hear yours, Mr. Duren, because I think yours could be a  
25 little bit long, and I've got a bunch of other people out

1 here waiting. So, we're going to put you back in the  
2 holding cell. I know you just unpacked all your stuff, but  
3 we're going to do the next case before yours, and then  
4 we'll bring you back out here. That will give you some  
5 time to prepare to represent yourself and go forward today,  
6 okay? All right.

7 MS. COLEMAN: Thank you, Your Honor. I appreciate it.

8 (OFF THE RECORD.)

9 THE COURT: All right, Mr. Duren, we're going to start  
10 with the state's case and whatever witnesses they have.  
11 You can have a seat unless you need to stand to sort your  
12 papers. I know it's kind of hard reaching, but you can  
13 have a seat while the state goes first, okay? All right.

14 Yes, ma'am, Ms. Coleman.

15 MS. COLEMAN: Yes. This is *David A. Duren vs. The*  
16 *State of South Carolina*, 2015-CP-43-2134. Applicant is  
17 presently confined to South Carolina Department of  
18 Corrections pursuant to orders of commitment of the Sumter  
19 County Clerk of Court.

20 Applicant was true-bill indicted at the May 2015 term  
21 of the Sumter County grand jury for burglary second degree,  
22 2012-GS-43-1149. Applicant proceeded pro se at trial  
23 before the Honorable George C. James, Jr. Applicant was  
24 found guilty as indicted on May 20, 2015. Judge James  
25 sentenced applicant to life without parole. Applicant did

1 not appeal his conviction or his sentence.

2 Additionally, applicant was true-bill indicted at the  
3 February 2002 term of the Sumter County grand jury for  
4 three counts of burglary second degree and arson second  
5 degree, 2002-GS-43-109. Jack Howell, Esquire, represented  
6 the applicant. On April 4, 2002, applicant pled guilty as  
7 indicted before the Honorable Clifton Newman. Judge Newman  
8 sentenced applicant to a seven-year term of imprisonment  
9 for burglary second degree, with two counts of burglary  
10 second and a six-year term of imprisonment for arson second  
11 degree with those charges running concurrent to each other.  
12 Applicant did not appeal his guilty plea or sentence.

13 Applicant filed an application for post-conviction  
14 relief on September 14, 2015, alleging that he was being  
15 held in custody unlawfully for the following reasons:  
16 Fourth, Fifth, Sixth, Eighth, Thirteenth, Fourteenth  
17 Amendment violations; due process violation; fraud upon the  
18 court; subject-matter jurisdiction; and ineffective  
19 assistance of counsel. The state filed its return on  
20 December 3, 2015, and he is present today in the courtroom  
21 and wishes to represent himself.

22 THE COURT: Oh, that's right. Let me start there  
23 before you ---

24 MS. COLEMAN: Sure.

25 THE COURT: --- get any farther.

1           Mr. Duren, if you'd stand up again? I apologize. I  
2 know we went through some of this earlier. I just want to  
3 chat with you a little bit more about representing  
4 yourself. Tell me how far you've gone in school.

5           MR. DUREN: I graduated high school.

6           THE COURT: All righty, and ---

7           MS. COLEMAN: Excuse me, Your Honor. Is he still  
8 under oath? I just wanted to...

9           THE COURT: He is. I figure let's just save the  
10 trouble of ---

11          MS. COLEMAN: Thank you.

12          THE COURT: --- going through that again, but ---

13          MR. DUREN: Your Honor, Your Honor, if it please the  
14 court?

15          THE COURT: Yes, sir.

16          MR. DUREN: I put the court on judicial notice that I  
17 didn't want to represent the court entity named Mr. Duren.  
18 If it pleases the court, the court could call me David,  
19 please.

20          THE COURT: Okay, David. Tell me what kind of work  
21 you've done in your life.

22          MR. DUREN: Well, United States Marine Corps, painter,  
23 self, self-employed. I had my own business at one time.  
24 I'm also a mechanic, and I also do carpentry work, and I do  
25 -- I turn bowls.

1 THE COURT: You do what now?

2 MR. DUREN: Turn bowls, make -- I build furniture.

3 THE COURT: Oh, bowls. Okay.

4 MR. DUREN: I build furniture.

5 THE COURT: Okay. All righty. Now, aside from the  
6 charges that you're in the Department of Corrections on  
7 now, have you ever had any other criminal charges in the  
8 past?

9 MR. DUREN: Yes.

10 THE COURT: Okay. Did you have lawyers represent you  
11 on those charges?

12 MR. DUREN: Yes.

13 THE COURT: Okay. You understand that -- you know, I  
14 don't know if you were satisfied with that representation  
15 or not, but you understand that attorneys have certain  
16 legal training that may be beneficial in court proceedings.  
17 You understand that?

18 MR. DUREN: I understand that.

19 THE COURT: Okay. Do you believe that you are capable  
20 and have sufficient education and training to represent  
21 yourself?

22 MR. DUREN: Yes, ma'am.

23 THE COURT: All right. Do you know why you're here  
24 today, what kind of case this is?

25 MR. DUREN: This is a P -- post, post, post-conviction

1 relief proceeding.

2 THE COURT: Okay, and what are you asking the court to  
3 do in the PCR relief case?

4 MR. DUREN: I'm asking them to vacate my sentences.

5 THE COURT: Okay.

6 MR. DUREN: Because of ineffective assistance of  
7 counsel in my prior conviction, on the prior conviction.

8 THE COURT: Now, you understand that if after I hear  
9 everything I decide that your conviction should be vacated,  
10 you will go back and get a new trial. You understand that?

11 MR. DUREN: Yes, ma'am.

12 THE COURT: That doesn't mean that the charge  
13 permanently goes away; it just means you start back from  
14 the beginning.

15 MR. DUREN: Okay.

16 THE COURT: You understand that?

17 MR. DUREN: If I go back, if the court decides that I  
18 go back and get a new trial, will the state appeal it?

19 THE COURT: I don't know the answer to that.

20 MR. DUREN: Okay.

21 THE COURT: I don't know the answer to that. That's  
22 not up to me to decide. They may. They may not. I don't  
23 know, but let's assume that they don't appeal and my  
24 decision stands and I say yes, you get a new trial. That  
25 just means you go back to the beginning, and you will still

1 have this charge of burglary and arson, and I forget what  
2 your other charges were, but you still have to go to trial  
3 on those charges. You understand that?

4 MR. DUREN: I already did time for those charges.

5 THE COURT: You could get more time than you are  
6 currently serving.

7 MR. DUREN: Those, those charges was 2002.

8 THE COURT: Okay, I'm sorry. What are you in for  
9 right now?

10 MR. DUREN: I'm in for burglary second, just one  
11 charge.

12 THE COURT: Okay. Well, then if I grant the PCR as to  
13 the burglary second charge.

14 MR. DUREN: Yes.

15 THE COURT: Is that what you're asking for? I'm  
16 sorry, I don't have everything in front of me. I think  
17 I've lost some of the paperwork.

18 MR. DUREN: I was, I was, I was charged with burglary  
19 second. I was indicted for burglary second.

20 THE COURT: Okay.

21 MR. DUREN: May 13, 2015.

22 THE COURT: Okay.

23 MR. DUREN: Okay.

24 THE COURT: And that's the seventeen-year sentence?

25 MR. DUREN: Huh?

1 THE COURT: Is that the seventeen-year sentence?

2 MR. DUREN: No. They gave me a life sentence. They  
3 three striked me.

4 THE COURT: Okay.

5 MR. DUREN: They enhanced my sentence.

6 THE COURT: Oh. Okay.

7 MR. DUREN: They three striked me because of my  
8 priors.

9 THE COURT: Gotcha.

10 MR. DUREN: But today I'm challenging my prior, too,  
11 for ineffective assistance of counsel because if those  
12 priors were -- if counsel was not given at those -- were  
13 inadequate that those -- the defendant can challenge those  
14 charges.

15 THE COURT: Okay. So, then I'm back to my original  
16 question.

17 MR. DUREN: Yes.

18 THE COURT: Do you understand that if I were to agree  
19 with you as to those 2002 charges and vacate all of your  
20 sentences, I guess, I grant your PCR application and let  
21 you get a new trial.

22 MR. DUREN: Yes, Your Honor.

23 THE COURT: You know, you might still end up doing  
24 life or ---

25 MR. DUREN: No. Fifteen.

1 MS. COLEMAN: Your Honor, the state is actually going  
2 to move to dismiss the 2002 charges.

3 THE COURT: I figured that.

4 But in the best case scenario for David here, you know  
5 it just means that you start back at the beginning. You  
6 understand?

7 MR. DUREN: All right. Okay. So, the charges are  
8 dismissed, so I get a new trial because I don't face a life  
9 sentence no more.

10 THE COURT: You might still. I don't know. It  
11 depends on the way they try you.

12 MR. DUREN: Okay. So, the state is considering that  
13 they are dismissing the 2002 charge, the enhancement  
14 charge?

15 THE COURT: Oh, no, no, no. No, no, no. That's not  
16 what he ask -- not what Ms. Coleman said. We'll get to  
17 that part in a minute. I just want to make sure you know  
18 that you would be starting back at the beginning with your  
19 charges.

20 MR. DUREN: Yes, ma'am.

21 THE COURT: Okay. I mean, I don't know what else to  
22 ask you. I guess you're comfortable representing yourself?

23 MR. DUREN: Yes, ma'am.

24 THE COURT: All righty. Then we're going to go  
25 forward, and I'm going to let Ms. Coleman go first.

1 MS. COLEMAN: Thank you.

2 THE COURT: And we'll talk about that thing she said  
3 about 2002 in a second.

4 MS. COLEMAN: Yes. I'll do that.

5 THE COURT: Okay.

6 MS. COLEMAN: The state at this time moves to dismiss  
7 the PCR allegations on the 2002 three counts of burglary  
8 second and arson second degree. We move to dismiss those  
9 as untimely filed past the statute of limitations.

10 THE COURT: Okay, David, basically what the state  
11 wants me to do is -- I know you filed this PCR application  
12 as to the 2002 charges and the 2015 charges, right?

13 DEFENSE: Yes, ma'am.

14 THE COURT: What they're saying is you filed the  
15 application for PCR too late on those 2002 charges. You  
16 understand you're supposed to file a PCR application within  
17 one year of the conviction and/or final determination of  
18 appeal, whichever ---

19 MR. DUREN: But ---

20 THE COURT: --- that is?

21 MR. DUREN: But I'm not challenging those three  
22 charges that they -- I'm challenging the two charges that  
23 they used to enhance my, my sentence.

24 THE COURT: Well, yes, those would ---

25 MR. DUREN: And the ---

1 THE COURT: --- be the 2002 charges.

2 MR. DUREN: But there was two burglary charges. They  
3 weren't arson. There were two burglary violent. Those are  
4 the two charges I'm challenging.

5 THE COURT: Yes, from 2002, right?

6 MR. DUREN: Yes, ma'am.

7 THE COURT: Okay, and that's what she's saying. That  
8 happened in 2002. So, you probably should have filed the  
9 post-conviction relief application some time in 2003 within  
10 a year of that conviction.

11 MR. DUREN: Under, under rule of discovery, I can  
12 bring those up at any time.

13 THE COURT: Well, tell me what rule you're talking  
14 about.

15 MR. DUREN: Rule 46, I think it's Rule 46. It's  
16 discovery. It's not newly discovered evidence. It's  
17 discovery.

18 THE COURT: Okay. What made you just discover that  
19 you needed to file a PCR?

20 MR. DUREN: During, during my research. In *US vs.*  
21 *McQueen*, 445 F3d 757:

22 Defendant may collaterally challenge the use of  
23 prior sentencing if the conviction was obtained  
24 in a violation of his right to counsel.

25 That's *US vs. McQueen*. *Baylor vs. State*, 392 SC 422,

1 the Sixth Amendment of the US Constitution guarantees  
2 defendant the right to effective assistance of counsel in  
3 *Strickland vs. Washington*. I -- those, those -- this  
4 sentence was in violation of, of my right to counsel at  
5 that proceeding because if the defendant can prove that the  
6 counsel was just inserted the day I plead guilty back in  
7 2002 just as standby to take the guilty plea, that's not,  
8 that's not counsel.

9 If we had the court record -- I asked for the  
10 transcript, but that, that counsel was inserted when I  
11 plead guilty because Judge Clifton Newman appointed that  
12 counsel the day I plead guilty. That counsel had no, he  
13 had no time to investigate this charge because if he had  
14 investigated those charges, he would have seen that the  
15 indictment that they supposedly had to enhance this charge,  
16 the indictment was totally defective because you have two  
17 charges on one indictment that are not closely connected  
18 offenses.

19 THE COURT: Well, and my question to you, though, is  
20 all that happened back in 2002, and you knew in 2002 that  
21 Judge Newman appointed that attorney that same day. Why  
22 didn't you file a PCR application about that some time in  
23 2002 or even 2003? Why is it just coming up now?

24 MR. DUREN: It just -- because, because, ma'am, in  
25 2002 and 2003 those sentence, those sentence was a six-year

1 sentence. I had no knowledge of the law back then, none,  
2 none. No knowledge of those laws.

3 THE COURT: Why didn't you?

4 MR. DUREN: Huh?

5 THE COURT: Why didn't you?

6 MR. DUREN: Ma'am, my mind was somewhere else, to be  
7 honest. I was content to do my time and go home. These  
8 came, these came up, these charges came up. They used  
9 these two charges. I can challenge my prior conviction  
10 according to *US vs. McQueen*.

11 THE COURT: Okay.

12 MR. DUREN: Because they were used to enhance the  
13 sentence.

14 THE COURT: Okay.

15 MS. COLEMAN: Your Honor, if I may ---

16 THE COURT: Sure.

17 MS. COLEMAN: --- respond to the newly discovered  
18 evidence claim? I would argue that *Hayden vs. State*, which  
19 is a 1983 South Carolina case, lays out the factors for  
20 newly discovered evidence in a post-conviction relief  
21 action.

22 MR. DUREN: This is not newly discovered evidence.  
23 This is discovery, not newly discovered.

24 MS. COLEMAN: Okay.

25 MR. DUREN: There's a difference.

1 THE COURT: Well, let me finish hearing what she has  
2 to say.

3 MS. COLEMAN: I was just going to say that one of the  
4 factors in that is that could not -- that the, the  
5 information could not, by the exercise of due diligence,  
6 have been discovered before the trial.

7 THE COURT: Right.

8 MS. COLEMAN: And we would argue that Mr. Duren did  
9 not exercise due diligence.

10 THE COURT: Right. Well, right.

11 David, I'm going to respectfully disagree with you,  
12 and I'm going to have to grant the state's motion to  
13 dismiss that part of your PCR. I mean, you just told me  
14 yourself that you were at that time content to just do your  
15 time, and you didn't have the knowledge that you have, but  
16 maybe you should have done some research at that point  
17 instead of now. The law only gives you one year to do your  
18 research and figure out whether you should file the PCR  
19 application, and you didn't do that because you were  
20 content to just do your time. And, you know, that's fine  
21 and that's the decision that you made, but I can't go back  
22 and rewrite history and allow you to bring that up now.  
23 That's too old. You didn't file the application in time.

24 MR. DUREN: Excuse me. Bear with me for a second,  
25 please.

1 THE COURT: Yes, sir.

2 (A PAUSE.)

3 MR. DUREN: In *Childress vs. Johnson*, 103 F3d 1221  
4 Fifth Circuit, sentencing and punishment. Inadequate  
5 representation of counsel appointed merely to stand by to  
6 listen to judge and response to contention that may arise  
7 while defendant waived his right to a jury trial on  
8 burglary charge was not assisting at all and required by  
9 the Sixth Amendment. Thus, defendant burglary conviction  
10 used to enhance sentence for later leaving the scene of a  
11 crime was vacated. That's in *Childress vs. Johnson*.

12 Defendant is entitled to effective assistance of  
13 counsel in determine how to plea and in making a plea and  
14 can attack his conviction collaterally if he's not given  
15 that right. That's even in prior convictions. It's a  
16 constitutional violation, and a constitutional violation  
17 can be raised at any point at any time. The Fifth, Sixth  
18 Amendment, Thirteenth and Fourteenth are constitutional  
19 violations, state and federal. Can be raised in any  
20 proceeding at any time regardless -- even if that defendant  
21 does not challenge his conviction at that time. It can be  
22 raised at any time, a constitutional violation.

23 THE COURT: I understand your argument, and I've heard  
24 what you've had to say, but I respectfully disagree with  
25 you, sir.

1 MR. DUREN: So, so, my constitutional rights, a  
2 defendant constitutional right can be violated at any time,  
3 and nothing can be done about it?

4 THE COURT: What I'm telling you is that the law  
5 requires that if you feel you were denied your right to  
6 counsel, there is a time frame in which you must appeal to  
7 the court or file an application to have that matter heard  
8 for the court to make that determination. You failed to do  
9 that in this case. Therefore, I will not hear that portion  
10 of your case, sir.

11 MR. DUREN: Excuse me one second.

12 (A PAUSE.)

13 MR. DUREN: The law, we're talking about, we're  
14 talking about the law. This is Supreme Court Justice  
15 Warren E. Burger, justice Supreme Court, Washington Post,  
16 26 May 1969, he say:

17 Guilt or innocence become irrelevant in a  
18 criminal charge as we flounder in a morass of  
19 artificial rules. All court rules and  
20 regulations are artificial.

21 And he goes on to say they are poorly conceived and  
22 impossible of application. Like they're impossible. All  
23 court rules and regulations are artificial. They, they are  
24 bylaws of the corporation. A corporation is an artificial,  
25 intangible, invisible, being created by the statute of law.

1 South -- these laws that -- in South Carolina are  
2 artificial laws.

3 I have cases right here that can prove that South  
4 Carolina -- the state is a corporation. I was never  
5 informed that the state was a corporation. I was never  
6 informed that I was a representing a corporate entity. I  
7 was told if I didn't adhere to the warrant, that they was  
8 going to take me to jail by force. All, all, all court  
9 rules and regulations are artificial. As they say in the  
10 language, I mean, it's quasi. It may look like it's real,  
11 it may act like it's real, but it's not real.

12 THE COURT: Okay.

13 MR. DUREN: And today we're standing in a military  
14 courtroom. Army regulation 840-10, it states that the  
15 United States flag with the two and a half inch frame  
16 fringe around it is only supposed to be flown in a military  
17 courtroom, and that's under US -- under the United States  
18 Code, Title 4, flag. You can read it. I have the Army --  
19 the regulation right here.

20 THE COURT: That's not necessary. We're not here  
21 about that, sir. What we're here about is you trying to  
22 get a new trial on all your charges ---

23 MR. DUREN: But ---

24 THE COURT: --- and ---

25 MR. DUREN: --- it's all tied together with this case.

1 These all tie together.

2 THE COURT: Sir, David, I understand that you have a  
3 certain position, that you are convinced that you are  
4 absolutely correct in that position, so much -- you are  
5 just as convinced as Ms. Coleman is that she is correct in  
6 everything that she says to me. And my job here is to make  
7 a decision as to who I think is right and what I believe  
8 the law says. And I've heard you, and I know that you are  
9 adamant about your position, but disagree with you, sir,  
10 and so I'm done with that issue. We're not going to hear  
11 your post-conviction relief application as to the 2002  
12 charges. I'm happy to hear from you about your 2015  
13 conviction if you want to discuss that, but we're done with  
14 the 2002 charges. I'm not going to hear that.

15 MR. DUREN: Okay. If we can't hear the 2002 charges,  
16 they are inserted in my 2015 conviction.

17 THE COURT: And you will have to figure out how to  
18 extract that. Do you have any other complaints about the  
19 2015 conviction?

20 MR. DUREN: Yes, ma'am.

21 THE COURT: Well, that's what I want to hear.

22 MR. DUREN: Okay.

23 THE COURT: Okay.

24 MR. DUREN: We'll start with the warrant.

25 THE COURT: Well, like I said, I'm going to hear from

1 Ms. Coleman first. I just wanted to hear that motion. And  
2 just so you understand my ruling, when it gets to be your  
3 turn, all we're going to be talking about is your 2015  
4 conviction, not the 2002 charges.

5 MR. DUREN: Okay.

6 THE COURT: Okay?

7 MR. DUREN: All right.

8 THE COURT: All right, Ms. Coleman.

9 MS. COLEMAN: Thank you, Your Honor. The state calls  
10 Jacob Smith to the stand.

11 JACOB M. SMITH, BEING DULY SWORN,

12 TESTIFIES AS FOLLOWS:

13 BAILIFF: State your full name. Spell your last name  
14 for the record.

15 WITNESS: Jacob Smith, S-m-i-t-h.

16 DIRECT EXAMINATION BY MS. COLEMAN:

17 Q. Hi, Mr. Smith. How are you?

18 A. Good. How about yourself?

19 Q. Fine, thank you. How long have you been practicing  
20 law?

21 A. Four years.

22 Q. And can you tell us some -- a little bit about your  
23 involvement in this case? Were you appointed or retained?

24 A. I was appointed to this case. Actually we were  
25 appointed from the bench, I believe. It was actually Tim

1 Murphy that was initially appointed. I worked in the  
2 public defender office. He came in one day, basically told  
3 me I was going to take over the case. So, I took over the  
4 case, picked up appointment on it, and proceeded forward  
5 with the preliminary hearing the next day.

6 Q. Okay, and how long did you represent Mr. Duren?

7 A. About four months.

8 Q. How many times did you met with him prior to his  
9 trial?

10 A. Ten to fifteen.

11 Q. Did the applicant cooperate with you during the course  
12 of your representation?

13 A. For the most part, yes, until the end. He decided he  
14 wanted to represent himself, so I filed the motion to be  
15 relieved and then also filed a motion to reduce bond, I  
16 believe it was, or reconsider bond.

17 Q. And he ultimately had a hearing about whether or not  
18 he could go pro se at trial. Is that correct?

19 A. Correct.

20 Q. Okay. Did you file any *Brady* or Rule 5 motions in  
21 this case?

22 A. I did.

23 Q. Okay. Did you review the discovery material with the  
24 applicant?

25 A. I did.

1 Q. Did you discuss the elements of the charges and what  
2 the state was required to prove?

3 A. I did.

4 Q. Did you discuss the applicant's version of the facts?

5 A. Yes, I did.

6 Q. And can you tell us a little about those?

7 A. He basically had an alibi. He said that his two  
8 sisters -- he was down in Georgia. I hired a PI to  
9 investigate that. PI came back with nothing. I informed  
10 Mr. Duren that he has not -- had not been able to find  
11 anything out on that end and that, you know, we were going  
12 to proceed forward.

13 ~~There was an issue in the discovery. DNA was not~~  
14 ~~processed as far as they have not collected it from Mr.~~  
15 ~~Duren to test what they had on the scene. So, a Schmerber~~  
16 ~~motion was filed or a Schmerber hearing was done, but I was~~  
17 ~~not representing him at that time. We -- I never had the~~  
18 ~~DNA to evaluate with Mr. Duren.~~

19 Q. Can you briefly describe the state's evidence against  
20 the applicant?

21 A. ~~Sure. There was a burglary. I believe there may have~~  
22 ~~been a video at one of the burglary sites, but it was~~  
23 ~~mainly a CODIS hit on DNA collected at the scene. I~~  
24 ~~believe it was blood DNA.~~

25 Q. Would you describe their evidence as overwhelming?

1 A. Well, at the time we didn't know. The DNA hadn't been  
2 tested, so it wasn't overwhelming at the time, but if the  
3 DNA was going to come back his, it, it would have been very  
4 strong.

5 Q. Okay. You mentioned a couple of alibi witnesses that  
6 you investigated. Were there any other potential witnesses  
7 or leads the applicant provided you with?

8 A. Not any he brought up to me.

9 Q. What other investigation did you do in this case?

10 A. Tried to make contact with alibi witnesses. We  
11 reviewed the discovery. The big thing for us was there was  
12 no DNA at the time that I represented him. Again, it was a  
13 short period of time; it was about four months. I think it  
14 might have been a little bit less that I actually  
15 represented him, but because we didn't have the, the DNA,  
16 the state did make an offer on the case. I relayed that  
17 offer to Mr. Duren and realistically it was wait and see  
18 for the DNA to come back.

19 Q. Did you spend any time preparing for trial in this  
20 case?

21 A. I didn't because we hadn't reached that point yet.

22 Q. Okay. How did -- well, you already explained this.  
23 How did your representation of the applicant end?

24 A. He told me one day that he wanted to proceed pro se.  
25 It was after I relayed the offer from the state. He asked

1 if he could get five years; he said that he would do five.  
2 I said I would ask. I asked. They wouldn't budge. The  
3 offer was plead straight up to two counts burg second  
4 violent and one count burg second nonviolent, I believe.

5 Q. Is there anything else you'd like us to know about  
6 your representation of Mr. Duren?

7 A. That's it.

8 Q. Okay.

9 MS. COLEMAN: No further questions. Thank you.

10 WITNESS: Thank you.

11 THE COURT: David, do you have any questions for this  
12 gentleman?

13 MR. DUREN: Yes. Yes, ma'am, I do, ma'am.

14 THE COURT: Okay.

15 CROSS-EXAMINATION BY MR. DUREN:

16 Q. Mr. Smith.

17 A. Yes, sir.

18 Q. Did you represent Mr. Duren at his notice to seek life  
19 without parole hearing?

20 A. I believe I did. Again, I came on -- Tim Murphy was  
21 on the case, I guess, initially, but I came in. I think I  
22 actually handled that. I think it was the day after I  
23 actually took over the trial.

24 Q. Okay. Did you do any investigation into his priors  
25 since they was going to use his priors to enhance his

1 charge?

2 A. Yeah. I reviewed the SLED records to indicate that  
3 you did have priors.

4 Q. So in your investigation of this select record, you  
5 did not notice any discrepancy in the indictments?

6 A. Not that I can recall. There may be -- I think there  
7 may have been an issue. I, I can't recall. I didn't -- I  
8 don't remember anything off the top of my head.

9 MR. DUREN: Just a second. Bear with me. I've just  
10 got a bunch of stuff up here.

11 THE COURT: Yes, sir.

12 BY MR. DUREN:

13 Q. Okay, Mr. Smith, you represented Mr. Duren in his  
14 notice to seek life imprisonment hearing. It was dated,  
15 let's see, dated, dated July the 31, 2014. Mr. Smith, in  
16 your investigation, did you investigate Mr. Duren prior  
17 record?

18 A. Like I said, I reviewed the prior record that you had  
19 with SLED, and there was an indication of a prior record.  
20 I believe ---

21 Q. I was talking prior indictments.

22 A. Prior indictments?

23 Q. Yeah.

24 A. No. I didn't -- I don't believe I actually reviewed  
25 the prior indictments. I reviewed your prior convictions.

1 Q. Isn't it the lawyer duty to do to a proper  
2 investigation if they're going to use these indictments for  
3 enhancement?

4 A. Certainly, and that's something that would have been  
5 done.

6 Q. Certainly. It's ---

7 A. Again, I represented you for three months.

8 Q. Huh?

9 A. I represented you for three months.

10 Q. Three months?

11 A. I looked at the convictions. You had prior  
12 convictions, that's correct. I reviewed the indictment  
13 that was served on you.

14 Q. Is, is two indictments supposed to be on the same --  
15 two warrants, two warrants supposed to be on the same  
16 indictment, two charges?

17 A. Again, you pled guilty to those charges, I believe,  
18 back in 2002. I had ---

19 Q. I, I understand, but these, these indictments -- this  
20 indictment is being used to enhance me.

21 A. I understand that. The conviction was being used to  
22 enhance you, yes.

23 Q. But you did no investigation?

24 MS. COLEMAN: Your Honor, I object. The indictment  
25 has been dismissed from this application.

1 THE COURT: Right. Yes.

2 David, I understand you want to talk about his  
3 investigation, but we're not talking about the 2002 cases  
4 now. We're only talking about the 2015 case.

5 MR. DUREN: This has to do with my life without parole  
6 hearing. This, this, this has nothing to do with the  
7 cases. I'm just asking him whether he did a proper  
8 investigation.

9 THE COURT: Okay.

10 MR. DUREN: That's all I'm asking.

11 THE COURT: All right.

12 BY MR. DUREN:

13 Q. Mr. Smith.

14 A. Yes, sir.

15 Q. Did you ever give the investigative report to Mr.  
16 Duren that you were investigating for his alibi defense?

17 A. I believe you spoke about that, about the ---

18 Q. Did, did you ever gave him the investigative report  
19 that Mr. Davis...

20 A. That John Davis completed?

21 Q. Yes.

22 A. John Davis never actually completed a written report.  
23 I was relieved as counsel before that, and his file was  
24 shut down.

25 Q. His file was shut down?

1 A. Yeah. His, his use of -- as a PI was ended, but we  
2 did discuss, as far as his findings, that there was nobody  
3 that he could make contact with the names and numbers you  
4 provided.

5 Q. Mr. Smith, what, what, what was Mr. Duren originally  
6 indicted for in 2012?

7 A. Burg second nonviolent or violent.

8 Q. Huh? In 2012, what was the original indictment?

9 A. I can't recall off the top of my head. I know you had  
10 two pending burg second violent and one pending burg second  
11 nonviolent.

12 Q. Now we can talk about this charge, two thousand --  
13 that I got the life sentence for. What was he originally  
14 indicted for in 2012?

15 A. Again, like I was saying, you, you were indicted for  
16 burg second violent.

17 Q. Second violent.

18 MR. DUREN: If it please the court, Your Honor?

19 THE COURT: Yes, sir.

20 BY MR. DUREN:

21 Q. Indictment, burglary after June 25th first degree,  
22 first count:

23 That David A. Duren did in Sumter County on  
24 or about 8 -- enter the building of Thomas  
25 Howell ---

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COURT REPORTER: Slow down, please.

Q. --- at Highway 156 South Harbor Street without consent with intent to commit a crime therein and in violation of South Carolina Code 16-11-03-118.

Which is burglary first degree?

A. Correct.

Q. Original indictment?

A. Correct.

Q. Did you ---

A. I believe you were charged with burglary second violent in 2012, and that's the enhancement paper you're holding in your hand.

Q. This is not the enhancement page. This is the original indictment in ---

A. It's, it's ---

Q. --- 2012.

A. It's the enhancement indictment that was served on you in court, yes.

Q. This is -- this indictment?

A. Correct.

Q. Okay. Mr. Jacob, what are the elements for first-degree burglary?

A. Are you talking about your enhancement to first-degree burglary, or are you talking about the original ---

Q. What are the elements for first-degree burglary?

1 A. Breaking and enter -- breaking and entering into a  
2 dwelling at night.

3 Q. So, was the entry into a dwelling when this indictment  
4 was originally charged?

5 A. Again, that's an enhancement incident. You were  
6 enhanced to a burg first.

7 Q. They can't, they can't enhance a nonviolent  
8 second-degree burglary into a first-degree burglary.  
9 There's no way.

10 A. It -- I believe it was a burg second and violent that  
11 you were charged with.

12 THE COURT: Let me interrupt. David, you can ask him  
13 questions about what he did or didn't do.

14 MR. DUREN: Okay.

15 THE COURT: What he -- who he talked to or didn't talk  
16 to, but arguing the law with ---

17 MR. DUREN: Okay.

18 THE COURT: --- Mr. Smith isn't going to get you  
19 anywhere.

20 BY MR. DUREN:

21 Q. First-degree burglary is entering into a dwelling?

22 A. Yes.

23 Q. Okay. You never put in a motion for dismissal?

24 A. No, I didn't.

25 Q. Why not?

1 A. Because you were enhanced.

2 Q. Huh?

3 A. You were enhanced.

4 Q. I was enhanced?

5 A. Due to your prior convictions.

6 Q. Okay. So, you just -- you did -- you investigated the  
7 whole thing? You investigated the whole charge?

8 A. I ---

9 Q. As far as you...

10 A. Again, I represented you for about three months, three  
11 or four months. I did what I could do in that time, yes.  
12 And I believe, if I'm not mistaken, that discovery -- even  
13 after I was relieved of counsel, you were provided a copy  
14 of discovery on the record. I left the public defender  
15 office shortly thereafter, so I wasn't actually here for  
16 it, but I seem to recall hearing that that hearing took  
17 place. So, I also gave you a copy of all the discovery  
18 that we reviewed, and then you also got a copy from the  
19 state on the record.

20 Q. Did you, ever did you ever have the intention to file  
21 for a motion of dismissal?

22 A. I did not.

23 Q. Did you ever check to see whether the solicitor office  
24 filed for continuancy in the case?

25 A. Not at the time I was representing you, no.

1 Q. Were you aware of the 180 day rule, 180 day order by  
2 Judge Finney dated March 5, 1999, that all criminal cases  
3 were to be disposed of within 180 days after defendant's  
4 arrest?

5 A. I wish that that was the case in Sumter County.

6 Q. Oh, it was the case.

7 A. I can assure you that it wasn't.

8 Q. Huh?

9 A. I, I can assure you that there were cases pending for  
10 longer than 180 days in Sumter County.

11 Q. But -- so, so, everybody just...

12 MR. DUREN: Your Honor, this is Supreme Court of South  
13 Carolina, Article 5, Section 4 of the South Carolina  
14 Constitution:

15 It is ordered that all criminal cases in the  
16 State of South Carolina shall be disposed of  
17 within 180 day from the date of the defendant  
18 arrest. Provided, however, the circuit court may  
19 continue a case beyond 180 days by written order  
20 if the court determine that exceptional  
21 circumstances exist in the case. This order does  
22 not create or deprive the defendant right to a  
23 speedy trial.

24 THE COURT: Well, listen, David.

25 MR. DUREN: This case should have been disposed of.

1 THE COURT: David, again, I am happy for you to ask  
2 Mr. Smith about what he did or didn't do. Did he file a  
3 motion ---

4 MR. DUREN: Did he?

5 THE COURT: --- or not? You can ask him things like  
6 that, but if you want to talk about the law, then I'm going  
7 to let Mr. Smith go and you can talk to me about the law.  
8 That's for me to decide whether some law was violated. But  
9 you ask him about the facts of what he did or didn't do  
10 while he was representing you.

11 BY MR. DUREN:

12 Q. Did you, did you file an order to dismiss the case?

13 A. A motion to dismiss? No, I did not.

14 Q. Did not. Okay.

15 THE COURT: Do you have any more questions for Mr.  
16 Smith about what he did or didn't do?

17 MR. DUREN: No, ma'am.

18 THE COURT: Okay. Any redirect?

19 MS. COLEMAN: Nothing further for this witness.

20 THE COURT: Thank you, sir.

21 WITNESS: Thank you.

22 (THE WITNESS EXITS THE STAND.)

23 THE COURT: Ms. Coleman, you can call your next  
24 witness.

25 MS. COLEMAN: Thank you. Yes, Your Honor. I would

1 like to make part of the record the testimony by Mr. Tim  
2 Murphy. Mr. Smith testified that he was also -- Mr. Duren  
3 was also represented for a short time by Timothy Murphy,  
4 and he testified at the trial starting on page 321 of the  
5 transcript, and I believe it goes through 325. And that's  
6 already part of the record, but it's actually -- I just  
7 wanted to point that out and any use that testimony as it  
8 applies to today's case as well because he spoke a little  
9 bit about his representation of Mr. Duren and, I believe,  
10 the discovery that was reviewed in this case.

11 THE COURT: Okay.

12 MS. COLEMAN: But Mr. Murphy is not here today to  
13 testify, and so the state has no further witnesses.

14 THE COURT: Okay.

15 Mr. David, do you have any witnesses?

16 MR. DUREN: Ma'am, I, I sent twelve subpoenas to the  
17 clerk of court to get time stamped and sent back to me so I  
18 could serve them, right?

19 THE COURT: Okay.

20 MR. DUREN: They sent all my -- just recently I have  
21 here -- they sent all my subpoenas back.

22 THE COURT: Okay.

23 MR. DUREN: Saying they don't serve subpoena. I say I  
24 sent a letter asking for you to time stamp them, put the  
25 court date on it and the time so I can have somebody to

1     serve them for me. I have, I have -- I even asked Mr.  
2     Griffith when he was my attorney to subpoena witnesses. It  
3     didn't happen. I asked Mr. Griffith to get the transcript  
4     of my prior -- transcript and stuff. He, he never got it.  
5     I wrote the court. They never sent it to me. I wrote the  
6     court and asked for the trial, for the trial evidence and  
7     the court evidence that was placed in evidence. They never  
8     sent it to me.

9           THE COURT: So, do you have any witnesses here today  
10     to testify?

11          MR. DUREN: I don't have any witnesses here today to  
12     testify.

13          THE COURT: Okay.

14          MR. DUREN: Because I have no way of getting them.  
15     They was impeding my progress to court.

16          THE COURT: Okay. Who were those witness that you  
17     wanted to come?

18           (A PAUSE.)

19          MR. DUREN: I have to go back to the witness list.

20          THE COURT: You don't remember any of their names?

21          MR. DUREN: Detective John Milton, Detective Callum  
22     [phonetic] from the South Carolina Department of -- I mean,  
23     from SLED. I was -- subpoenaed the chief of police. I was  
24     subpoenaing Mr. John Davis. I was subpoenaing Mr. Scott --  
25     Detective Scott Bowman, Detective Alex.

1 THE COURT: And what were those people going to tell  
2 me, you think?

3 MR. DUREN: Ma'am?

4 THE COURT: What kind of questions were you going to  
5 ask them? What were they going to tell me?

6 MR. DUREN: Well, well, challenge Mr., challenge Mr.  
7 John Milton on chain of custody and violation of the  
8 Fourth, of my Fourth Amendment, illegal search and seizure  
9 for that -- the swab, the swab.

10 THE COURT: Okay. I thought your post-conviction  
11 relief application was saying that you didn't have proper  
12 counsel.

13 MR. DUREN: Up until a point.

14 THE COURT: Well, what does the chain of custody have  
15 to do with any of that?

16 MR. DUREN: Ma'am?

17 THE COURT: What does the chain of custody have to do  
18 with that?

19 MR. DUREN: That was the only evidence they had to  
20 convict me, ma'am.

21 THE COURT: Okay. So, are you saying that somebody  
22 should have ---

23 MR. DUREN: The chain, the chain of custody was  
24 defective. The swab was taken illegally because I  
25 consented for a medical doctor or nurse to take my swab,

1 and Detective Milton under threat coerced to take my PR  
2 bond made me give them a swab. And the rule of contract  
3 say -- the plain language of the consent form say this was  
4 to be taken by a medial doctor or nurse.

5 THE COURT: Well, but let me interrupt you because all  
6 that stuff is what you talk about at trial or before the  
7 trial happens.

8 MR. DUREN: I object to it in trial, ma'am.

9 THE COURT: Well, the judge there made a ruling. I  
10 can't change that judge's ruling. That's in the past; I  
11 can't change that. I mean, if you were here saying that  
12 someone should have made a motion to suppress that evidence  
13 or that a lawyer failed to object to it, that's the kind of  
14 thing I'm here about, but not just the judge made the wrong  
15 decision. You would file an appeal for that, not a PCR  
16 alleging ineffective assistance of counsel. In fact, you  
17 were your own counsel at trial. So, are you telling me you  
18 didn't do a good enough job?

19 MR. DUREN: Ma'am?

20 THE COURT: You're trying to tell me that you didn't  
21 do a good job representing yourself at trial?

22 MR. DUREN: Apparently not.

23 THE COURT: Well, but who can we blame for that? You  
24 wanted to represent yourself, right?

25 MR. DUREN: Well, Your Honor, when I asked -- when I

1 had counsel, I kept asking Mr., Mr., Mr. Smith motion for  
2 the dismissal, he wouldn't do it. I, I kept asking for  
3 investigation. Matter of fact, twice he had to come back  
4 and ask me, well, who do you say you want to get, you know,  
5 for your alibi defense. I had to give it to him over and  
6 over.

7 THE COURT: Well, at the point that you fired him as  
8 your lawyer, why didn't you do all that stuff yourself  
9 after that?

10 MR. DUREN: Ma'am?

11 THE COURT: Why didn't you file those motions  
12 yourself?

13 MR. DUREN: Ma'am, I filed those motion. Those motion  
14 kept, kept getting nowhere. In order for me to get a  
15 motion to this court, ma'am, I have to send it to my mother  
16 and have her hand deliver it now.

17 THE COURT: Okay.

18 MR. DUREN: Other than that, they say we never get it.

19 THE COURT: Okay.

20 MR. DUREN: The court say we never got it. I filed  
21 those motion. I had to start filing through my mother; I  
22 had to send it to her address and get her to hand file it.  
23 Just recently I had her file a motion. They told her they  
24 wasn't going to file it. They told her that your son must  
25 think he's smarter than the judge. That's how the court

1 is, is, is treating my mother because she has filed a  
2 motion for me.

3 THE COURT: But she was able to file the motions,  
4 right?

5 MR. DUREN: Yeah, after, after that, but I didn't get  
6 those motion in time enough. They didn't get in.

7 THE COURT: Okay. So, why didn't you argue those  
8 issues when you showed up for trial? There was a judge  
9 there then, and you were standing right there in the  
10 courtroom.

11 MR. DUREN: I made, I made all the motion. I made a  
12 motion to suppress the DNA evidence. He didn't do it. I  
13 made a motion to dismiss the indictment because of  
14 indictment ambush two days before trial; they reindicted me  
15 two days before trial.

16 Four years, four years they had me indicted for  
17 first-degree burglary in 2012. They didn't take me for  
18 life, give me life, decide to give me life without parole  
19 until July of 2014, okay? My lawyer made no motion at, at  
20 that hearing. Then I came, I came back and filed the other  
21 motion and asked him to file motion for dismissal to the  
22 180 day rule. He told me he wasn't going to do it. So, I  
23 started to do it. They act like they don't -- they told me  
24 they never got my motion. What, what can I do if the court  
25 is impeding me to file my motion, and then I have to start

1 filing it through my mother. That's the only way I got it.

2 THE COURT: So, you did file them through your mother,  
3 and then when you came to court, a judge heard those  
4 motions and denied them. And what I'm telling you is  
5 that's not the subject of a PCR. If you think the judge  
6 was wrong because the law says the judge should not have  
7 denied those motions, that's for the appellate court to  
8 decide, but you're here in front of me talking about  
9 ineffective assistance of counsel. That's what I need to  
10 hear about. How was your counsel ineffective?

11 MR. DUREN: He didn't know all the law.

12 THE COURT: All right.

13 MR. DUREN: But also my Fourth Amendment was violated.  
14 My Fifth Amendment was violated.

15 THE COURT: All right. I know you don't have any  
16 witnesses here. You want to tell me everything you want me  
17 to know about your PCR application, and when I say  
18 everything, I mean excluding those 2002 convictions.  
19 Everything you want me to know about the 2015 conviction  
20 and why you want me to grant your application.

21 MR. DUREN: Subject-matter jurisdiction.

22 THE COURT: I want you tell me all about it,  
23 everything you want me to know.

24 MR. DUREN: Okay, subject matter. I was originally  
25 indicted for burglary first degree. After I wouldn't take

1 a plea of fifteen years, a plea of ten years, a plea of  
2 zero to fifteen years because I didn't do the crime -- I  
3 had an alibi defense. I was 600 miles away at the time.

4 I was waiting to go, I was waiting to go to court in  
5 Columbus, Georgia. I had to report to, to a bondsman every  
6 day of the week down there and she could, and she could  
7 verify that I had to report to her every morning at 9  
8 o'clock. I even, I even wrote her and asked her to send me  
9 that notarized statement, certified statement when I was at  
10 the Sumter County jail. She, she said she sent it. They,  
11 they can't -- Sumter County said they never received the  
12 letter. I, I had the investigator talk to Mr. Greg Carter  
13 from Columbus, Georgia. I painted his house there for week  
14 I was there. I painted the house for him. I was staying  
15 with my sister. My sister, Fay, she dropped me off on her  
16 way going to Texas. I was nowhere around when this crime  
17 took place. I had a alibi defense.

18 I've never got that investigation. He said -- that  
19 man, that man spent \$1200 of the state money and didn't do  
20 no investigation because I kept calling Mr. Davis asking  
21 him about the investigation from the Sumter County jail.  
22 He saw me one time.

23 Now, I was indicted for burglary first degree because.  
24 I wouldn't plead -- and the, and the solicitor knew the  
25 whole time. She knew she didn't have for -- conviction for

1 first degree. That's why I had my attorney, try to get him  
2 to put in for a motion of dismiss, which I did after that,  
3 but they said they don't receive it. Two days before  
4 trial, they come back and amended the indictment on May the  
5 7, 2015, brought me before Judge Cothran May the 13, 2015,  
6 and tell me I'm going to court two business days later on  
7 the 18th.

8 I said -- I asked him in the courtroom at that -- I  
9 was trying to get the transcript. I asked them in the  
10 courtroom on the record for a discovery hearing because at  
11 that time, I didn't have no witness list that they was  
12 going to use. I had no witness statements that they was  
13 going to use. I had no, I had no chain of custody that  
14 they was going to use. I had no, I had no DNA forensic  
15 report, nothing. I had no discovery. Mr. Smith said that  
16 he gave -- Mr. Smith did not give me no discovery.

17 Matter of fact, Judge, if you was to take a walk out  
18 there in Sumter County jail, you would see all the  
19 defendant out there that doesn't have discovery, and you  
20 have defendants out there that have indictments that -- not  
21 even signed. I'm just letting you know what's going on out  
22 there.

23 Now, does, does first-degree burglary and  
24 second-degree burglary have their various difference? Yes,  
25 it does. It changes the nature of the original indictment.

1 They cannot be proved by the same element, first and  
2 second-degree burglary. First degree is enter into a  
3 dwelling. Second degree is enter into a building. A  
4 dwelling is where anybody sleeps or a guard or anything, or  
5 any guard shack that's within 100 yards. Second-degree  
6 burglary just requires the entry of a building without  
7 consent. Therefore, the nature of, the nature of the  
8 indictment is changed. Court loses subject-matter  
9 jurisdiction of indictment.

10 THE COURT: So, you're saying you should have been  
11 indicted for burglary second but it was a burglary first?

12 MR. DUREN: The warrant specifically state -- I have  
13 here the warrant specifically state burg -- I was charged  
14 with burglary second degree nonviolent on the warrant. I  
15 have the warrant, second burglary degree nonviolent. Now,  
16 you can, you can three strike me if it's a violent or  
17 serious offense, but I was tried with a nonviolent offense.

18 THE COURT: So, what you're saying is you don't think  
19 that they could have charged you with burglary first  
20 because it started out as a burglary second nonviolent?

21 MR. DUREN: Yes, ma'am.

22 THE COURT: What's the basis of you believing that?

23 MR. DUREN: I have, I have the code and statute right  
24 here.

25 THE COURT: What code?

1 MR. DUREN: For, for burglary first and second.

2 THE COURT: Right. You know that that code says that  
3 burglary first degree can be charged if a burglary is  
4 committed by a person with a prior record of two or more  
5 convictions for burglary?

6 MR. DUREN: Burglary first degree?

7 THE COURT: Yes, sir.

8 MR. DUREN: But the, but the controlling nature of  
9 that, the controlling nature that, and we must look to the  
10 nature of the indictment, is, one, entering into a  
11 dwelling. That's what we must look to in the indictment,  
12 the controlling nature of the indictment.

13 THE COURT: Okay.

14 MR. DUREN: Even though they are both close, second  
15 degree has the, has the same statute in it for burglary  
16 first -- I mean second, but the controlling nature is --  
17 burglary second is into a, into a building without consent  
18 to deprive the owner of something.

19 THE COURT: Okay.

20 MR. DUREN: Burglary first is entering into a  
21 dwelling.

22 THE COURT: Okay.

23 MR. DUREN: The nature, the nature of both has been  
24 changed. They are two different, they are two different  
25 statutes. One is, one is, one 311. The other is 312.

1 THE COURT: Okay. What else do you want me to know?

2 MR. DUREN: Huh?

3 THE COURT: What else do you want me to know about  
4 your case?

5 MR. DUREN: Your Honor, believe it or not, I, I, I  
6 told, I told Mr., Mr., Mr. Smith that I was going to plead  
7 to, what -- that I was -- motion for dismissal because they  
8 didn't have the elements for burglary first, and they  
9 didn't. He was the only one that knew it, that know that.  
10 After three and a half, after four and a half years, the  
11 solicitor going to come back and say we made a mistake? We  
12 know what was going on. She was trying to force a  
13 conviction. We know that. It happens all the time.

14 THE COURT: Did you make that motion to dismiss ---

15 MR. DUREN: Yes, ma'am.

16 THE COURT: --- for that reason?

17 MR. DUREN: I made that motion to dismiss.

18 THE COURT: Okay. So, I'm back to where I'm saying if  
19 you believe that the trial judge made the wrong decision,  
20 that's for you to appeal to the Court of Appeals.

21 MR. DUREN: Ma'am, I had ten days to appeal. When I,  
22 when I got sentenced, they took me back to Sumter County  
23 jail and put me in isolation. My mother tried to come  
24 visit. They told my mother they'd already shipped me.  
25 They held me in isolation. When I went Kirkland, they held

1 me in isolation. There was no way that I could get to make  
2 an appeal. I had no writing materials; I had no envelope.  
3 I couldn't get to the legal kiosk. Kirkland do not let you  
4 use the legal kiosk. They do not let you use the legal --  
5 I had no way to write, to put my appeal in. And when I  
6 tried to put in my appeal after that, it was too late.

7 THE COURT: Okay.

8 MR. DUREN: If this, if this is a violation of the  
9 constitution, this is the most fundamental violation of,  
10 of, of a defendant due process to law, most fundamental.  
11 Unless that, unless that defendant or whoever it is is  
12 given that right of due process, which the -- your  
13 constitution guarantee that defendant, there can be no  
14 justice, Your Honor.

15 THE COURT: How were you denied due process?

16 MR. DUREN: Huh?

17 THE COURT: What is the due process violation?

18 MR. DUREN: Due process? My right to a fair trial, my  
19 right to a fair trial, not giving the evidence I want.  
20 Even at this time, I have witness upon witness. Asked Mr.  
21 Jack Howell right there for my complete case file, the  
22 client complete case. He sent me something said this is  
23 all the solicitor give them for discovery. I look at it.  
24 It has, it has no motion to relieve counsel in it. It has  
25 no motion to seek life, life without parole, parole in it,

1 nothing. It has no -- none of the lawyers', none of the  
2 lawyers' notes or nothing in it, and the client has that  
3 right to that file. I asked. I asked and I saw when I  
4 went pro se -- when I went pro se, I filed a motion before  
5 the court for discovery. Ms. McElveen never gave me any  
6 discovery. It's a violation of due process.

7 THE COURT: Did you ever get the discovery?

8 MR. DUREN: No, ma'am. I still haven't got any  
9 discovery. What I got, I got piece by piece from the clerk  
10 of court. He would send me a piece here, send me a piece  
11 here, send me a piece here, send me a piece here. Just  
12 recently he sent me my sentencing sheet time not time  
13 stamped with the court reporter signature on it, forged,  
14 but I, I got a copy of, of the, of the sentencing sheet,  
15 true copy, with no signature on it. So, they are  
16 committing fraud all the way around, Your Honor.

17 THE COURT: Which sentencing sheet are we talking  
18 about?

19 MR. DUREN: This one, the life without -- I mean, this  
20 one where Judge James sentenced me to life without parole.  
21 One sheet is not, one sheet is not certified true copy with  
22 the, with the court reporter signature and everything on  
23 it. The one I have, though, it doesn't have no court  
24 reporter signature on it, and it's true copy and it's not  
25 even time stamped.

1 THE COURT: Well, all that stuff happened after you  
2 had been convicted. The sentencing sheet is not filled out  
3 until you're actually sentenced. That's ---

4 MR. DUREN: Yeah, yeah.

5 THE COURT: That's not ---

6 MR. DUREN: What I'm saying, due process before when I  
7 was trying to get all these things in order to, in order to  
8 fight my, my case. My due process violated, was violated.  
9 I wasn't, I wasn't given, I wasn't given the DNA  
10 application because Ms., Ms. McElveen two times -- if I  
11 could get the transcript -- told Judge Cothran, she lied in  
12 court and said that they didn't have the DNA forensic  
13 testing. Now when she comes up to trial she put the test,  
14 she put it into exhibit. It's dated way back in 2012, and  
15 she told Judge Cothran twice on the record that she didn't  
16 have it, and I've been, I've been asking for it in  
17 discovery. I, I, I didn't get the chain of custody until  
18 the day of trial. I didn't get the witness list until the  
19 day of trial. I didn't -- I still haven't got no  
20 statements that the witness made. I have no affidavit for  
21 the, for the expert witness. These are all due process  
22 violation.

23 If you would go back and look at the record, Your  
24 Honor, from March 25th, January 2nd, you would see Ms.  
25 McElveen has been lying through her teeth. I hate to say

1 it, but she has. She withhold -- she withheld evidence.  
2 Whether confirmed my guilt or confirmed my innocence, it  
3 was a *Brady* violation. I am entitled to that evidence and  
4 it's a due process violation, and all we have to do is look  
5 at the court record. She lied, said she gave me all my  
6 discovery on, on May, on May the, May the 13th. You go  
7 back and look at the transcript. She didn't.

8 THE COURT: Do you have a copy of that transcript for  
9 me to look at?

10 MR. DUREN: I, I asked, I asked Ms. -- I asked Mr.  
11 Griffith to please make available that transcript to me.  
12 It was never made available to me. I have the, I have the  
13 letters right here where I asked him for -- everything I  
14 asked him that I'm telling you. She didn't make it  
15 available.

16 THE COURT: Well, that's probably why he's not your  
17 lawyer anymore, but you don't have it here for me to look  
18 at?

19 MR. DUREN: No. No, ma'am, I don't. So, so, I, I  
20 understand that. So, how am I -- like when I'd asked --  
21 shoot. I know Mr. Griffith is no longer my lawyer.

22 THE COURT: Sure.

23 MR. DUREN: I asked him, I called him Friday and asked  
24 him when are we going to PCR hearing. He didn't even know  
25 who I was. After I told him, he said oh, yeah. We got --

1 he had -- was scheduled for Monday, but we got it Tuesday.  
2 I said so what are we arguing? He said, well, we're  
3 arguing ineffective assistance of counsel. I said how can  
4 we argue ineffective assistance of counsel when I  
5 represented myself at trial? He said oh yeah. You do have  
6 a point. I said so what we are arguing? Well, I have to  
7 look over the transcript again. I said so you don't even  
8 have a brief? He said no, I don't have a brief. So, how,  
9 how -- what am I supposed to come in here today with, Your  
10 Honor?

11 THE COURT: Well, that's why I asked you if you were  
12 ready to proceed today. We could have done your case on a  
13 different day if you weren't ready.

14 MR. DUREN: I prefer my case before you.

15 THE COURT: All right.

16 MR. DUREN: I prefer my case before you.

17 THE COURT: Okay.

18 MR. DUREN: But, but, Your Honor, you know, there is,  
19 there is more, there is more here than meet the eyes today,  
20 Your Honor. There's a lot that's untold here today, you  
21 know, and I know that the state is not going to go -- even  
22 if I had a lawyer, I know that the state is not going to go  
23 against a public defender because he works for the state,  
24 too. I, I know that. I know that. I know that. And I  
25 know that forty to thirty-five percent of the people that

1 are in prison, a lot of them are innocent. I know that,  
2 too. I'm sitting down there at Lieber. I'm looking at  
3 people that shouldn't even be in prison, including me. I  
4 know where I was at when this crime took place.

5 And that ain't the first time law enforcement tried to  
6 pin a trial -- pin a charge on me. They tried it in  
7 Clarendon County. I had to go back and forth to court for  
8 a whole year, take a jury trial when the police tried to  
9 plant evidence in my booking report and take a jury trial.  
10 You know, you know, my record in the past, yes, I did those  
11 charge. I did. I admit to it, but this one I didn't do.  
12 I didn't.

13 Now, now, my blood got there they say. I don't know  
14 because I'm looking at the chain of custody. The, the  
15 officer -- forensic expert that took the original test,  
16 that took the test for the blood, that actually did the  
17 swab, he didn't even sign the initial chain of custody.  
18 He's nowhere in the chain of custody, so how can that be?  
19 Who knows what happened. That could never -- that could  
20 not have been my blood. I don't know that. And the chain  
21 of custody, they, they say they had it. There's not even a  
22 chain of custody. There's no Form A. There's no Form B.  
23 There's no Form C. There's no initial chain of custody  
24 signed nowhere. These are all due process violations, Your  
25 Honor, constitutional violations.

1           Was I duly convicted? No. And legally convicted?  
2 No. I never had that chance. The Thirteenth Amendment  
3 said unless a person is duly and legally convicted -- bear  
4 with me one second, Your Honor.

5           (A PAUSE.)

6           MR. DUREN: Our court -- the Honorable Justice McIver  
7 of the South Carolina Supreme Court state, he say: The law  
8 casts its protection over all person alike. Hence,  
9 therefore, any person can be made to suffer for a crime.  
10 He, he said before any person can be made to suffer for a  
11 crime, he must be caught and held in the exact method for  
12 which the law has provided or, in other words, he must  
13 proceed against step-by-step according to the rules of  
14 practice which the law has ordained. It is to no avail to  
15 proceed against him according to other or better rules.  
16 The law rules must be pursued or the law -- or he said the  
17 law rules must be pursued or the law penalty cannot be  
18 imposed upon -- on him for his crime.

19           If the court, if the prosecutor, or anybody violates  
20 the defendant due process right, the sentence can't be  
21 imposed on him. His constitutional rights has been  
22 violated, Your Honor. And we're not having the transcript  
23 today, that makes a big difference when I ask for these  
24 transcripts, and to me it would seem like it was never  
25 meant for me to have because if I was an attorney and my

1 client asked me for the transcript, I would give it to him.  
2 I would make every available effort to get it to him. So,  
3 how can I prove -- you know, I can sit up here and talk in  
4 the wind, but if I get it later and I look, everything I  
5 say is true. My due process has been violated.

6 We could listen to the audio. They have audio. They  
7 have audio. We don't have to wait 'til they transcript.  
8 We can go get the audio; we can request the audio. You  
9 didn't have to wait for a transcript.

10 THE COURT: But you don't have that audio here today,  
11 do you?

12 MR. DUREN: They don't give it -- they not going to  
13 give it to me. I know they not and you know that, Your  
14 Honor.

15 THE COURT: I just had to ask the question.

16 MR. DUREN: You know that.

17 THE COURT: But unfortunately -- and I don't want to  
18 cut you off if you've got more to say, but unfortunately it  
19 sounds like a lot of the stuff that you're talking about is  
20 your disagreement with what the trial judge did, the  
21 decisions that the trial judge made about the motion to  
22 dismiss, whether it's regarding the indictment, chain of  
23 custody, DNA evidence, things like that, and those are the  
24 kinds of things that should have been brought in an appeal.  
25 A PCR application isn't a substitute for an appeal.

1 MR. DUREN: Like I say, I'll tell you. To get an  
2 appeal -- because they put you in isolation and don't give  
3 me something. How can I, how can I do it?

4 THE COURT: Look, I don't know the exact circumstances  
5 of that, but I'm not sitting here as an appellate judge is  
6 what I'm saying.

7 MR. DUREN: I understand that, Your Honor.

8 THE COURT: It's not my job as we sit here today to  
9 decide those issues that could have, should have been  
10 decided by the Court of Appeals. That's not my job, so I  
11 can't rule on those things. If you think the trial judge  
12 got it wrong, it's not my job to decide that the trial  
13 judge got it wrong or right or whatever. I'm sorry, but I  
14 did cut you off. Anything else you want to tell me about  
15 your PCR application?

16 MR. DUREN: I do, I do. First violation,  
17 subject-matter jurisdiction, we already discussed that.  
18 Violation of my Fourth, Thirteen Amendment. I was not duly  
19 and legally convicted.

20 THE COURT: Okay, anything else?

21 MR. DUREN: Nothing else. I have some papers for the,  
22 the...

23 THE COURT: You have papers for me?

24 MR. DUREN: No. For the attorney general.

25 THE COURT: Okay.

1 MR. DUREN: May I give them to them?

2 THE COURT: Yes, sir.

3 MR. DUREN: I'm serving you these papers in open  
4 court.

5 MS. COLEMAN: Thank you.

6 MR. DUREN: One of them is a notice of intent to claim  
7 the right. The other is an international notice of  
8 affidavit of truth. They were, they were time stamped with  
9 the clerk of the Sumter County courthouse in May and April  
10 of last year.

11 THE COURT: Okay.

12 MR. DUREN: Okay.

13 THE COURT: Now, I don't, you know, I don't know the  
14 substance of what those are. Now, if they are some kind of  
15 things that need to be filed still -- I know you said some  
16 of them are time stamped, but ---

17 MR. DUREN: Those already been ---

18 THE COURT: --- if there's anything else ---

19 MR. DUREN: They already been filed.

20 THE COURT: Okay.

21 MS. COLEMAN: These have all been filed.

22 THE COURT: All right. So, she has copies of them  
23 now.

24 MR. DUREN: And your name, ma'am?

25 MS. COLEMAN: Julie Coleman.

1 MR. DUREN: Julie Coleman, okay.

2 THE COURT: All right, Ms. Coleman, before we wrap  
3 this up, do you want to ask David any questions?

4 MS. COLEMAN: I have no cross-examination, Your Honor,  
5 just a brief closing argument.

6 THE COURT: Okay. Absolutely. I'll hear from you  
7 now.

8 MS. COLEMAN: Thanks. Starting with the issue of  
9 discovery, just looking at page 39 of the transcript, the  
10 solicitor went through the dates and times when he was  
11 served with discovery. So, I believe he was given copies  
12 of the file on the record in open court as far as that  
13 goes.

14 As you've stated already, the state would argue that  
15 many of these are direct appeal issues and are not able to  
16 be raised on post-conviction. He hasn't met the burden of  
17 proof really for any of these allegations.

18 I would say ineffective assistance of counsel, Mr.  
19 Duren has done -- he did a fantastic job at trial, and you  
20 can see by reading the transcript he vigorously  
21 cross-examined all the witnesses. He made every objection  
22 and every motion to suppress that he could. You can tell  
23 that he's very organized and prepared, and he chose to  
24 represent himself again today. And I would say that he was  
25 -- Judge Cothran determined that he was able to go pro se

1 at trial and you did again today, and I would say that he  
2 was not, not...

3 THE COURT: Deficient.

4 MS. COLEMAN: Deficient, yes, and not denied -- or  
5 effective assistance of counsel in this. We would ask you  
6 to dismiss his application. Thank you.

7 THE COURT: Thank you, ma'am.

8 I'm going to give you the final word, David, briefly  
9 if you want. You don't have to say anything else ---

10 MR. DUREN: Yes, ma'am.

11 THE COURT: --- if you don't ---

12 MR. DUREN: Your Honor, I'd ask, I'd ask the court to  
13 grant me my, my PCR application on the grounds that my due  
14 process rights has been violated under the state  
15 constitution and the federal constitution. State  
16 constitution state that unless a person is legally and duly  
17 convicted, and I do -- if -- even though I don't have  
18 transcript, Your Honor, to prove, to prove, I'm telling you  
19 the truth, you know, and I would the state -- ask the state  
20 to provide this transcript.

21 THE COURT: Well, it's only Ms. Coleman's job in this  
22 case to give me the trial transcript of whatever you are  
23 appealing. Make sure that we have that. I'm not going to  
24 make her hunt down a court reporter for some date in some  
25 proceeding that she wasn't involved in.

1 MR. DUREN: Okay. All right. The trial transcript is  
2 supposed to be complete transcript of all evidence and  
3 everything placed into evidence.

4 THE COURT: It is a transcript of what happened at the  
5 trial, yes, sir.

6 MR. DUREN: Yes.

7 THE COURT: Not any other hearings.

8 MR. DUREN: I mean, and anything that was placed into  
9 evidence is supposed to be in the transcript.

10 THE COURT: Not -- no, not necessarily. Not  
11 necessarily. I mean, it depends on what it is. I don't  
12 know.

13 MR. DUREN: I'm talking about all intangible objects  
14 is supposed to be in the transcript.

15 THE COURT: Sometimes there are copies of some  
16 documents, but sometimes not. Those go in an evidence  
17 room, and they are held by the clerk's office in  
18 safekeeping. The court reporter doesn't keep those.

19 MR. DUREN: Okay.

20 THE COURT: So, they can't put them with the  
21 transcript.

22 MR. DUREN: I wrote the, I wrote the clerk of court  
23 and asked for those evidence and asked for all my motion  
24 that are placed in evidence. I have the letter right here.  
25 Clerk of court wrote me back and told me -- wrote the court

1 back -- wrote me back and told me they don't keep them. I  
2 was -- normally like they don't keep -- that they never  
3 have those.

4 THE COURT: It depends on what it is. Some stuff they  
5 keep; some stuff is returned to the state. I just -- it  
6 depends on ---

7 MR. DUREN: I'm talking about all my ---

8 THE COURT: --- what it is and what the circumstances  
9 are.

10 MR. DUREN: I'm talking the motion, DNA, papers, all  
11 that.

12 THE COURT: They might have copies of the motions in  
13 the file if you filed them, but if they were never filed,  
14 then they don't have them.

15 MR. DUREN: They don't, they don't have no evidence  
16 that the state put into exhibit or nothing. I asked for  
17 all of it.

18 THE COURT: I don't know where it is. I don't keep  
19 the evidence. I really honestly don't know. Some things  
20 should remain in the clerk's office. Some things may have  
21 gone back to the police department's evidence room or the  
22 sheriff's department evidence room.

23 MR. DUREN: Before you make a, a, a ruling on this,  
24 Your Honor, I have something I'd like to pass up to Your  
25 Honor. It's a certificate of service before you make a

1 ruling on this.

2 THE COURT: A certificate of service for what?

3 MR. DUREN: Affidavit that I've given judicial notice  
4 to give motion to relieve. Oh, no, that's not that.  
5 Brought one.

6 MS. COLEMAN: Your Honor, I'm sorry to interrupt. I  
7 forgot to mention one thing in my closing argument.

8 THE COURT: Sure.

9 MS. COLEMAN: If it's not -- okay.

10 THE COURT: Sure.

11 MS. COLEMAN: I meant to argue. If you should find it  
12 necessary to deny this application, the state would request  
13 that you include a finding of overwhelming evidence, and  
14 this is all in the transcript of the trial. The evidence  
15 in the case was -- there was blood found on the -- on a  
16 cooler from the building that was broken into by the pool.  
17 That person who broke in smeared their blood on a cooler  
18 and they matched it. It was CODIS hit to Mr. Duren, and  
19 the state argues that this is overwhelming evidence which  
20 would preclude him from an argument of ineffective  
21 assistance of counsel.

22 THE COURT: Thank you, ma'am.

23 What kind of paper are you looking for, David?

24 MR. DUREN: This -- oh, here it is. No. One second,  
25 Your Honor.

1 (A PAUSE.)

2 MR. DUREN: Okay, this is a certificate of service for  
3 petition of removal, Your Honor.

4 THE COURT: Petition of removal?

5 MR. DUREN: Yes.

6 THE COURT: Okay.

7 MR. DUREN: It was also served on my attorney, and it  
8 was also served on the attorney general, and it has been  
9 filed with the Sumter County clerk of court. A copy was  
10 sent to the Sumter County clerk of court.

11 THE COURT: Okay.

12 MR. DUREN: It's a petition of removal. Before you  
13 make a final judgment, the case is being removed to the  
14 federal jurisdiction.

15 THE COURT: Okay. Well, I've got my copy. You say  
16 you filed it with the court, too, right?

17 MR. DUREN: Yes, ma'am.

18 THE COURT: All righty, anything else I need?

19 MR. DUREN: No, ma'am.

20 THE COURT: All right, I'm not going to make a  
21 decision today. I'm going to think about everything that  
22 you've told me, and I will let you know something in the  
23 mail. You'll get something in the mail, okay, with my  
24 decision. Okay, thank you, sir.

25 --- END OF TRANSCRIPT OF RECORD ---

**CERTIFICATE**

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR SUMTER COUNTY, SOUTH CAROLINA, ON THE 26TH DAY OF JULY, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JUNE 17TH, 2017



*Remy*

ALAN WILSON  
ATTORNEY GENERAL

December 3, 2021

**RECEIVED**

DEC 07 2021

GENERAL COUNSEL

South Carolina Department of Corrections  
Attn: Jonathan Eckstrom  
4444 Broad River Road  
Columbia, South Carolina 29221-1787

**Re: David A. Duren, #181965 v. State of South Carolina**  
**2019-CP-43-1328**

Dear Mr. Eckstrom:

Please serve the inmate, David A. Duren, #181965, with the enclosed conditional order of dismissal in his PCR action and then return the enclosed affidavit of service to our office.

If you have any questions, please feel free to call: (803) 734-3737.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General

MHJ/ks  
Enclosures

Exhibit B

STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

RECORDED

2021 NOV 22 PM 2:28

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

David A. Duren, #181965,

LES B. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.  
Applicant,

2019-CP-43-1328

v.

CONDITIONAL ORDER OF DISMISSAL

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

State of South Carolina,

*Sherry H. How*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

Respondent.

This matter comes before this Court by way of a post-conviction relief (PCR) action filed by David Duren (Applicant) on June 21, 2019. The State made its return and motion to dismiss, requesting the application be summarily dismissed because of Applicant's failure to comply with the statute of limitations, because it is successive, and as partially barred by the doctrine of laches, entitling Respondent to judgment as a matter of law.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections. In February 2002, the Sumter County Grand Jury indicted Applicant for three counts of second-degree burglary (2002-GS-43-107) and one count of second-degree arson (2002-GS-43-109).<sup>1</sup> Jack Howle, Esquire, represented Applicant. On April 4, 2002, Applicant pleaded guilty as indicted before the Honorable Clifton Newman. Judge Newman sentenced Applicant to seven years' imprisonment for two counts of second-degree burglary and six years' imprisonment for second-degree arson, with the sentences to be served concurrently. Applicant did not appeal his guilty pleas or sentences.



<sup>1</sup> Applicant lists both sets of charges/indictments on his current PCR application.

Additionally, in September 2012, the Sumter County Grand Jury indicted Applicant for second-degree burglary (2012-GS-43-1149), which was amended by the Grand Jury in May 2015.<sup>2</sup> On May 20, 2015, Applicant proceeded *pro se* to a jury trial before the Honorable George C. James, Jr. The jury convicted Applicant as indicted. Judge James sentenced Applicant to life imprisonment without parole pursuant to the recidivist offender sentencing structure set forth in section 17-25-45 of the South Carolina Code. Applicant did not appeal his conviction or sentence.

#### **First PCR Application and Appeal (2015-CP-43-2134)**

Applicant filed his first application for post-conviction relief on September 14, 2015. In this application, Applicant alleged he is being held in custody unlawfully on both his 2002 and 2015 charges for the following reasons:

1. "4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, amend. Violation."
2. Due Process Violation
3. Fraud Upon the Court
4. Subject Matter Jurisdiction
5. Ineffective Assistance of Counsel

Respondent filed its Return and Partial Motion to Dismiss on December 3, 2015. An evidentiary hearing into the matter was convened on July 25, 2016, at the Sumter County Courthouse before the Honorable Jocelyn Newman. Applicant was present at the hearing and represented by Timothy Griffith, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office represented the State.

At the evidentiary hearing, Respondent moved to dismiss any allegations pertaining to Applicant's 2002 burglary and arson convictions as untimely. The PCR court granted Respondent's motion

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<sup>2</sup> The records provided to Respondent by the Sumter County Clerk of Court do not include the original indictment. However, Respondent requests this Court take judicial notice of the public index, which lists the original indictment date as September 27, 2012



and dismissed those allegations. Applicant then proceeded only on allegations regarding his 2015 convictions.

Applicant filed a notice of appeal on November 21, 2016, after the PCR court issued a Form 4 Order denying relief that same day. On December 1, 2016, the Supreme Court of South Carolina dismissed the notice of appeal without prejudice and directed the PCR court to enter an order continuing the required findings of fact and conclusions of law. The remittitur returned to the circuit court on December 19, 2016.

The PCR court denied relief and dismissed the allegations with prejudice by written Order filed February 28, 2017. On March 6, 2017, Applicant filed a timely notice of appeal. On January 18, 2018, appellate counsel Laura M. Caudy filed a Johnson<sup>3</sup> petition for writ of certiorari on Applicant's behalf. In this petition, Applicant asserted the following issue:

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate the constitutionality of Petitioner's prior convictions, which were used by the state to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45, where these convictions were obtained in violation of Petitioner's Sixth Amendment right to counsel since Petitioner pled guilty with counsel who was appointed immediately before his plea merely as a formality to stand by Petitioner during the proceeding.

On September 24, 2018, the Supreme Court of South Carolina denied Applicant's petition and granted appellate counsel's motion to be relieved. The remittitur issued October 12, 2018.

---

<sup>3</sup> Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).



**2017 Federal Habeas Action – 1:16-cv-03756-MBS-SVH**

In the meantime, Applicant filed a petition for writ of habeas corpus in the federal district court on February 28, 2017.<sup>4</sup> In this petition, Applicant attacked the district court's decision in eight civil actions. Applicant also requested the following: "the court to reinstate Lawrence L. Crawford's cases; consolidate the instant case with others; remove state cases into the instant action; disqualify several state and federal court judges; transfer the instant action and other cases in this court to New Jersey; and transfer Plaintiff and his property to a prerelease camp."

The United States Magistrate Judge issued a Report and Recommendation on February 28, 2017, determining the claims contained in the petition were vague and conclusory, in violation of Rule 2(c) of the section 2254 Rules, and a number of the allegations had previously already been decided. On May 9, 2017, the United States District Court for the District of South Carolina adopted the recommendation, summarily dismissed the application without prejudice, and denied a certificate of appealability.

**CURRENT APPLICATION**

In his *second* and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Fraud Upon the Court
2. "Null and Void Indictment"
3. *Brady* Violation
4. Error of Law
5. Discovery Violation
6. "Prior Conviction Violation."
7. "6<sup>th</sup> Amend. Right to Counsel."

---

<sup>4</sup> Applicant marked through portions of the form section 2254 petition, replacing "§ 2254" with "writ of error," and adding section 1983. Applicant also crossed out "Petitioner" in the caption and added "parties listed in case 8:16-cv-3328 et al," and replaced "Respondent" with "defendants Judge Robert E. Hood et al in expanded cases." Because Applicant sought to have his sentence and conviction vacated, the United States District Court for the District of South Carolina continued to analyze his petition under section 2254.



Applicant requests the following form of relief: "Sentence and conviction set aside."

Attached hereto and incorporated by reference are the records of the Sumter County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR and appellate records, the records of Applicant's federal habeas action, the current PCR application and Respondent's return.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to section 17-27-70 and -80 of the South Carolina Code, this Court informs the parties of its intent to dismiss the application this application is procedurally barred and no purpose would be served by further proceedings. See S.C. Code Ann. § 17-27-70(b) (establishing the procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (holding that summary disposition is appropriate when there is no need to develop facts and the applicant is not entitled to relief); Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the Court will hold an evidentiary hearing). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

#### **Statute of Limitations**

This PCR application 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, *et. seq.* Section 17-27-45(a) reads as follows:

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



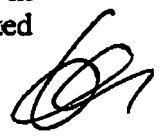
The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of and sentenced for the offenses he challenges in this application on April 4, 2002, and May 20, 2015. Applicant did not appeal his convictions or sentences. Therefore, any application for post-conviction relief must have been filed on or before April 4, 2003, for the first set of charges, and May 20, 2016, for the second set of charges in order to comply with the statute of limitations. This Application was filed on June 21, 2019, *sixteen years and three years*, respectively, after the statutory filing periods had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, section 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.” Therefore, this Court finds it must summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

#### **Successive Applications**

Second, this Court finds the application must be summarily dismissed because it is successive to Applicant’s previous collateral actions. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been raised in a 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, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. 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).

Applicant could have raised, and did raise at least some of, the grounds for relief he now alleges in his prior collateral actions; thus, the current application is successive and barred under section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and this Court finds the application must be summarily dismissed as successive to Applicant's previous collateral actions.

#### *Laches*

Finally, all allegations related to Applicant's 2002 charges should be summarily dismissed pursuant to the equitable doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Requiring reasonable diligence "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many



years ago, where records and witnesses are no longer available.” Id. (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). “Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches.” Id.

Here, Applicant seeks review of his convictions more than *sixteen years* after he pleaded guilty. Absent some explanation or justification for the delay in seeking relief, laches will prevent Applicant from seeking collateral review of his conviction, especially because the delay affects the availability of evidence to review Applicant’s claims. Applicant has offered no justification for the delay. Because of the delay, witness memories and physical evidence will have naturally faded and degraded. See, e.g., Bray, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge’s ruling that laches barred belated review of denial of PCR seven years after PCR hearing was held). Moreover, because of Petitioner’s failure to timely challenge his conviction, the tape recordings of his guilty plea hearing have almost assuredly been destroyed. See Rule 607, SCACR (“[A] court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five years . . . and the court reporter may reuse or destroy the tapes after the expiration of that period.”); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for



reconstruction of record noting such remedy “would undoubtedly be futile considering the passage of over ten years’ time” when the delay was caused by appellant).

As a result, Applicant’s delay in bringing this action has affected the availability of evidence for this Court to review his claims and prejudices Respondent in defending against them. Therefore, the Court finds Applicant’s allegations regarding his 2002 convictions should be summarily dismissed as barred by the equitable doctrine of laches.

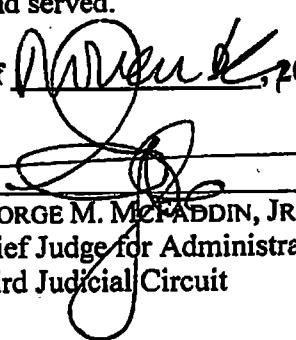
**CONCLUSION**

Pursuant to section 17-27-70(b), the Court intends to dismiss this Application with prejudice unless Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Sumter County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Lindsey A. McCallister, Esquire  
PCR Division  
P.O. Box 11549  
Columbia, SC 29211

Applicant is cautioned that his response to this order must be actually received by the Sumter County Clerk of Court and opposing counsel within twenty days, and the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 15<sup>th</sup> day of November, 2021.

  
\_\_\_\_\_  
GEORGE M. MCFADDIN, JR.  
Chief Judge for Administrative Purposes  
Third Judicial Circuit

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**  
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated Officer Edwards (Server) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA )  
COUNTY OF Greenville ) **AFFIDAVIT OF PERSONAL SERVICE**

On this 15 day of December 2021, I served the Conditional Order of Dismissal, on Inmate David A. Duren, SCDC Inmate #181965, by delivering personally and leaving a copy of the same at Perry Correctional Institution. Deponent is not a party to this action.

s/ James H. Edwards

SCDC Server

**SWORN TO AND SUBSCRIBED BEFORE ME**

this 15 day of December 2021

Tamara Conwell (L.S.)  
Notary Public for South Carolina

My Commission Expires September 25, 2023

**ADMISSION OF SERVICE**

Service of a copy of the within Conditional Order of Dismissal is admitted at the South Carolina Department of Corrections ( Perry Correctional Institution), Greenville County, SC this 15 day of December, 2021.

s/ David Duren  
Inmate  
SCDC Inmate #: 181965

State of South Carolina  
County of Sumter

In the Court of Common Pleas  
for the Third Judicial Circuit

David A. Duren  
Applicant

Case # 2019-CP-43-1328

v

State of South Carolina  
Respondent

Applicant's opposition and  
Reply to the Court's Conditional  
order

2021 DEC - 7 AM 8:33  
JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

### Introduction

Now come, above captioned applicant, David A. Duren pro se respectfully filing his opposition and reply to the Court's Conditional Order, allowing Applicant 20-days within to provide the Court with sufficient reasons as to why the Conditional order should not become final and the application should not be dismissed.

Applicant would respectfully point out to the Court that he filed the instant application pursuant to our Supreme Court's holding in Jackson v State 331 S.C. 486, 489 S.E.2d 915 (1997). Here the applicant will assert to the Court that he is suffering continuing results of his prior conviction, petitioner is entitled to an evidentiary hearing to prove whether these persistent effects have prejudiced him

See *McDuffie*, *supra*; *Brown v State* 814 S.E. 2d 146, 147, In *Brown v State* If State Post-Conviction Relief is a statutory remedy in South Carolina see S.C. Code Ann 17-27-10-160, which provides "Any person who has been convicted of or sentenced for a crime and who claims

(1) that the conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this State, may institute... a proceeding under this Chapter to secure relief.

Petitioner will assert the two burglary convictions 2002-GS-43-107 and the arson 2002-GS-43-109 in 2002 is invalid for violation of his constitutional right to effective assistance of counsel under the 6th amendment, petitioner will also assert that procedural due process require notice of the charges against him.

Petitioner will assert that Judge Clifton Newman appointed Counsel 5 was before the petitioner plead guilty to those charges in 2002. the petitioner will assert that the only court document that the attorney name appear on in 2002 is the sentencing sheet.

In *Strickland v Washington* 466 U.S. 668, 687, 104 S.Ct 2052, 80 L. Ed 674 (1984) the court stated "that a person who happens to be a lawyer is present at trial alongside the accused, however is not enough to satisfy the constitutional commands, whether judges, for public defenders satisfy "The constitutional guarantee of assistance of counsel... by mere formal appointment; *Overly v Alabama* 308 U.S. 444, 446, 60 S.Ct 321, 84 L. Ed 377 (1940)."

"In other words, the right to Counsel is the right to effective assistance of Counsel. Simply put, a Judge may not appoint Counsel when the Judge is aware that, for whatever reason, Counsel is unable to provide effective representation to a defendant. Effective, not just pro forma representation to a defendant, representation is required by both the South Carolina and Federal Constitutions.

The petitioner will assert that Judge Clifton Newton was the guilty plea in 2002 given when the defendant of the danger of self-representation as mandated by *Foreman v Calif.*

The State may not duck the question; Can a petitioner challenge his prior conviction in a per proceeding if that conviction was in violation of his state and federal constitutional rights. The case is not just if the result of the unconstitutional conviction still persists. Petitioner was given a life without parole sentence, because of the 2002 conviction. The Supreme Court of South Carolina has ruled in *State v Jackson*; *State v Wadette* and most recently *Brown v State* 814 S.E.2d 146, 147 that a evidentiary hearing must be held.

Further in *Jackson*, the per Judge found Jackson lacked standing to pursue his claim under the Uniform Post Conviction Procedure Act, S.C. Code Ann 17-27-10 et seq. (1985) & Supp. 2001), because Jackson was not in custody and never served a prison sentence.

The Supreme Court reversed, finding the case was not moot, despite the completion of the sentence, where the conviction may be used for impeachment and sentencing purpose in future criminal proceeding. Jackson 381 S.C. 486, 489 S.E.2d 915. In Jackson, the Court (citing *McDuffie v State*, 276 S.E. 229, 227 S.E.2d 595 (1981)) said "where an applicant alleges the result of his prior conviction still persists, even though the sentence has been fully served the petitioner is entitled to an evidentiary hearing to determine if he is prejudiced. Id

U.S. v *McQueen* 448 F.3d 757 a defendant may collaterally challenge the use of prior conviction in sentencing if that conviction was obtained in violation of his right to counsel.

Right to counsel in state felony prosecution is retroactive so that defendant's conviction secured in violation of their right cannot be used to enhance sentence in subsequent criminal case.

Defendant's "Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

The trial court was required to review whether defendant waived his right to counsel during prior uncounsel guilty plea hearing before determining whether prior guilty plea could be used to enhance sentence.

*Childress v Johnson* 103 F.3d 1221 (5th Cir.) Sentencing and punishment adequacy of representation. Counsel appeared merely to stand by, listen to judge and respond to contingencies that may arise while defendant waived right

to Jury trial on burglary charges was not assistance  
at all, as required by the 6th amendment.

If a defendant can establish that counsel was not  
incompetent but "insert" prejudice to their right  
to effective assistance of counsel is presumed.  
See U.S. v. Hollis 506 F. 3d 415.

Never once during the guilty plea proceeding 4-4-2002  
did Judge Al. Howard warn the defendant of the  
danger of self representation, nor did he give the  
defendant a "Forcible Inquiry" as mandated.

Applicant submits the conditional order should not  
become final, but rather the Court should appoint counsel  
and conduct an evidentiary hearing at the Court's earliest  
convenience.

Applicant contends that even though the prior sentence  
has been fully served under Jackson v State he has  
standing to challenge the prior conviction because the  
State used the prior conviction for sentencing enhancement  
purpose.

Applicant submits the conditional order should not  
become final and the matter proceed to an evidentiary  
hearing at the Court's earliest convenience.

Respectfully Submitted

David A. Duren  
David A. Duren

Affidavit

The Applicant submit the following affidavit to the Court. In 2000 the Applicant was arrested for a probation violation, while in jail at the Sumner County Correctional Center, 1281 North Main St Sumner, S.C. The Applicant was served with warrant # G-774633 Burglary and Non-violent, Exhibit (A), warrant # B-774581 Assault, ~~see~~ Exhibit (B), warrant # G-774187 Burglary and Violent see Exhibit (C), warrant # G-328691 Burglary and degree, see Exhibit (D), warrant # G-774995 Burglary and Non-Violent, see Exhibit (E), on 11-2-2001 bond was denied, the defendant will assert he never attended a bond hearing on that date, nor did he sign any bond paper on that date, he was never provide with any information for a public defender for any of those charges, he never apply for one. on Nov 16, 2001 Judge Howard P. King sentenced the Applicant to 5 years for a probation violation see Exhibit (F). on 11-19-2001 the Applicant was transported to the Department of Correction see Exhibit (G). From 11-19-2001 the record is silent to 4-4-2002 where the defendant was transported from Evans Line Jail, to the Sumner County Court of General Session, when the defendant got there, its when he found out that he was there for Indictment # 2002-GS-43-107 and 2002-GS-43-109, he was then informed that Judge Clifton Newman would not entertain that case because he was not represented by Counsel, so I was sent back out of the Court room when the Judge told the public defender office to appoint me Counsel, Counsel was then appointed and he went back into the Court room and Judge Clifton Newman accept the guilty plea. For once before, during on after did Judge Clifton Newman warn the defendant of the danger of

"Self Representation as Mandated by Forester v  
Calif. the defendant was not given a Forester Inquiry"  
From the time the defendant was served with all  
5 arrest warrants to being indicted from the  
grand jury Feb 25, 2002 see Exhibit (H) the defendant  
was never represented by Counsel the only function  
that attorney Jack Howel performed was standing beside  
the defendant because the Court said it would not  
take a guilty plea without one, and signing the guilty  
plea sheet. There is no other Court documents anywhere  
in the Court records except the guilty plea sheet.

I have visited the public defender office and the  
Clerk of Court for both file # 2002-GS-43-109 and  
2002-GS-43-109 for anything pertaining to attorney  
Jack Howel. The Clerk of Court has not answered that  
request. Here's what the public defender office had to  
say. see Exhibit (I), and Exhibit (J) 2002-GS-43-109  
and Exhibit 2002-GS-43-109. Exhibit (K) the sentencing  
sheet of 4-4-2002 is the only document where attorney  
Jack Howel name appears.

Applicant assert that this affidavit is the truth  
and nothing but the truth. Truth need no disguise

Respectfully Submitted

David A. Duran  
David A. Duran

Sworn to and subscribe to before  
me this 1st day of December, 2021

Tamara Conwell  
Notary Public

My Commission Expires: \_\_\_\_\_

My Commission Expires  
September 25, 2023

Affidavit of Service by Mail

State of South Carolina  
County of Greenville

Affidavit of Service by Mail

On this day of Dec 20, 2021 I David A. Duren  
have served a clock stamp copy of Applicant's opposition  
and reply to the Conditional Order by the Court by placing  
said document in U.S. Mail at Perry Courthouse Just  
addressed to the following listed below, South Carolina Attorney  
General and S.C.D.C. The Applicant was personally served  
on Dec 15, 2021 at Perry Courthouse.

David A. Duren  
David A. Duren

Signed to and Subscribed before me  
this 20 day of Dec 2021

Thomas Conwell

Notary Public My Commission Expires

My Commission Expires: September 25, 2023

S.C. A. G.  
Att: Lindsey McCullister  
PCR Division  
Post office Box 11549  
Columbia, S.C. 29211

S.C. D. C.  
Att: Luanthan Eakstrom  
4444 Broad River Rd  
Columbia, S.C. 29221-1787

Exhibit C

RECORDED

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMTER FOR THE THIRD JUDICIAL CIRCUIT

David A. Duren, #181965, Case No.: 2019-CP-43-1328

Applicant,

v.

State of South Carolina,  
Respondent.

FINAL ORDER OF DISMISSAL

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

*[Signature]*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

This matter is before the Court based on an application for post-conviction relief filed by Applicant David A. Duren, #181965. In response, Respondent, the State of South Carolina, made its return and moved to summarily dismiss the action as procedurally barred as untimely, successive, and under the doctrine of laches pursuant to the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq. (2014).

After a review of the record and pleadings, this Court agreed this application should be summarily dismissed as untimely and successive and provisionally dismissed the action by way of a Conditional Order of Dismissal filed on November 22, 2021, giving the Applicant twenty 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 December 15, 2021, serving the above-mentioned Conditional Order of Dismissal on Applicant.

In response to this conditional dismissal, Applicant filed several documents with the Sumter County Clerk of Court. First, Applicant filed a document, captioned "Applicant's Opposition and Reply to the Court's Conditional Order," on November 2, 2021. In this first response, Applicant argues the Conditional Order of Dismissal fails to reference or consider Jackson v. State, 331 S.C. 486, 489 S.E.D 915 (1997), which he asserts supports his position that he does not need to show any present incarceration to pursue post-conviction relief so long as he,

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the applicant, “suffers, or may suffer, collateral consequences result[ing] from the conviction.” He further asserts he should be able to pursue post-conviction relief on his 2002 conviction because he suffers collateral consequences from this earlier conviction despite having served the entirety of his sentence for this conviction.

Applicant filed a second document in response to the Conditional Order, captioned “Applicant’s Opposition and Reply to the Court’s Conditional Order”, filed December 7, 2021, which sets forth the same arguments as in his first response pertaining to the collateral consequences he suffers from his 2002 conviction.

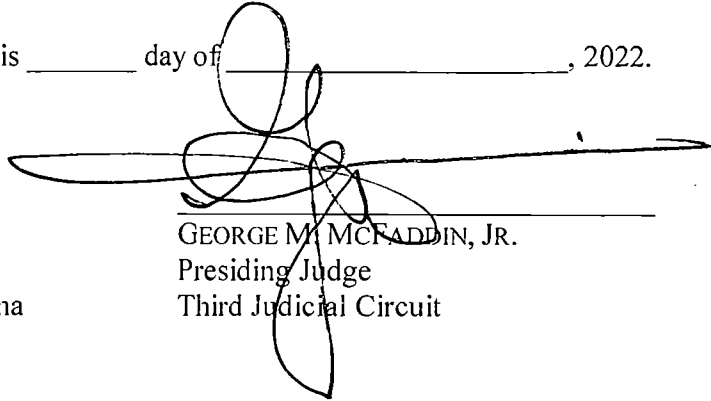
After reviewing these responses, this Court notes that Applicant is correct in one regard—a post-conviction relief applicant need not be presently incarcerated (or establishing that he is still suffering a collateral consequence for that matter) to pursue post-conviction relief. Brown v. State, 423 S.C. 56, 814, S.E.2d 146 (2018). However, Applicant still cannot overcome the statutory hurdles of successiveness and the statute of limitations that procedurally default this application and necessitate summary dismissal under the Uniform Post-Conviction Procedures Act, S. C. Code Ann. § 17-27-10 et seq. Applicant has already pursued a post-conviction relief action in which he asserted a challenge to his 2002 conviction, which was correctly denied. This current application is clearly successive to this earlier action. Moreover, this application is patently untimely.

Accordingly, this Court finds Applicant has failed to establish a sufficient reason why he should be able to proceed forward with this untimely, successive application.



**IT IS THEREFORE ORDERED** that for the reasons set forth in the Court's Conditional Order of Dismissal, this application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

**AND IT IS SO ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2022.



\_\_\_\_\_

GEORGE M. MCFADDIN, JR.  
Presiding Judge  
Third Judicial Circuit

\_\_\_\_\_, South Carolina

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