

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Paul M. Burch, Circuit Court Judge

RECEIVED

MAR 6 2012

S.C. Supreme Court

VICTOR D. BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

DAYNE C. PHILLIPS
Assistant Appellate Defender

ALAN WILSON
Attorney General

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

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

ATTORNEY FOR PETITIONER

J. RUTLEDGE JOHNSON
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT	1
APPLICATION FOR POST-CONVICTION RELIEF	28
AMENDED MEMORANDUM SUPPORTING POST-CONVICTION RELIEF APPLICATION	36
RETURN	46
POST-CONVICTION RELIEF HEARING TRANSCRIPT	51
APPLICANT’S EXHIBIT 1 INITIAL BRIEF OF APPLICANT	128
APPLICANT’S EXHIBIT 2 LETTER TO JACK SWERLING	143
ORDER OF DISMISSAL	144
CLERK OF COURT RECORDS	157

STATE OF SOUTH CAROLINA
COUNTY OF YORK

1
IN THE
COURT OF GENERAL SESSIONS
CASE NO.: 06-GS-46-3641

STATE OF SOUTH CAROLINA,
Plaintiff,
-vs-
VICTOR DEMONT BROWN,
Defendant.

TRANSCRIPT OF RECORD

August 9, 2007
York, South Carolina

B E F O R E:

Honorable Lee S. Alford, Judge.

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

Ms. Misty Horton
Assistant Solicitor
Attorney for the State
York, South Carolina

Mr. Jack B. Swerling
Attorney at Law
Attorney for the Defendant
Columbia, South Carolina

COPY

Shannon McGilberry
Court Reporter

1 MS. HORTON: May it please the Court, Your Honor?

2 THE COURT: Solicitor.

3 MS. HORTON: Your Honor, this is State versus Victor
4 Brown. He is currently charged with trafficking cocaine,
5 five kilos of cocaine, Your Honor, and a resisting arrest
6 charge.

7 The State has made an offer of allowing Mr. Brown to
8 plead to a level between twenty-eight and a hundred grams
9 for a negotiated twelve-year sentence. We've extended that
10 offer for quite some time. I had at one point planned to
11 try the case this week, but the chemist was going to be
12 unavailable, so we extended the offer again for this week,
13 scheduled the plea for today. Mr. Swerling thought the plea
14 would go through, I thought the plea would go through. Mr.
15 Brown has decided to not plead.

16 He may be aware that I'm leaving the office, but I've
17 spoken with Ms. Colton who will receive this case and have
18 confirmed that she will not give him the offer back after
19 this week. So this is the last chance he has at the twelve-
20 year offer and a reduction in his charge and that the State
21 will be prepared to go forward to trial the next term of
22 court, which I believe is August the 27th or the term after
23 that, Your Honor. And at that point Mr. Brown will be
24 facing a mandatory minimum twenty-five years.

25 THE COURT: All right. Then, Counsel, need to be ready

1 for trial either the week of August the 27th or the
2 following term, whatever that is.

3 MS. HORTON: Yes, sir, Your Honor, and there is -- the
4 only discovery that we have left to give over are the
5 informant tapes and the informant information. I've told
6 Mr. Swerling that we'll make those available to him as early
7 as next Tuesday and Ms. Colton had told him that he can call
8 her to schedule picking those up.

9 MR. SWERLING: Yeah. I'll pick them up Tuesday, Your
10 Honor, and communicated this to Mr. Brown. My only problem
11 is I do have a designated trial on the day of August 27th in
12 front of Judge Lee. That should go, but if not, I'll be
13 here ready that week or the next term after that, but that
14 is already set.

15 THE COURT: All right. This is Mr. Brown?

16 MR. BROWN: Yes, sir.

17 THE COURT: Mr. Brown, you understand the plea offer's
18 gone after today and you got to be ready for trial and go
19 forward with the trial either August 27th or if your counsel
20 is conflicted out that week, then it would be the next week
21 after that that court is scheduled. You need to be read for
22 trial.

23 MR. BROWN: Yes, Your Honor. Can I speak?

24 THE COURT: Well, do it through your attorney, if you
25 don't mind. I don't mind you speaking, but you need to do

1 that through your attorney, make sure that you don't say
2 anything that's not going -- that's going to be prejudicial
3 to you.

4 MR. BROWN: I mean, I was just wanting to say to you,
5 Your Honor, while I've been out on bond I have accomplished
6 my diploma. I feel like I --

7 THE COURT: Well, that doesn't have anything to do with
8 me today. I mean, you know, you're -- you-all can negotiate
9 with the Solicitor's office and if you-all are able to work
10 out anything, that's fine. If not, you're entitled to a
11 trial and have a jury make the determination and your
12 attorney, of course, will represent you at the trial.
13 That's the only thing I can do with it today is to tell you
14 you need to be ready to go forward with the trial.

15 If they withdraw the offer, I know -- I'm sure if
16 they're going to reveal all the information about the
17 informant and that kind of thing they're certainly not
18 going to extend the offer beyond that, so in any event,
19 that's your decision.

20 MS. HORTON: Your Honor, and just for Mr. Brown's
21 benefit, I'd like to add to the record that I've had
22 numerous conversations with Mr. Swerling where he has asked
23 me numerous things to reduce -- numerous times to reduce the
24 offer for numerous reasons and my position is that a twelve-
25 year offer for these charges, with Mr. Brown's record, which

1 is not huge -- I don't think he's ever done an extensive
2 length of time, but with the amount of cocaine that we
3 brought into the state and with the record that he does
4 have, that a twelve-year offer is more than fair from what
5 we normally offer here and probably a little less than what
6 -- substantially less than what we have offered in the past
7 in the same type cases.

8 I have taken into consideration everything that I know
9 about him in making the offer. The offer's just not going
10 to get any better than twelve years.

11 THE COURT: That's the important thing is that they're
12 saying this is the best offer you're going to get and so you
13 just need to decide whether you accept whatever they're
14 offering you or then you're going to trial, because I can
15 tell you they won't extend it again. So it's either take
16 this offer. /They're going to go any lower. Your attorney's
17 done all he can do and you've got probably a better offer
18 than they offer in most of these kind of cases, but they're
19 not going any lower and so you either make the decision to
20 accept this offer or you go to trial and/the mandatory
21 minimum there is twenty-five years no parole if the jury
22 convicts you. Your attorney will either do what you want to
23 do, plead or trial, whatever you want to do. All right,
24 sir.

25 MR. BROWN: Your Honor, I mean, I know I ain't supposed

1 to -- he's supposed to speak for me, but I'm coming here to
2 let you know, I mean, I was notified on July the 26th to
3 enter this plea. I mean, he don't want me to speak, but I
4 feel like the Lord put it on my heart to let you know.

5 MR. SWERLING: Judge, I just advised him not to speak
6 without knowing -- I have no way of knowing what he's going
7 to say. He can say whatever he wants to, if that's what his
8 choice is, with Your Honor's patience and indulgence.

9 THE COURT: Sir, we're on the record. Whatever you say
10 can be turned around and used against you when you come to
11 trial, if you say anything today and so, you know, keep that
12 in mind. I don't want -- like your attorney, I don't want
13 you to say or do anything that's going to come back to haunt
14 you or prejudice you any way when you come to trial. All
15 right. And I think you should follow the advice of your
16 counsel, whatever he's advising you to do is what you ought
17 to -- I don't mean insofar as the plea bargain or a trial.
18 I'm talking about with what you say to the Court today that
19 might be put on the record.

20 MR. BROWN: Okay, Your Honor. Well, --

21 THE COURT: I don't know of anything you going to say
22 that's going to make any difference today. I think you need
23 to either accept the offer that's been -- I can't make them
24 give you anything better and so -- and your attorney,
25 obviously, has gotten them as low as they're going to go and

1 so you either accept that or you go to trial. I mean, it's
2 as simple as that, Mr. Brown. I can't say it any more than
3 that. Okay.

4 MR. BROWN: I mean, Your Honor, well, I feel that -- me
5 and my family feel that we think we need another lawyer.

6 MR. SWERLING: Judge, and I will consent to being
7 relieved.

8 THE COURT: Well, I understand. I don't mind him
9 getting another attorney, provided he's going to be ready to
10 go to trial August 27th, 'cause I'm not going to extend the
11 time beyond that if you get another lawyer. So you can go
12 with this lawyer, if you going to get you another lawyer to
13 represented you.

14 I can tell you now, though, Mr. Brown, you're not going
15 to get a better offer than twelve years. I don't care if
16 you come in here with F. Lee Bailey or whoever else you come
17 in here with. Mr. Swerling is as good as any defense
18 attorney in this state for sure, but I - whoever you get's
19 not going to get a better offer than twelve.

20 Now, you can go to trial. The jury could find you
21 guilty or not guilty. If they find you not guilty, you
22 won't get anything. If they find you guilty, you're going
23 to get a mandatory minimum twenty-five. So it's your
24 choice. You can do whatever you want to.

25 If you want to relieve your attorney in this case, then

000030

1 as long as the next attorney is going to be ready August the
2 27th. If he's not, you'll have to represent yourself. Do
3 you understand that?

4 MR. BROWN: (No response)

5 THE COURT: If you relieve this attorney and tell me
6 you're going to get another attorney, you got to be ready
7 for trial on the 27th. Do you understand? We're not going
8 to extend the time to give you more time to prepare. Do you
9 understand that?

10 MR. BROWN: (No response)

11 THE COURT: Sir?

12 MR. BROWN: Yes, sir.

13 THE COURT: Let me explain -- in the event you choose
14 to represent yourself or you wind up representing yourself,
15 let me give you this admonition now before we get to that
16 point. An attorney would most likely represent you better
17 than you could represent yourself. An attorney is trained
18 in the rules of court, rules of evidence, courtroom
19 procedure and the common law, statutory criminal laws of
20 South Carolina. An attorney would be able to fully explain
21 to you the charge and punishment you face. An attorney
22 would be able to tell you the witnesses and evidence that
23 the State has available to present at trial to prove your
24 guilt. An attorney would be able to tell you of any legal
25 defense that might be available to you if you go to trial.

1 An attorney would be able to subpoena all witnesses that you
2 know of to your trial to assist you in your defense. Even
3 if you decided to plead guilty instead of going to trial, an
4 attorney may be able to negotiate with the Solicitor to
5 either get the charge you face or possible sentence you face
6 reduced. Do you understand the benefits of having an
7 attorney represent you, sir?

8 MR. BROWN: Yes, sir.

9 THE COURT: And you understand if you represent
10 yourself, there are dangers in self-representation, 'cause
11 you don't have the same knowledge that an attorney has
12 insofar as court procedure and the law is concerned? Do you
13 understand that?

14 MR. BROWN: Yes, sir.

15 THE COURT: I'm explaining this to you because if you
16 come in here August the 27th and don't have a lawyer, you're
17 going to have to represent yourself, pro se. Do you
18 understand?

19 MR. BROWN: Yes, sir. I'm not saying that -- I mean,
20 if you would just read this letter, Your Honor, --

21 THE COURT: I'm not reading anything. The only thing
22 that's before this Court today -- I can't make the Solicitor
23 change their plea bargaining agreement, Mr. Brown. Do you
24 not understand that? You can plead straight up; I can give
25 you whatever I want to give you. They make the deals. The

1 Court does not make the deals, so I can't make them go below
2 twelve years. Your attorney can't make them go below twelve
3 years, whether it's this attorney or a new attorney. So you
4 got two choices: you can plead guilty for the plea
5 bargaining agreement or you can go to trial. It's as simple
6 as that. There's nothing I can do about it.

7 You can try to convince me you're a nice guy and you've
8 made a lot of changes since you've been charged, it's not
9 going to make any difference. Do you understand? They're
10 the ones you've got to convince, the Solicitor's office.
11 They made the plea bargaining agreement. I don't make it.
12 Okay.

13 MS. HORTON: Your Honor, there's only one other concern
14 that I have. As part of Mr. Brown's bond order, he's out on
15 a \$500,000 bond, 'cause he went back to Tennessee. He was
16 required by the Court, I believe in front of you, Judge
17 Alford, that he have an attorney of record as part of his
18 bond condition or conditions on his bond. If he does decide
19 to relieve Mr. Swerling, the bond order gave him thirty days
20 to have an attorney on record.

21 THE COURT: All right. If Mr. Swerling's relieved,
22 another attorney has to be in place for you to stay out on
23 bond. Otherwise, the bond is cancelled. Do you understand
24 that?

25 MR. BROWN: (No response)

1 THE COURT: See, In other words, you have to hire
2 another attorney before he's relieved or you have to go off
3 the bond or you have no bond. Do you understand?

4 MR. BROWN: Your Honor, I mean, I lost my father in the
5 middle of all this and --

6 THE COURT: Mr. Brown, that's got nothing to do with
7 this case. I mean, I sympathize with you, but it doesn't
8 have anything to do with the case, which decision you've got
9 to make.

10 MR. BROWN: I've been in Court. I mean, I haven't
11 revoked my bond in no way.

12 (WHEREUPON, Mr. Swerling and Mr. Brown conferred off
13 the record.)

14 MR. BROWN: Well, we'll be here for a trial next week,
15 sir.

16 THE COURT: All right. Is Mr. Swerling going to
17 represent you? All right. Go talk about it some more and
18 come back and we'll see. Nothing's going to change. You're
19 either going to take the twelve or you're going to trial.

20 (WHEREUPON, this proceeding was held in abeyance.)

21 THE CLERK: Mr. Brown, do you have a South Carolina
22 driver's license?

23 MR. BROWN: No, ma'am.

24 THE CLERK: Please raise your right hand and place your
25 left on the Bible.

1 (WHEREUPON, Victor Demont Brown was duly sworn.)

2 THE COURT: You can put your hand down, sir. Sir,
3 you're Victor Brown; is that correct?

4 MR. BROWN: Yes, sir.

5 THE COURT: How old are you, Mr. Brown?

6 MR. BROWN: Thirty-five.

7 THE COURT: How far did you go in school?

8 MR. BROWN: To the eleventh grade, but out on bond I
9 did achieve my diploma.

10 THE COURT: What do you do for a job or occupation?

11 MR. BROWN: Work at the Dollar General Store, for Five
12 Star Courier.

13 THE COURT: Are you married, sir?

14 MR. BROWN: Yes, sir.

15 THE COURT: Do you have children under age?

16 MR. BROWN: I have four children.

17 THE COURT: What are their ages?

18 MR. BROWN: Two sixteen, thirteen and twelve.

19 THE COURT: Did you serve time in jail on this charge
20 when you were arrested?

21 MR. BROWN: Yes, sir.

22 THE COURT: How much time?

23 MR. BROWN: From the arrest date to December 27th, I
24 think, 28th.

25 THE COURT: Mr. Brown, you're charged today with

1 trafficking cocaine in an amount between twenty-eight and
2 one hundred grams first offense. This offense is classified
3 as a felony. It carries a minimum sentence of seven years,
4 a maximum sentence of twenty-five years and \$50,000 fine.
5 This is a no-parole offense, which means you would be
6 expected to serve the sentence you get in this case.

7 It's also classified as a violent offense and the
8 importance of that classification is it could affect your
9 eligibility for parole on this charge or any other charge
10 you might get in the future. It also could affect your
11 participation in certain programs offered by the Department
12 of Corrections. Do you understand that, the violent offense
13 classification? Do you understand that?

14 MR. BROWN: Yes, sir.

15 THE COURT: It's also classified as a serious offense.
16 The importance of that classification is that should you get
17 three serious offenses on your record or a combination of
18 three serious and most-serious offenses on your record, upon
19 receiving the third such offense, you could get a sentence
20 of life without parole, the so-called three strikes rule.
21 This offense would classify as one strike. Do you
22 understand that, sir?

23 MR. BROWN: Yes, Your Honor.

24 THE COURT: If I accept your plea of guilty to this
25 charge, it will constitute a drug offense on your record.

1 The importance of that is should you get another drug
2 offense of any kind in the future with this charge on your
3 record, the penalties will be enhanced or higher because
4 this is on your record. In other words, penalties for a
5 second drug offense are higher, sometimes much higher, than
6 they are for a first offense. Do you understand that, sir?

7 MR. BROWN: Yes, Your Honor.

8 THE COURT: Understanding the charge, the maximum and
9 minimum sentences you could receive, the implications of
10 having a no-parole offense, a violent offense, and a serious
11 offense and a drug offense on your record, understanding all
12 that, how do you plead to this charge today, guilty or not
13 guilty?

14 MR. BROWN: Guilty.

15 THE COURT: Do you understand that by pleading guilty
16 you give up your right to remain silent?

17 MR. BROWN: Yes, sir.

18 THE COURT: Do you understand that by pleading guilty
19 you give up your right to a trial by jury?

20 MR. BROWN: Yes, Your Honor.

21 THE COURT: Do you understand if you give up your right
22 to a trial by jury, you also give up your right to assert
23 any legal defenses you might have in a jury trial?

24 MR. BROWN: Yes, sir.

25 THE COURT: Now, I know your attorney's gone through

1 those rights with you, but I'm going to do that as well.

2 At trial you would have the right to confront and
3 cross-examine all witnesses against you. You would have the
4 right to present any witnesses and/or evidence in your own
5 defense. You would have the right to testify in your own
6 defense if you wish to do so, but no one could make you
7 testify in your own trial.

8 If you decided to go to trial and not testify, the
9 judge would tell the jury they could not hold your failure
10 to testify against you. In fact, the jury couldn't even
11 consider your failure to testify in their deliberations on
12 your guilt or innocence.

13 You would be presumed innocent throughout your trial.
14 The State would have to prove you guilty beyond a reasonable
15 doubt to a jury of twelve people. All twelve people would
16 have to unanimously agree that you were guilty in order for
17 you to be convicted and even if you were convicted, you'd
18 still have the right to appeal that conviction. Do you
19 understand your rights with regard to a trial by jury?

20 MR. BROWN: Yes, sir.

21 THE COURT: Understanding that right, do you still want
22 to plead guilty or do you want me to set your case for
23 trial?

24 MR. BROWN: Plead guilty.

25 THE COURT: What are the negotiations, Solicitor?

1 MS. HORTON: Your Honor, negotiated twelve years.

2 THE COURT: All right. You've reduced the charge; is
3 that correct?

4 MS. HORTON: Yes, Your Honor. He was originally
5 charged --

6 THE COURT: What was the original charge?

7 MS. HORTON: -- originally charged with trafficking
8 cocaine third offense in an amount over four hundred grams.
9 The State reduced it to trafficking cocaine first offense in
10 an amount between ten and twenty-eight grams.

11 THE COURT: Mr. Brown, the State has agreed to reduce
12 this charge from a trafficking third offense, trafficking
13 over four hundred grams third offense, down to a trafficking
14 between twenty-eight and one hundred grams first offense and
15 for a negotiated sentence of twelve years. Is that your
16 understanding of the agreement you had with the Solicitor's
17 office in order to plead guilty to this charge?

18 MR. BROWN: Yes, sir.

19 THE COURT: Has anybody promised you anything other
20 than that in order to get you to plead guilty?

21 MR. BROWN: No, sir.

22 THE COURT: Has anybody threatened you, coerced you,
23 made you plead guilty against your will?

24 MR. BROWN: No, sir.

25 THE COURT: Are you satisfied with the manner in which

1 your attorney has advised and represented you in this case?

2 MR. BROWN: Yes, sir.

3 THE COURT: Have you and your attorney fully discussed
4 the charges against you?

5 MR. BROWN: Yes, sir.

6 THE COURT: Has your attorney told you the witnesses
7 and evidence the State has available to present at trial to
8 prove your guilt?

9 MR. BROWN: Yes, Your Honor.

10 THE COURT: Has your attorney discussed with you any
11 possible legal defenses that might be available to you if
12 you were to go to trial?

13 MR. BROWN: Yes, sir.

14 THE COURT: Have you told your attorney the names of
15 any and all witnesses you know of that your attorney could
16 subpoena and bring to trial to assist you in your defense if
17 you were to go to trial?

18 MR. BROWN: Yes, sir.

19 THE COURT: Are you today under the influence of any
20 mind-altering substance, such as alcohol, drugs or
21 prescription medications which interfere with your judgment
22 or ability to understand what you're doing in court today?

23 MR. BROWN: No, sir.

24 THE COURT: Do you have any mental, emotional or
25 nervous condition that interferes with your judgment or

1 ability to understand what you're doing in court today?

2 MR. BROWN: No, sir.

3 THE COURT: Are you pleading guilty today of your own
4 free will?

5 MR. BROWN: Yes, sir.

6 THE COURT: Are you in fact guilty of this charge?

7 MR. BROWN: Yes, sir.

8 THE COURT: Please give me the facts, Solicitor.

9 MS. HORTON: Your Honor, on July the 22nd of 2006, a
10 confidential informant met with the York County Multi-
11 jurisdictional Drug Enforcement Unit. That informant
12 informed officers with the drug unit that he could purchase
13 five kilos of cocaine from a individual known to him as
14 "Dred" and that the price on each kilo was 19,000.

15 The informant made several recorded phone calls to the
16 defendant and at some point did speak to a hispanic male.
17 The deal was set up. The informant met with the defendant,
18 along with a co-defendant, David Sleet, at Motel 6 on
19 Carowinds Boulevard in Fort Mill, which is in York County,
20 at room 324. Officers were conducted surveillance from room
21 322.

22 At that time Mr. Brown did not have any drugs on him
23 and he continued to broker the deal between the informant
24 and unknown hispanic males. Eventually the hispanic males
25 arrived in the area. They came to the Sleep Inn, which is

1 also located in York County. They had with them five kilos
2 of cocaine.

3 Mr. Brown met with the hispanic individuals, picked up
4 one kilo of cocaine, brought that to room 324 at the Motel 6
5 where he and the informant continued the deal. There was
6 talk of the money being exchanged before the informant could
7 get the remainder of the cocaine.

8 At that time officers, who had been listening through a
9 recording device the entire time, did enter the room. Mr.
10 Brown was placed under arrest after a brief struggle where
11 he was tazed several times by members of York County Drug
12 Enforcement Unit. He was placed under arrest. Mr. Sleet
13 was placed under arrest.

14 The one kilo of cocaine was recovered from that room.
15 Officers then went to the Sleep Inn where the additional
16 cocaine was recovered. They were unable to locate the
17 hispanic males, although officers did see one hispanic male
18 fleeing the scene and they were also unable to get any
19 information regarding those hispanic males.

20 His prior record, Your Honor, is mainly from Tennessee.
21 There are some drug convictions. It's unclear as to what
22 those charges are. It could have technically been a third
23 offense, but with the charge it would not have mattered
24 anyways. The State is allowing him to plead as a first
25 offense due to the ambiguity of his record and because of

1 the negotiated sentence.

2 THE COURT: All right. Mr. Brown, you've heard the
3 facts recited to the Court by the Solicitor's office with
4 regard to this charge. Do you disagree in any way with what
5 they say happened on this charge?

6 MR. BROWN: No, sir.

7 THE COURT: I find the decision of the defendant,
8 Victor Brown, to plead guilty to this charge to be made
9 freely, voluntarily and intelligently. He's had the
10 representation of a competent attorney with whom he says she
11 is satisfied. I find the facts as presented to the Court by
12 the Solicitor's office concurred in by the defendant, fully
13 support the guilty plea in this case and I'll accept the
14 plea as freely and voluntarily made.

15 Mr. Brown, if you disagree with the proceeding in which
16 we are currently involved, you have ten days from today's
17 date within which to file a notice of intent to appeal. Do
18 you understand your right to appeal today's proceeding?

19 MR. BROWN: Yes, sir.

20 THE COURT: Counsel.

21 MS. HORTON: Your Honor, if I may, just one other
22 thing. We've briefly talked about it earlier. There are
23 both audio tapes and videotapes of the transaction as well
24 as a confidential informant that was involved. I have not
25 officially released that information. I told Mr. Swerling

1 that it would be available if Mr. Brown chose not to accept
2 the State's offer and Mr. Brown's probably aware of who the
3 informant is, but we have not officially released any
4 information on that informant or any video or audio.

5 THE COURT: Of course, there are other charges pending
6 in this case as well---

7 MS. HORTON: Yes, sir, Your Honor. Yes, sir.

8 THE COURT: ---against other persons, I'm talking
9 about; not against --

10 MS. HORTON: Yes, sir.

11 THE COURT: -- not against Mr. Brown, but against other
12 people. All right. Go ahead, Counsel.

13 MR. SWERLING: Thank you, Your Honor. Your Honor,
14 since it's a negotiated sentence, I understand that it's not
15 normal for folks to address the Court, but he came down here
16 with a number of members of his family. It's a very close-
17 knit family and two of them would like to just address Your
18 Honor briefly,---

19 THE COURT: Yes, sir.

20 MR. SWERLING: ---tell you a little bit about Mr.
21 Brown. This is his uncle and his niece and I think they'd
22 just like to address you very briefly.

23 THE COURT: Please give us your name for the record and
24 proceed, sir.

25 MR. TRENT: Don Trent. T-r-e-n-t is my last name.

1 THE COURT: Yes, sir.

2 MR. TRENT: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MR. TRENT: First of all, the defendant, the man who
5 stands here before you made a mistake. We know that. He's
6 truly sorry. A devoted husband, devoted father, devoted
7 family member. I mean, just a good guy. I mean, he made a
8 mistake. I know he's sorry about it, but I mean, we just
9 want you to know that he is a good person. He really is.

10 THE COURT: Thank you, sir.

11 MR. TRENT: Thank you.

12 THE COURT: Yes, ma'am.

13 MS. PORTER: My name --

14 THE COURT: Please give us your name.

15 MS. PORTER: LaKendra Porter.

16 THE COURT: Yes, ma'am.

17 MS. PORTER: And even though he's my uncle, but he's
18 been like -- he's been a father to me, like, my whole life,
19 to me and my brother. Really, to the whole family or
20 whatever. Everything he need he do -- I mean, he does -- he
21 is there for us no matter what we need or whatever and how
22 much -- I mean, how much time, that he always makes time to
23 provide for our needs or whatever and he support all the
24 family. He's like a father to everybody or whatever and
25 it's going to be hard for us not -- I mean, for him not

1 being here, but I wish it could have been a better way and
2 less time, but I guess -- I mean, I don't know.

3 THE COURT: Thank you, ma'am.

4 MR. TRENT: But he is a good guy. We thank you, Your
5 Honor.

6 MR. SWERLING: Judge, of course, we'd ask you to accept
7 the negotiated sentence in this case. Mr. Brown's -- one of
8 his greatest friends is in the back, but he has a very
9 strong family unit. Last -- on the 28th of July, Saturday,
10 I met him and his family. I met -- expected to just meet
11 him and about -- I mean, literally about twenty folks drove
12 down from Knoxville and I was most impressed with that. We
13 had a lot of dialogue between us and answered questions.
14 Everybody -- the family was very interested in what was
15 happening and today they all came down again. So I think
16 that when someone has that kind of strength in their family
17 unit, they're going to be there for him while he's
18 incarcerated and afterwards.

19 Victor does realize he made a mistake. Unfortunately,
20 the negotiations are not going to go below twelve years is
21 what I tried to tell him and I would just ask Your Honor to
22 accept it in light of what Ms. Horton has said and
23 appreciate the opportunity, having heard us before and now
24 as well.

25 THE COURT: Mr. Brown, is there anything you want to

1 say to the Court?

2 MR. BROWN: First of all, I would like to apologize to
3 the State of South Carolina and just hope -- I mean, I know
4 y'all probably won't accept my apology, but --

5 THE COURT: Let me say this: it's not a question of
6 accepting your apology. It seems like you're a good person
7 from everything I've heard and you're a good family person
8 and you have a lot of support from your family, which is
9 kind of unusual in a lot of these cases. I think you got
10 caught up with a bad situation to make some money out of it.

11 Unfortunately, these drugs are creating tremendous
12 havoc all over this world and some of these people that are
13 hooked up on these drugs are doing all kind of crimes,
14 ruining their lives, ruining their families, they're
15 robbing, stealing, killing, supporting these habits. This
16 is some bad stuff and the Legislature, because of that, I'm
17 sure, the Legislature has enacted extremely stiff penalties
18 in this state. I don't know what they are in other states,
19 because I only deal with this state, but for instance, if
20 you had to plead guilty or if a jury found you guilty of the
21 original charge against you, you couldn't have gotten less
22 than twenty-five years no parole. That would have been the
23 minimum sentence.

24 It's up to the State to do the negotiating. Your
25 attorney can only do so much and you have one of the best

1 criminal attorneys in the state. I say that without any
2 question. He's one of the best, most recognized criminal
3 defense attorneys in this state. He has that reputation.
4 And so he's negotiated, done all he could do for you and
5 that's what I've tried to tell you earlier. The Court can't
6 do anything to help you.

7 If you plead straight up on a charge, then the Court
8 can consider everything you want to present. Okay. But
9 that would mean you'd have to plead to the original charge
10 and I wouldn't have any say-so anyway. It'd be a minimum
11 twenty-five no parole. So there was really -- and the
12 reason I didn't really listen to you is because it's not up
13 to me unless you plead straight up on the charge and if you
14 got a mandatory minimum sentence, I still don't have any way
15 to help you. Do you understand?

16 MR. BROWN: Yes, sir.

17 THE COURT: Your attorney's done all he could do to try
18 to help you in this case and it's just a question of making
19 the best of a really bad situation. You either go to trial
20 and if they have good evidence against you and convict you,
21 you're not going to do less than twenty-five no parole.

22 If you plead, then the best you can do is negotiate
23 with them and get the best deal you can. Your attorney, I'm
24 satisfied, has done that and the State tells me they're not
25 going to beyond this and if they have to reveal their

1 informant, you got other defendant or possible more from
2 this whole transaction, they have to reveal of that, it's
3 going to hurt their case against them. If they do that,
4 they're not going to make any more deals. Do you
5 understand?

6 MR. BROWN: Yes, sir.

7 THE COURT: So you're just between a rock and a hard
8 place. I can't change the sentence. I can accept it or
9 reject it, but obviously I will accept it. I just want to
10 make sure you understand. It's not coming just from your
11 attorney, but it's also coming from the Court. Yes, sir.

12 MR. BROWN: And as we spoke before me and him and Misty
13 and the police, I was in agreement to cooperate, but in the
14 middle of everything my father passed and that took
15 everything for us to put it together, put him away. So,
16 therefore, by the Spanish people knowing where we live, I
17 wasn't able to cooperate and working two jobs and going to
18 night school, so --

19 THE COURT: I understand. All right, sir. Case number
20 2006-GS-46-3641, Victor Brown, having plead guilty to
21 trafficking cocaine in an amount between twenty-eight and
22 one hundred grams first offense, the sentence of the Court
23 is he be committed to the State Department of Corrections
24 for a determinate term of twelve years. He's given credit
25 for any jail time he has served on this charge. Good luck

1 to you, Mr. Brown.

2 MR. SWERLING: Thank you, Your Honor.

3 MS. HORTON: Thank you, Your Honor.

4

5

* * * * *

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

FORM 5

STATE OF SOUTH CAROLINA)

County of YORK)VICTOR DEMONT BROWN)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

08 CP 46-3051

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

2008 AUG - 6 AM 11:08

FILED-RECEIVED

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention BROADRIVER CORRECTIONAL INSTITUTION, 4460 BROAD RIVER ROAD, COLUMBIA, SOUTH CAROLINA
2. Name and location of Court which imposed sentence York County Moss JUSTICE CENTER, 1675 YORK HIGHWAY, YORK, SOUTH CAROLINA
3. Name(s) of co-defendant(s) (if any) NA
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) TRAFFICKING COCAINE-2006-GS-46-3641; 12 YEARS
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) AUGUST 9, 2007- 12 YEARS
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty YES
- (b) after a plea of not guilty N/A
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. N/A
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Did not understand that I needed to appeal my case.
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance of counsel as it relates to my guilty plea
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) a plea was entered into without sufficient advice and understanding of the
- (b) consequences of my plea.
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. York County Moss
- ii. JUSTICE CENTER, 1675 YORK HIGHWAY, YORK, SOUTH CAROLINA
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

N/A

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

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

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

- (a) I was unaware of the complexity of sentencing issues; the consequences
 (b) regarding my parole eligibility; and treatment of the offense under S.C. Code
 (c) of Laws.

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

- (a) your arraignment and plea? YES
 (b) your trial, if any? N/A
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
YES- However, none were filed

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

- (a) the name and address of each attorney who represented you:
 i. JACK B. SWERLING, 1720 MAIN STREET, #301, COLUMBIA, SC 29201
 ii. CAMERON BOGGS, P.O.B. 65, GREENVILLE, SC 29602-0065
 iii. JAMES W. BOYD, 1544 EBENEZER ROAD, ROCK HILL, SC 29732
 (b) the proceedings at which each such attorney represented you:
 i. JACK B. SWERLING, 1720 MAIN STREET, #301, COLUMBIA, SC 29201
(INITIAL APPEARANCE THROUGH PLEA)
 ii. CAMERON BOGGS, P.O.B. 65, GREENVILLE, SC 29602-0065
(BOND HEARING)
 iii. JAMES W. BOYD, 1544 EBENEZER ROAD, ROCK HILL, SC 29732
(BOND HEARING)

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

VACATE CONVICTION AND RESENTENCE.

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

NO

STATE OF SOUTH CAROLINA)

County of

See next page

VERIFICATION

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

SWORN to and subscribed before me this
day of _____,

(L.S.)

Notary Public

My Commission Expires: _____

Revised 3/2003

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

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

STATE OF SOUTH CAROLINA)

County of Richland)

VERIFICATION

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

Victor D. Brown

SWORN to and subscribed before me this 4th
day of August, 2008.

Mary Capwell (L.S.)
Notary Public

My Commission Expires: 6/30/2010

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

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

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

Victor D. Brown
Applicant

SWORN or affirmed to and subscribed before me this

4th day of August, 2008.

Mary Caldwell
Notary Public

My Commission Expires: 6/30/2010

STATE OF SOUTH CAROLINA

FILED-RECEIVED

IN THE COURT OF COMMON PLEAS

County of York

Victor B. Brown #323433

2010 JUN 28 AM 8:00

AMENDED

Applicant,

DAVID HAMILTON

MEMORANDUM SUPPORTING

C.C.P. & G.S.

YORK COUNTY, SC

POST-CONVICTION RELIEF APPLICATION

-v-

State of South Carolina

Ca. No. 2008-CP-46-3051

Respondent,

The Applicant Victor Demont Brown, (Hereinafter referred to as Brown')
 Hereby respectfully submit this memorandum supporting his current application
 for post-conviction.

STATEMENT OF CASE

On november 9, 2006. The Grand Jury of York County present upon their
 Oath by indictment a charge of Trafficking ten (10) grams or more, cocaine
 against "Brown" in violation of section 44-53-370, Code of Laws of South
 Carolina, (1976, as amended).

This offense were alleged to have occurred in York County.

Brown's case was called to trial on August 9, 2007. he pled guilty to the
 charge before the Honorable Lee S. Alford and was sentenced to twelve (12)
 Years.

ISSUE I

THE TRIAL COURT JUDGE PARTICIPATED IN THE PLEA PROCESS WITH THREATS AND
 COERCION:

Transcript Record:

Tr. pg. 3, Li. 17-22: The Court, Mr. Brown, you understand the plea
 offer's gone after today

Tr. Pg. 4, Li. 17-18; They're certainly not going to extent the offer
 beyond that.

Tr. Pg. 5, Li. 11-22; The Court, this is the best offer you're going to
 get and so you just need to decide whether you accept whatever they're
 offering you because I can tell you they won't extend it again. So it's either

take this offer, they're not going to go any lower. your attorney's done all he can do and you've got probably a better offer than they offer in most of the kind of cases, but they're not going any lower and so you make the decision to accept this offer or you go to trial and the mandatory minimum there is Twenty-Five (25) years no-parole.

Tr. Pg. 6, Li. 21-23; I don't know of anything you're going to say that's going to make any difference today. I think you need to accept the offer that's been offer.

THE TRIAL COURT WAS BIAS AND PREJUDICE, CONTINUED WITH FURTHER PARTICIPATION AND COERCION IN THE PLEA PROCESS ACTING AS AN ADVERSARY FOR THE PROSECUTION, VIOLATING SOUTH CAROLINA RULES OF COURT 501 JUDICIAL CONDUCT CANON 2 (b):

501 Judicial Conduct Canon 2 (b) states' a judgment must not testify voluntarily as a character witness, because to do so may lend the prestige of the Judicial Office in support of the party for whom the Judge testifies.

See Tr. Pg. 7, Li. 4-7; Where Applicant informed the trial Court Judge that him and his family had decided and arranged to retain another defense attorney, and attorney Swerling stated that he will consent to being relieved.

Tr. Pg. 7, Li. 8-13; The Court, well I understand, I don't mind him getting another attorney, provided he's going to be ready to go to trial August 27th, cause I'm not going to extent the time beyond that if you get another Lawyer. So you can go with this Lawyer. (Mr. Swerling)

Tr. Pg. 7, Li. 14-23; The Court, I can tell you now, though, Mr. Brown, you're not going to get a better offer than Twelve (12) years, I don't care if you come in here with F. Lee Bailey or whoever else you come in here with. Mr. Swerling is as good as any defense attorney in this state for sure, but whoever you get's not going to get a better offer than Twelve years.

Tr. Pg. 7, Li. 20-23; Now, you can go to trial, if they find you guilty, you're going to get a mandatory minimum twenty-Five.

Tr. Pg. 7, Li. 25; Tr. Pg. 8, Li. 1-10; If you want to relive your attorney in this case, then as long as the next attorney is going to be ready August 27th, If he's not, you'll have to represent yourself, do you understand that? Mr. Brown, (no response).

THE TRIAL COURT JUDGE CONTINUED WITH PARTICIPATION IN THE PLEA PROCESS, BIAS, PREJUDICE, COERCION AND BLATANT THREATS:

Tr. Pg. 8, Li. 13-25; The Court, stated to Mr. Brown, that in the event he choose to represent himself or wind up representing himself.

Tr. Pg. 9, Li. 9-14; the Court, and you understand if you represent yourself, there are dangers in self-representation, cause you don't, have the same knowledge that an attorney has do you understand that? Mr. Brown,

Tr. Pg. 9, Li. 15-25; Pg. 10, Li. 1-3; The Court , I'm explaining this to you because if you come in here August 27th and don't have a Lawyer, you're going to have to represent yourself pro se do you understand?

Mr. Brown, yes sir, if you would just read this letter your Honor.

The Court; I'm not reading anything, The only thing that's before this Court today---I can't make the Solicitor change their plea bargaining agreements Mr. Brown, do you understand that? you can plead straight up; I can give you whether I want to give you, they make the deals, the Court does not make deals. your attorney can't make them go below twelve years whether it's this attorney or a new attorney.

Before accepting a guilty plea a trial Court must comply with governing Rules and, in particular, address three core concerns by ensuring that (1) the guilty plea is free from Coercion; (2) the Defendant understands the nature of the charge (3) the defendant understands the Consequences of his plea.

Although a trial Court may reject a plea agreement and express its reasons for doing so, all form of Judicial participation in or interference with the plea negotiation process are prohibited. Rule 11, Fed Rules Crim. Proc. require that the Court shall not participate in any such "discussions", the sentencing (Judge) should take no part whatsoever in any discussion or communication regarding the sentence to be imposed prior to the entry of a plea agreement.

(1) Judicial intervention may coerce the defendant into an involuntary plea that he would not otherwise enter.

"The unequal position of the Judge and the Accused, one with the power to convict to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a Judge become a participant in plea bargaining he bring to bear the full force and majesty of his Office, his

awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is contence one facing prison term, whether of longer or shorter duration, is easily influenced to accept what appears the more perferable choice".

The trial Court Judge's transcribed record statements at Mr. Brown's guilty plea hearing which exerted "Pressure" on Mr. Brown to accept the (Twelve 12 Years) plea agreement that had been negotiated with the Prosecution, amounted to improper participation in plea negotiation process", Which was not a harmless error notwithstanding purported corrective measure, because it was unknown whether Mr. Brown would have accepted the plea agreed in absence of trial Court's participation..

In this case the trial Court Judge acted the role of an adversary for the Prosecution. Mr. Brown the applicant requested the opportunity to retain another defense attorney, Attorney Swerling agreed with consent to be relieved as counsel. The Trial Judge stated the he understand and granted Mr. Brown's request, but yet (Judge) proceeded with bias, prejudice and strong role of participation of Coercion and interference in the plea process to get Mr. Brown to plead Guilty to Twelve (12) years of imprisonment..

The record is very clear, the trial Court Judge participated with a high manner of Coercion in Mr. Brown's plea process. Transcript Page 3, Line 17 Through Pages 4, 5, 6, 7, 8, 9, 10 & page 11, Line 1-11 Complete Coercion by trial Judge to get Mr. Brown to accept the twelve (12) years and plead guilty.

Further, Mr. Brown's trial Counsel failure to object to the trial Judge's participation and coercion in the plea process constituted ineffective assistance and clear indication that Counsel himself maintained an active role as an adversary for the prosecution.

Mr. Brown's plea was a Coerced, involuntary, unknowing and unintelligent made plea obtained in violation of Due Process, and out of fairness due to the Honor or up-holding the integrity of the state's Judicial System this Court should Vacate the Sentence and Conviction, granted the Applicant a new trial.

ISSUE II

APPLICANT "BROWN" CLAIMS THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

ARGUMENT FACTS II

On November 9, 2006 a Court of General Sessions convened, the Grand Jurors of York County presented upon their oath an indictment for Trafficking Cocaine first offense against Victor Demont Brown, it read as follows:

TRAFFICKING COCAINE

That on or about August 5, 2006, in York County, South Carolina, the defendant, Victor Demont Brown, did, unlawfully and knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual constructive possession or knowingly attempt to become in actual or constructive possession of a quantity of cocaine, as defined and otherwise limited in section 44-53-110, 44-53-210 (b)(4), 44-53-210 (d)(1), or 44-53-210 (d)(2), and did traffic in cocaine in an amount being ten grams or more, in violation of section 44-53-370, Code of Law of South Carolina, (1976, as amended).

The Applicant Mr. Brown, was represent by a retained Counsel at the guilty plea hearing.

THE TESTIMONY, Tr. Pg. 2, Li. 3-6; The prosecution stated the State v. Victor, is currently charged with Trafficking Cocaine, Five Kilos of Cocaine and resisting arrest.

The prosecution statement of charge against Mr. Brown was erroneous, deceptive, and misleading.

The Applicant Mr. Brown was according to the arrest warrant, arrested for violating the South Carolina Drug Laws, the warrant read as follows:

WARRANT AFFIDAVIT

That on August 5, 2006, one Victor Demont Brown did willfully and unlawfully violate S.C. Drug Laws by possessing, aiding, abetting and conspiring to traffic in approximately 5.000 grams of cocaine while at the Motel (6), 255 Carowinds Blvd. fort Mill, S.C.. Criminal history reports that the defendant has one prior drug conviction. probable cause based on a police

investigation and the recovery of evidence. report # 200600026529.

The Grand Jury's true bill indictment clearly states' indicatively that it charged Mr. Brown with trafficking cocaine, ten (10) grams or more, as a first offense without indicating otherwise.

Further, the Applicant's defense attorney, allowed the trial Court Judge and Prosecutor to amend the grand jurors indictment. See Tr. Pg. 16, Li. 7-15; The Prosecutor stated to the Trial Court , the Applicant Mr. brown was originally charged with trafficking cocaine, third offense in an amount over four hundred grams. That the State reduced it to trafficking cocaine first offense in he amount between ten (10) and twenty-eight (28) grams.

The trial Court, stated; Mr. Brown , the State has agreed to reduce this charge from a trafficking third offense, trafficking over four hundred grams third offense, down to a trafficking between twenty-eight (28) and one hundred (100) grams first offense and for a negotiated sentence of twelve years.

Case in point is, after Mr. Brown's indictment were True Billed and returned, the prosecution and trial Court amended the grand jurors indictment during time of hearing guilty plea proceedings, by adding the word "Third" Offense to Mr. Brown indictment. The trial Court Judge also amended the indictment where he changed the grand jurors' and States' Charged indictment charge of Ten (10) or more to (28) grams, too twenty-eight (28) to One Hundred (100) grams.

COCAINE STATUTE 44-53-370, Sec. 44-53-210 (b)(1) and CRACK COCAINE STATUTE 44-53-375, Sec's 44-53-110, 44-53-210 (b)(4), 44-53-210 (d)(1), 44-53-210 (d)(2) read as follows:

Cocaine, 10 grams or more of cocaine or any mixtures containing cocaine, is guilty of a felony which is known as "Trafficking in Cocaine" 10 grams or more, but less than 28 grams, first offense term imprisonment not less than 3 Yrs. nor more than 10 years, 44-53-370, Section 44-53-210 (b)(1).

The Prosecution (adding) the word "Third" and the trial Judge's amendment the indictment to a greater charge changed the nature of the grand jurors' charged crime.

Trail Counsel's failure to object and challenge the trial Court's participation in the plea process and jurisdiction, Constituted a serious deficiency of ineffective assistance, Prejudice and Due Process Violations.

Under the Sixth Amendment to the United States Constitution, a criminal defendant has a right to receive reasonably effective assistance from his attorney. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); A two prong test for determining whether a defendant received Constitutionally adequate representation was established by the Supreme Court in Strickland, in which it held that an individual, who asserts an effective assistance of Counsel claim, must demonstrate that; (1) his attorney's performance fell below an objective standard of reasonableness, given by all of the circumstances and prevailing professional norms; and (2) A reasonable probability exists that, but for the attorney's unprofessional error, the results of the proceeding would have been different.

Counsel failed to conscientiously discharge his professional responsibilities while he was handling Applicant Brown's case. He did not have Brown's best interest in mind; He neglected the necessary investigations and the preparation of Brown's case. He failed to properly acquaint himself with the Law and Facts surrounding the case and as a direct result to his intentional negligence; there was a very serious error in his assessment of both the Law and Facts. In this case, Counsel failed to oppose the prosecution's case to any adversarial testing. Thus he failed to function as the Counsel that the Constitution Sixth Amendment guarantees. Counsel's representation was not within... the range and scope of competence demand by Strickland.

When a defendant alleges that he received ineffective assistance of Counsel, he must prove that Counsel's performance was deficient and that his deficient performance prejudiced the defendant's case, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In order to meet his burden of proof, the Applicant must demonstrate errors and omissions on the part of trial Counsel such that Counsel's deficiency prejudicial to the defense as to deprive that Applicant of a fair trial Wilson v. State, 315 S.C. 158, 432 S.E. 2d 477 (1992); Cherry v. State, 300 S.C. 115, 386 S.E. 2d 624 (1989). The facts of this case clearly indicate that Applicant has met his burden of proof.

The guilty that were advised by Counsel were done so without a proper colloquy from either the Court or Counsel. Applicant at the time was illiterate and only mimicked what Counsel told him to say. This violated Applicant's Due Process Constitutional Rights, rendering his guilty plea not

voluntarily, knowingly or intelligently given Boykin v. Alabama, 89 S.Ct. 1709 (1969); Pittman v. State, 524 S.E. 2d 623 (S.C. 1999).

ISSUE III

APPLICANT'S TRIAL COURT LACKED SUBJECT MATTER JURISDICTION AND ERROR WHEN ACCEPTED APPLICANT PLEA TO THE AMENDED INDICTMENT WITHOUT PRESENTMENT OR PROPER WAIVER:

ARGUMENT FACTS III

The Amendment of the grand jurors' indictment to "third" offense and from Ten (10) to Twenty (28) grams, too Twenty (28) to One Hundred (100) grams changed the "Nature of the offense charged". As defined in §17-19-100, South Carolina Code of Laws, as amended, the trial Court lacked Jurisdiction to accept the Applicant plea or impose sentence, Section 17-19-100 reads, in part as follows:

if (a) there be any defect in form in any indictments or (b) on the trial of the case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the Court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance and if such amendment does not change the nature of the offense charged".

The South Carolina Supreme Court has held that where an amendment to a criminal indictment changes the maximum penalty to be imposed, even if the penalty is an increased fine as opposed to imprisonment, a change in the "nature of the offense charged" has occurred, Clair v. State, 478 S.E. 2d 54 (S.C. 1996); Hopkins v. State, 451 S.E. 2d 389 (S.C. 1994); State v. Riddle, 391 S.E. 2d 253 (S.C. 1990); Weinhaues v. State, 513 S.E. 2d 840 (S.C. 1998); State v. Sowell, 67 S.E. 316 (S.C. 1910).

Based upon the inconclusive evidence and facts presented by the prosecution, See Tr. Pg. 16, Li. 7; Prosecutor Ms. Horton Stated, originally charged with Trafficking Cocaine "third offense". Also Tr. Pg 19, Li. 2023; Ms. Horton Stated, his prior record, your Honor, is manly from Tennessee. There are some drug convictions, its' unclear as to what those charges are. It could have technically been a "third offense", and the Trial Court Judge's

statement of the crime charge for accepting the guilty Plea and where he changed the indictment's charge to a greater charge, See Tr. Pg. 16, Li. 7-15 from a charge of "First Offense in an amount between Ten (10) and Twenty-Eight (28) grams too a charge of between Twenty-Eight (28) and One-Hundred (100) grams.

The action of the Prosecution and Trial Court Judge was an amendment of the indictment without grand jury's presentment or proper waiver, depriving the Trial Court of subject matter of jurisdiction; The Trial Court error when accepting Applicant's plea without jurisdiction.

Subject matter jurisdiction is the Power of a Court to hear and determine cases of a general class to which the proceedings in question belong. In a Criminal case a Court does not have the authority to accept a guilty plea and pronounce punishment if it does not have subject matter over the case at bar, State v. Brown, 360 S.C. 58 (2004), had Applicant's attorney advised him of this canon of Law and contested subject matter jurisdiction, the Applicant obviously would not have pleaded guilty.

CONCLUSION

For the foregoing reasons, Applicant prays' that this Court inquires into the alleged matters of ineffective assistance of Counsel, involuntary plea and Trial Court lack of jurisdiction; Order an evidentiary hearing, vacate Applicant's conviction, sentence and grant further and other relief as the Court deems just and proper.

RESPECTFULLY,

Victor D. Brown 323433

Victor D. Brown #323433

T.R. (C.I.) Lower, U-3

200 Prison Road

Enoree, S.C. 29335

Date: June 14, 2010.

FILED-RECEIVED
IN THE COURT OF COMMON PLEA

2010 JUN 28 AM 8:00

Victor Demont Brown

DAVID HAMILTON Applicant,
C.C.C.P. & G.S.
YORK COUNTY, SC

V.

State of South Carolina

Respondent,

AFFIDAVIT OF SERVICE

Ca. No. 2008-CP-46-3051

Pleas be advised, I Victor Demont Brown, Hereby under the penalty of perjury being sworn. Has with the Affixed Postage, deposited in the Tyger Correction Institutions' Mail System a copy of the enclosed Supporting Memorandum, supporting my P.C.R. application, to be delivered, serving all including and listed parties as follows:

S.C. Attorney General Office
P.O. Box 11549
Columbia, S.C. 29211-1549

Leah B. Moody, Esquire
P.O. Box 1015
Rock Hill, S.C. 29730

Victor D. Brown
Victor Demont Brown

SWORN to before me this 14 th
day of JUNE, 2010.

Hebert Jones
Notary Public of South Carolina

My Commission Expires: 1-14-2019

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
FOR THE 16TH JUDICIAL CIRCUIT
Case No.: 2008-CP-46-3051

Victor D. Brown, #323433,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

RETURN

FILED - RECEIVED
2008 NOV 14 AM 11:35
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Respondent, making its Return to the application for post conviction relief (PCR) filed August 6, 2008, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the November 2006, term of the York County Grand Jury for Trafficking Cocaine (2006-GS-46-3641). Jack B. Swerling, Esquire, represented the Applicant. On August 9, 2007, Applicant pled guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of twelve (12) years. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the York County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel;

a. Was not informed of the right to appeal.

III.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing Strickland*.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *Id.* Applicant must overcome this presumption in order to receive relief. Cherry, *Id.*

Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland

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

IV.

The Applicant alleges that Counsel was ineffective for failing to consult with him about an appeal. The State submits this allegation is without merit. Counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal); or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000). In making this determination, courts must take into account all the information counsel knew or should have known. Id. Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Id. There being nothing in the record to indicate that the Applicant reasonably demonstrated to Counsel that he was interested in appealing, the State submits that the allegation is totally without merit and should be dismissed.

Nevertheless, the allegation probably raises a question of fact, which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The State therefore requests that this Court convene an evidentiary hearing solely on the

issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. §17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

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

VII.

WHEREFORE, having made its Return, the State requests that an attorney be appointed to represent the Applicant and that a hearing be held.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

ASHLEY A. McMAHAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Nov. 13th, 2008.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

VICTOR D. BROWN,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2008-CP-46-3051

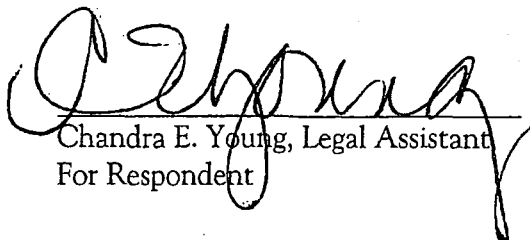
AFFIDAVIT OF SERVICE BY MAIL

FILED-RECEIVED
 2008 NOV 14 AM 11:35
 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC

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

Leah B. Moody, Esquire
 Post Office Box 1015
 Rock Hill, South Carolina 29731

DATED this 13th day of November, 2008.


 Chandra E. Young, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA.,)

IN THE COMMON PLEAS
COURT OF YORK

CASE NO.: 2008-CP-46-03051

COUNTY OF YORK.,)

VICTOR BROWN.,)

PLAINTIFF,)

-VS.-)

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA.,)

DEFENDANT.)

FEBRUARY 02, 2011
YORK, SOUTH CAROLINA

B E F O R E:

HONORABLE PAUL M. BURCH, Judge.

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

MR. JOSEPH J. WATSON
ATTORNEY AT LAW
650 E. WASHINGTON STREET
GREENVILLE, SOUTH CAROLINA 29601
864-467-0380
JOE@JOEWATSONLAW.COM
FOR THE APPLICANT

ORIGINAL

MS. KAREN RATIGAN
ASSISTANT ATTORNEY GENERAL
SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE
PO BOX 11549
COLUMBIA, SOUTH CAROLINA 29211-1549
KRATIGAN@SCAG.GOV
FOR THE DEFENDANT

WANDA NELSON, CVR
CIRCUIT COURT REPORTER
SIXTEENTH CIRCUIT, AT LARGE
Wnelson@sccourts.org

E-X-A-M-I-N-A-T-I-O-N

<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
VICTOR BROWN	MR. WATSON	4-29
	MS. RATIGAN	29-37
TINA BERRY	MR. WATSON	38-43
		44-45
	MS. RATIGAN	43-44
MR. JACK SWERLING	MS. RATIGAN	46-62
	MR. WATSON	62-74

* * * * *

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>EVD.</u>
APP.1	APPLICANT'S BRIEF	P.5
APP.2	APPLICANT'S LETTER	P.18

REPORTER'S NOTE: ALL EXHIBITS WERE FILED WITH THE YORK
COUNTY CLERK OF COURT'S OFFICE.

1 (ON THE RECORD WEDNESDAY, FEBRUARY 2, 2011 AT
2 10:25 AM.)

3 THE COURT: Thank you very much. You may be
4 seated.

5 (APPLICANT, BLACK MALE ENTERING COURTROOM.)

6 MS. RATIGAN: May it please the court, Your
7 Honor. The first case in the morning is Victor Brown
8 versus the State of South Carolina the Docket Number is
9 2008-CP-46-3051. Mr. Brown was indicted for trafficking
10 cocaine in excess of four hundred grams back in November of
11 2006. He was represented on this charge by Mr. Swerling.
12 On August 9th of 2007 he pled guilty to the lesser offense
13 of trafficking cocaine twenty-eight to a hundred grams as a
14 first offense. Judge Alford sentenced him to a twelve year
15 sentence. He did not file an appeal and the State is ready
16 to proceed at this time.

17 THE COURT: Mr. Watson.

18 MR. WATSON: May it please the Court, I call
19 Victor Brown.

20 THE COURT: Come around, Mr. Brown, please.

21 MADAME CLERK: Raise your right hand place your
22 left hand on the Bible.

23 (WHEREUPON: VICTOR BROWN,
24 BEING DULY SWORN IN, TESTIFIED AS FOLLOWS.)

25 MADAME COURT REPORTER: Mr. Brown.

1 MR. BROWN: Yes.

2 MADAME COURT REPORTER: I ask, sir, that you
3 speak up loud enough so Judge Burch can hear every response
4 that you give. He has to hear every response. And also,
5 so that I can make an accurate record. Thank you, sir.

6 MR. BROWN: Yes, ma'am.

7 DIRECT EXAMINATION

8 VICTOR BROWN BY MR. WATSON:

9 Q. All right. Mr. Brown, if you would, I'm going to
10 reiterate what she said. If you would speak like you're
11 speaking to people in the back of the courtroom, then
12 everybody's gonna hear you. Okay?

13 A. All right.

14 Q. First thing I want to do is go through a brief
15 chronology with you, just to get some dates sort of set up.
16 You were arrested on July the 22nd of '06; is that correct?

17 A. August the 5th of 2006.

18 Q. And you hired Jack Swerling to represent you in
19 October of '06; is that correct?

20 A. Yes, sir.

21 Q. And you were still in jail at that time.

22 A. Yes, sir.

23 Q. You made bond on December the 27th of '06.

24 A. Yes, sir.

25 Q. And then I'm gonna jump ahead to a meeting you had

VICTOR BROWN: DIRECT EXAMINATION BY MR. WATSON

5.

1 with Jack Swerling on -- Did you have a meeting at his
2 office in Columbia on July the 26th of '07?

3 A. Twenty-second, I think, sir.

4 Q. Okay. And then did you ultimately enter your guilty
5 plea, I believe, on August the 9th?

6 A. Yes, sir.

7 Q. All right. You filed your initial application for PCR
8 on August the 6th of '08; is that correct?

9 A. Yes, sir.

10 Q. All right. And Judge, I'm gonna do this. I think
11 that there - -

12 You also filed a Brief in support of that application
13 on November the 4th of '08; is that correct?

14 A. Yes, sir.

15 Q. And I don't -- This Brief is not in the Attorney
16 General's file. I don't know if it's in the Clerk's file,
17 but I just want to get it in the record as part of what he
18 filed in this case.

19 (WHEREUPON: APPLICANT'S EXHIBIT NUMBER ONE IDENTIFIED
20 AND MARKED, ENTERED INTO EVIDENCE.)

21 MADAME COURT REPORTER: Thank you.

22 MR. WATSON: Thank you, ma'am.

23 And that's a Brief in support of his application that
24 was filed on November the 4th. I don't know if you've got
25 that or not.

1 Q. And the last thing that you filed is on June 28th of
2 '10, you filed an Amendment Memorandum in support of a PCR;
3 is that correct?

4 A. Yes, sir.

5 Q. And, Judge, I think that is in the record.

6 Let me briefly go over -- I don't want to talk about
7 these issues in substance right now, but I want to just
8 sort of highlight for the Court what you think the issues
9 are in this case. All right.

10 A. Yes, sir.

11 Q. And we'll go back and talk about them in more detail.
12 You understand that the PCR you are alleging ineffective
13 assistance of your attorney, Mr. Jack Swerling.

14 A. Yes, sir.

15 Q. In your initial application you said that the plea was
16 entered without sufficient advice of the consequences of
17 the plea. Would you just tell the judge in one sentence
18 what you meant by that?

19 A. I didn't know it was parole eligible, and --

20 Q. Parole eligible or parole ineligible?

21 A. Parole ineligible.

22 Q. Okay. And I'm gonna come back to that. Do you feel in
23 your allegations of ineffective assistance of counsel that
24 you had trouble communicating with Mr. Swerling about your
25 case?

VICTOR BROWN: DIRECT EXAMINATION BY MR. WATSON

7

1 A. Yes, sir.

2 Q. Is that one of your allegations?

3 A. Yes, sir.

4 Q. Did you hire another attorney during the course of
5 this case pending to assist you in the case? And if so,
6 who was that?

7 A. Alan E. Schwarz in Knoxville, Tennessee.

8 Q. Okay. And what he hired, not on the same date, but
9 was he representing you at the same time Mr. Swerling was
10 representing you?

11 A. Yes, sir.

12 Q. And is it -- Do you feel that there was a lack of
13 communication between Mr. Swerling and Mr. Schwartz about
14 your case? Is that one of allegations?

15 A. Yes, sir. Yes, sir.

16 Q. Do you feel like you entered this plea freely and
17 voluntarily? The ultimate plea that you entered in August.

18 A. No.

19 Q. Okay. And is one of your allegations that part of the
20 coercion that was used came from Mr. Swerling?

21 A. Yes, sir.

22 Q. All right. You have raised an allegation about the
23 chain of custody and I'm just gonna talk -- Tell me briefly
24 what that is. What do you allege as far as Mr. Swerling
25 and the chain of custody in this case is ineffective?

1 A. The chain of custody was never established and it was
2 -- so that way -- therefore he couldn't have made an
3 adequate decision to advise me of the plea without knowing
4 the evidence and how the evidence was counted.

5 Q. Okay. We will come back to that in just a minute.
6 I'm gonna go back to the meeting in July of '07 when you
7 came to Columbia and met with Mr. Swerling. How long was
8 that before the ultimate plea that you entered?

9 A. One week.

10 Q. Okay. And sometime either right before that meeting
11 in July of '07 or after that meeting did you actually hire
12 yet a third attorney to take over this case?

13 A. Yes, sir.

14 Q. And who was that?

15 A. Imhoff and Associates of Santa Monica, California.

16 Q. Okay. And let me just spell that for the record.

17 That's I-M-H-O-F-F and Associates?

18 A. Yes.

19 Q. In California?

20 A. Yes, sir.

21 Q. Okay. Did you -- Do you feel that Mr. Swerling should
22 have requested a continuance to let those attorneys become
23 your lawyers in this case?

24 A. Yes, sir.

25 Q. And did he do that?

VICTOR BROWN: DIRECT EXAMINATION BY MR. WATSON

9

1 A. No, sir.

2 Q. And is that one of your allegations of ineffective
3 assistance?

4 A. Yes, sir.

5 Q. All right. Was there some confusion as to actually
6 what level of trafficking you were pleading to in this
7 case?

8 A. Yes sir.

9 Q. Okay. And finally, we're gonna talk a little bit in a
10 minute about the record in the case, but is there an alle -
11 - are you alleging that -- is the substance of your
12 allegations that Judge Alford participated in this plea
13 agreement and coerced you into entering this plea?

14 A. Yes, sir.

15 Q. And I want to touch on a couple of issues that you
16 have raised and set them aside if you agree that's what we
17 need to do. You had alleged one time that the indictment
18 only charged you with trafficking in more than ten grams.

19 A. Yes, sir.

20 Q. And that you were convicted or pled guilty to
21 trafficking in more than twenty eight grams.

22 A. Yes, sir.

23 Q. So you think the indictment was defective and
24 therefore the plea should be set aside. Is that a fair
25 statement?

1 A. Yes, sir.

2 Q. Did I explain to you that trafficking more than ten
3 grams would include trafficking in more than twenty eight
4 or more than a hundred or whatever level?

5 A. Yes, sir.

6 Q. All traffic indictments start with an allegation of
7 trafficking more than ten grams. Do you understand that?

8 A. Yes, sir.

9 Q. And you want to abandon that as an issue; is that
10 correct?

11 A. Yes, sir.

12 Q. You also alleged in some of your work that the
13 indictment alleged that you trafficked in the case and you
14 interpreted that to mean that you actually had the drugs,
15 possessed the drugs. And that the evidence that would have
16 been presented at trial and the evidence that was presented
17 at the plea was that you were a mule or a co-conspirator or
18 that you were aiding and abetting as opposed to actually
19 trafficking. Do you understand that?

20 A. Yes, sir.

21 Q. And you raised that as an issue. I showed you the
22 Statute and showed you that trafficking includes anybody
23 that aides, abets, attempts, conspires -- in other words
24 that's included in trafficking and you understand that now.

25 A. Yes, sir.

1 Q. And you understand that that's not an issue to go
2 forward?

3 A. Yes, sir.

4 Q. You also asked in your initial application that the
5 court vacate and resentence you. You understand that the
6 only choice the court has in this case would be to set
7 aside this conviction completely and you would go back to
8 ground zero as far as facing what the original charge was,
9 which is more than you pled to. Do you understand that?

10 A. Yes, sir.

11 Q. And you understand that ultimately you might be facing
12 more than the seven to twenty-five years that you were
13 facing and more than the twelve years that you got?

14 A. Yes, sir.

15 Q. Okay. With all that said, let me talk to you about
16 the first issue that we talked about, the parole
17 eligibility. Did you ever talk to Mr. Swerling about
18 parole eligibility as it relates to this case?

19 A. No, sir.

20 Q. Did he ever advise you that it was parole ineligible?

21 A. No, sir.

22 Q. Okay. The Judge commented several times in the
23 transcript about parole eligibility. Do you remember him
24 talking about parole eligibility?

25 A. Yes, sir.

1 Q. Do you remember him telling you that you would be
2 expected to serve your full sentence?

3 A. Yes, sir.

4 Q. Did he later tell you that the charge could affect
5 your parole eligibility?

6 A. Yes, sir.

7 Q. What did you take that to mean?

8 A. That possibly if I entered in a plea I still have a
9 chance at parole eligibility.

10 Q. Okay. Between your lack of conversation with Mr.
11 Swerling and between the Judge's conversation with you, did
12 you think you were possibly parole eligible in this case?

13 A. Yes, sir.

14 Q. And have you found out that you were not parole
15 eligible?

16 A. Yes, sir.

17 Q. Would you have pled guilty if you had known you were
18 not parole eligible?

19 A. No, sir.

20 Q. Let me talk a little bit about your relationship with
21 Mr. Swerling during the course of the case. You were
22 arrested in August of '06.

23 A. Yes, sir.

24 Q. You made bond in December of '06.

25 A. Yes.

1 Q. How many times did Mr. Swerling come and visit you at
2 the jail or do you recall?

3 A. Twice.

4 Q. How long were those meetings?

5 A. Probably thirty minutes each session.

6 Q. Okay. The first time he came to see you do you
7 remember what y'all talked about?

8 A. Representation and obtaining the discovery Rule Five.

9 Q. Okay so the first he visited you he had not obtained
10 the discovery in this case?

11 A. No, sir.

12 Q. The second time that you visited with Mr. Swerling in
13 jail, what did y'all talk about?

14 A. Bond reduction.

15 Q. And what was your conversation regarding bond
16 reduction?

17 A. I asked -- Well they had said that it takes ninety
18 days before I could go back up for a bond reduction. So
19 through phone conversations while I was downstairs at the
20 jail, he told me, well in ninety days we'll go back up for
21 a bond reduction. So when the ninety days expired he later
22 told me in the visit in December, if he take me up they was
23 seeking to go ahead and try the case.

24 Q. Okay. So if you move for a bond reduction the
25 solicitor would fast track the case is what he said?

1 A. Yes, sir.

2 Q. Okay. So you never got a bond reduction?

3 A. No, sir.

4 Q. You ultimately made bond?

5 A. Yes, sir.

6 Q. Okay. You posted the full five hundred thousand
7 dollars, or your family did?

8 A. Yes.

9 Q. Okay. How many times before the July '07 meeting with
10 Mr. Swerling did you meet face to face with Mr. Swerling?

11 A. Twice.

12 Q. Okay. When was the first time after you got out that
13 you met with him, do you recall?

14 A. Sometime in January.

15 Q. Of '07?

16 A. Yes.

17 Q. Okay. And how long did that meeting take place?

18 A. Probably forty-five minutes to an hour.

19 Q. What was the purpose of that meeting?

20 A. To sign a retainer agreement and -- I thought I was
21 coming for a preliminary hearing.

22 Q. Okay.

23 A. Because that was what the bondsman said it was. He
24 said you got a preliminary hearing. So when I got in
25 commute to come to York, South Carolina I called him and he

1 said just come on to Columbia that the solicitor had
2 rearranged the hearing. So I went on to Columbia and we
3 discussed about the retaining fee and whatever of that
4 nature.

5 Q. Let me just make it clear. When you were bonded out,
6 you were allowed to go back to Tennessee to live?

7 A. Yes.

8 Q. You live in Tennessee?

9 A. Yes, sir.

10 Q. Your bondsman was in Tennessee?

11 A. Yes, sir.

12 Q. Okay. All right. You said you met with him twice
13 between getting out on bond and the July meeting. Where
14 was the second meeting and what was that about?

15 A. Rock Hill Police Department about cooperation with the
16 Drug Task Force.

17 Q. Okay. And then you met with him in July?

18 A. Yes.

19 Q. During the course of that period of time between
20 December of getting out on bond and the July meeting with
21 Mr. Swerling did you ever attempt to call him to talk about
22 your case?

23 A. Yes.

24 Q. All right. Tell me, how many time did you call and --

25 A. Probably once or twice every month.

1 Q.

2 Okay. Were you able to talk him every time you called?

3 A. No, sir.

4 Q. How many times did you actually have a conversation
5 with him during that five month period of time?

6 A. Probably three.

7 Q. Okay. And what did y'all talk about at that time?

8 A. The balance of his fee.

9 Q. Okay. Now my question is, during any of the times you
10 visited with Mr. Swerling in jail, the time you met with
11 him in January to sign the fee agreement, the time you met
12 with him in Rock Hill to talk about working with the
13 police, and your three conversations, or however many
14 conversations you had with him on the phone, did you ever
15 talk about possible defenses in this case?

16 A. No, sir.

17 Q. Did you ever talk about trial strategy?

18 A. No, sir.

19 Q. Did you ever talk about suppression of evidence,
20 suppression of statements?

21 A. No, sir.

22 Q. Why did the -- Did you attempt to work with the
23 police?

24 A. No, sir.

25 Q. Okay. Was there a problem with what they wanted you

1 to do and your being able to leave Tennessee or what was
2 the issue?

3 A. Yes, it was like a dispute plus it was a high risk on
4 my life and my family's life.

5 Q. Well, what was the dispute -- Who was the dispute with
6 and what was that about?

7 A. The dispute was because there was no communication
8 between Jack Swerling or the solicitor with the bondsman
9 about me leaving the state.

10 Q. Okay. Would the bondsman let you leave the state?

11 A. No.

12 Q. Okay. You talked about hiring Alan Schwartz. Did you
13 attempt -- When you hired Alan Schwartz, did you attempt to
14 get Mr. Schwartz, the attorney in Tennessee, and Mr.
15 Swerling to communicate?

16 A. Yes, sir.

17 Q. And do you know for in fact that they did communicate
18 on at least one occasion?

19 A. Yes.

20 Q. Okay. Did -- Do you know if they communicated other
21 than that one occasion?

22 A. No, sir.

23 Q. No you don't know, or no they didn't communicate?

24 A. No they didn't communicate.

25 Q. All right. Did -- Were you getting frustrated from

1 January to May, June about Mr. Swerling's representation
2 and communication with you?

3 A. Yes, sir.

4 Q. Did you attempt again to get Mr. Swerling to
5 communicate with Mr. Schwartz about your case?

6 A. Yes, sir.

7 Q. Did you write Mr. Swerling a letter about that issue?

8 A. Yes, sir.

9 Q. Can you identify that?

10 A. Yes. This is the letter I typed and mailed to him
11 with a payment stating that my phone number had changed and
12 that I would like for him to get in touch with Mr. Schwartz
13 'cause this is serious issue so I could be more prepared
14 with what's going on with the status of the case.

15 Q. Okay. And to you knowledge did -- in response to that
16 letter, did Mr. Swerling ever get with Mr. Schwartz?

17 A. No, sir.

18 Q. Okay. I'm gonna mark that please.

19 I'm offering this, Judge.

20 (WHEREUPON: APPLICANT'S EXHIBIT NUMBER TWO IDENTIFIED
21 AND MARKED, ENTERED INTO EVIDENCE.)

22 BY MR. WATSON:

23 You were originally represented by Ms. Moody, Leah
24 Moody, in this application for PCR?

25 A. Yes.

1 Q. Can you identify this letter please, sir?

2 A. This is a letter to Ms. Moody stating that --

3 Q. Who's it from?

4 A. From Alan Schwartz, stating that he had tried numerous
5 times to correspond with Mr. Swerling to help assist me
6 while I was in Tennessee with the status of the case and to
7 better prepare myself.

8 Q. Okay. I'd offer this letter.

9 MS. RATIGAN: I'd object to that, Your Honor.
10 This is written by an Alan Schwartz who's not here today.
11 I just don't -- And I also don't think it's relevant to the
12 issue at hand.

13 MR. WATSON: Well, as far as relevance, Judge,
14 one of the issues he's raising is Mr. Swerling not
15 communicating with his other attorney. His continued
16 efforts to have Mr. Swerling talk with this attorney in
17 affirmation from this attorney, Mr. Schwartz, that Mr.
18 Swerling didn't communicate with him.

19 MS. RATIGAN: We would argue that it's not an
20 affirmation. It's simply a letter. It's not notarized.
21 It's just signed by someone that I'm not familiar with from
22 Knoxville, Tennessee and it's not subject to cross
23 examination, Your Honor.

24 THE COURT: Objection sustained.

25 MR. WATSON: Thank you, Judge.

1 (WHEREUPON: APPLICANT'S EXHIBIT NUMBER TWO
2 IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

3 BY MR. WATSON:

4 Q. Let me talk a little about the meeting in July of '07.
5 How did that meeting get set up?

6 A. Around prior to the Saturday of the meeting which was
7 supposed to have been a Friday, he called me Thursday
8 morning and told me he had got me a plea for twelve years
9 and I need to be ready to enter it come the following week.
10 So I was like, well, I've been trying to contact your
11 office to see what the status of the case and he stated
12 that he did all he could and all this so I just need to be
13 ready to enter the plea and that's the best deal the
14 State's offering.

15 Q. Okay. And did you go to meet with him in July?

16 A. Yes.

17 Q. Okay. And you said the plea was the next Monday. Did
18 in fact the plea get continued for another week after that
19 meeting?

20 A. Yes.

21 Q. All right. When did you find out about that?

22 A. I found out like probably about the 3rd, 4th,
23 somewhere around in there.

24 Q. Okay. Somewhere along the way either before that
25 meeting in Jack's office, Mr. Swerling's office, between

1 the time he called you and said I've worked this thing out
2 and the time you actually entered a plea, did you in fact
3 hire other attorneys to represent you?

4 A. Yes.

5 Q. Who did you hire?

6 A. Imhoff and Associates.

7 Q. And how much did you pay them to represent you?

8 A. Twenty-five thousand dollars.

9 Q. And they -- You were out on bond at that point in
10 time.

11 A. Yes.

12 Q. And did you -- let me know, I'm sort of jumping ahead.
13 During the course of the meeting with Jack, with Mr.
14 Swerling in July of '07 at his office, did you ever talk
15 about defense strategy, suppression, possibly going to
16 trial, anything like that?

17 A. No, sir.

18 Q. What did he tell you about the deal?

19 A. Either I take it or I get twenty-five years.

20 Q. Okay. Now you came up in August and you ultimately
21 entered that plea; is that correct?

22 A. Yes, sir.

23 Q. You appeared in front of Judge Alford how many times
24 on that day?

25 A. Twice.

1 Q. Okay. The first time you appeared in front of him did
2 you have a conversation with the Judge about whether you
3 were gonna plead or not?

4 A. Yes.

5 Q. Okay. And then did you take a break before you
6 actually came back in and entered the plea?

7 A. Yes.

8 Q. Do you recall how long that break lasted?

9 A. Between twenty to twenty-five minutes, maybe.

10 Q. All right.

11 A. Tops.

12 Q. And where did you go during that twenty or twenty-five
13 minute break?

14 A. To the lobby of the courtroom.

15 Q. Okay. And did you have a conversation with Mr.
16 Swerling at that time about whether you should plead or
17 not?

18 A. Yes.

19 Q. And what did Mr. Swerling tell you?

20 A. He said I was pissing the Judge off and I just need to
21 go in here, accept the plea or he's gonna surely give me
22 twenty-five years next week when I come for trial.

23 Q. Okay. And just for the record, the trial was gonna be
24 the next week if you didn't plead.

25 A. Yes.

1 Q. Okay. Would you have entered that plea if not for Mr.
2 Swerling tell you you were gonna get twenty-five years if
3 you didn't take the twelve year deal?

4 A. No.

5 Q. Now let me talk to you briefly about the chain of
6 custody and I want you to explain this to the Judge. After
7 you were sentenced and in jail you looked at the -- You
8 actually filed a freedom of information and got some
9 information on the chain of custody in this case; is that
10 correct?

11 A. Yes.

12 Q. And you see that there's a problem. You think there's
13 a problem with the chain of custody.

14 A. Yes.

15 Q. Okay. Tell The Court what that problem is in your
16 mind.

17 A. On the incident report sheet 2006-000-2658 -- 26258
18 there's not evidence use numbers on the alleged substance.
19 So if there was no evidence numbers -- use numbers, who can
20 distinguish where this substance was kept and how it was
21 kept?

22 Q. All right. Now, is there a proper chain on number 25
23 951?

24 A. Yes.

25 Q. Okay. And when we're talking about a proper chain,

1 you're looking at, as I understand it, two different pieces
2 of paper; is that correct?

3 A. Yes.

4 Q. You were looking at the property and evidence sheets
5 that were used by the property and evidence room.

6 A. Yes.

7 Q. Okay. And then you're also looking at the custody
8 transfer sheet; is that correct?

9 A. Yes.

10 Q. And so your observations about number 26 529 is it was
11 marked correctly; is that correct?

12 A. Yes.

13 Q. All right. And that was one bag of cocaine that
14 ultimately weighed out at about nine hundred and some
15 grams?

16 A. Yes.

17 Q. All right. And your allegations are the other four
18 bags of cocaine were not properly marked in property and
19 evidence; is that correct?

20 A. Yes, sir.

21 Q. And you're also alleging they're not on the transfer
22 sheet showing they went to SLED to be analyzed.

23 A. Yes.

24 Q. Okay. And you think that that should have been an
25 issue that was explored by Mr. Swerling as far as

1 negotiating a better deal; is that correct?

2 A. Definitely.

3 Q. Okay. Is there anything else about the chain of
4 custody issue that I'm missing?

5 A. No, sir.

6 Q. Does that adequately explain it?

7 A. Yes, sir.

8 Q. Okay. Did you have a codefendant in this case?

9 A. Yes.

10 Q. What's your understanding of what happened to his
11 case?

12 A. It was -- he tried the case and it was dismissed prior
13 to the evidence or something of that nature.

14 Q. Do you know if -- Do you have any knowledge if it
15 relates to a chain of custody or why it was dismissed?

16 A. Not for sure, but I think that's what it was. I
17 haven't talked to him.

18 Q. Okay. Did you tell Mr. Swerling that you had retained
19 Thomas Lawson with the Imhoff and Associates attorneys?

20 A. Yes.

21 Q. Okay. Did you want a continuance in this case so that
22 they could get involved in representing you in this case?

23 A. That was my whole understanding of coming thinking
24 that when he relieved himself as the transcript state that
25 the Judge would honor that and I was trying to show the

1 Judge that I had proper representation, but he didn't want
2 to listen or read the letter that was --

3 Q. Okay. In the transcript you are attempting -- the
4 first time you were in front of Judge Alford you were
5 attempting to show him something. What is that that you
6 were attempting to show him?

7 A. That I have proper representation to stay out on bond
8 ---

9 Q. Okay.

10 A. --- and to get a continuance.

11 Q. Did you have evidence showing that you had another
12 attorney in this case?

13 A. Yes.

14 Q. Did you think Mr. Swerling should have requested a
15 continuance and let that attorney get involved in the case?

16 A. Yes.

17 Q. What did Judge Alford tell you about the fact that if
18 you let Mr. Swerling go that day what would happen to you?

19 A. That he was going to revoke my bond and still try me
20 next week.

21 Q. Did the Judge talk to you on several occasions about
22 whether there was time to get another attorney or whether
23 he would give you more time to get these other attorneys in
24 place, and if so what did he say to you?

25 A. He told me he would not give me time to do nothing. I

1 need to either accept or -- I need to accept the plea or be
2 ready to stand trial. He didn't care if I hired F. Lee
3 Bailey.

4 Q. Well, did you tell the judge that you and your family
5 thought that you needed another attorney other than Mr.
6 Swerling?

7 A. Yes.

8 Q. Did he tell you you're going to go to trial on August
9 the 27th, there was no time beyond that?

10 A. Yes.

11 Q. Did he tell you he was not going to continue the case?

12 A. Yes.

13 Q. Did he tell you if you either gonna go to trial with
14 Mr. Swerling or by yourself?

15 A. Yes.

16 Q. Had the case ever been continued before?

17 A. No, sir.

18 Q. How old was the case at the time you entered the plea?

19 A. One year and four days.

20 Q. All right. One of the things you alleged is that
21 there was some confusion over the level of trafficking that
22 you were pleading to. At some point in the transcript did
23 the solicitor say that you were pleading to ten to twenty
24 eight grams as opposed to over twenty eight grams?

25 A. Yes. Page Sixteen.

1 Q. Did that add to your confusion?

2 A. Yes, sir.

3 Q. All right. Now the last issue that I want to talk
4 about with you is the Judge's conversation with you. Not
5 during the plea itself, but that first time that you
6 appeared in front of him. And you said some of the things
7 that he said. Did the Judge comment on whether the plea
8 offer would be extended after that day? What did he say
9 about that?

10 A. He said the plea offer is gone away after today so I
11 need to make -- listen to the advice of my counsel and
12 either accept the plea or be ready for trial.

13 Q. Did he tell you that that was the best offer you were
14 gonna get, that you weren't gonna get any kind of better
15 offer?

16 A. Yes, sir.

17 Q. Did he tell you that I can tell you that they're not
18 gonna extend that offer again?

19 A. Yes, sir.

20 Q. Did he tell you that this was probably a better offer
21 than they offered in most other drug cases?

22 A. Yes, sir.

23 Q. Did he tell they're not gonna go any lower in their
24 offer?

25 A. Yes, sir.

1 Q. Did he tell you several times that the mandatory
2 minimum was gonna be twenty-five years and if you got
3 convicted you'd get twenty-five years?

4 A. Yes, sir.

5 Q. Did he tell you that F. Lee Bailey would not be able
6 to any better job than Mr. Swerling?

7 A. Yes, sir.

8 Q. All right. Have I covered all of the issues that you
9 had wanted to raise and that we have talked about in this
10 case, Mr. Brown?

11 A. Yes, sir.

12 Q. Is there anything else that you want to add at this
13 time?

14 A. No, sir.

15 Q. Okay. I'm going to ask that you answer any of the
16 questions by Madame Attorney General.

17 CROSS EXAMINATION

18 VICTOR BROWN BY MS. RATIGAN:

19 Q. So you hired Mr. Swerling while you were still in jail
20 up here in York?

21 A. My family did.

22 Q. Okay. And he represented you at that bond hearing --

23 A. No, sir (sic).

24 Q. -- when you were --

25 A. No, ma'am.

1 Q. Well let me finish. When you got bond, and you were
2 released, did he represent you at that hearing?

3 A. The plea hearing?

4 Q. No. The bond hearing.

5 A. No.

6 Q. When you got bond and were released to the bondsman in
7 Tennessee.

8 A. When I got released?

9 Q. On bond.

10 A. Or did he take me for the bond?

11 Q. Yes.

12 A. No, he did not.

13 Q. Okay. So you had a different attorney at the bond
14 hearing?

15 A. Yes.

16 Q. But your testimony today is that you got bond and you
17 had a bondsman in Tennessee. So you were in Tennessee
18 after you were released.

19 A. Yes.

20 Q. Okay. And that was December of '06?

21 A. Yes.

22 Q. And your testimony is that you had two face-to-face
23 meetings with Mr. Swerling after that and you had a couple
24 of phone calls; is that correct?

25 A. Yes.

1 Q. And when you had these meetings with him did you
2 review the State's discovery materials? The State's
3 evidence?

4 A. No ma'am.

5 Q. Did he tell you that there was an audio tape of the
6 buy with the confidential informant?

7 A. Yes.

8 Q. And did you tell him, kind of, your side of the story,
9 your version of what had happened that day?

10 A. Yes.

11 Q. But prior to going forward and pleading guilty, you
12 had never seen the incident report, you had never seen any
13 of the State's evidence?

14 A. I seen some of the discovery.

15 Q. Okay. So you did discuss the case with Mr. Swerling?

16 A. Well when he obtained it he mailed me the discovery,
17 but I was still in the County.

18 Q. Okay.

19 A. But as far as me and him sitting down going over the
20 discovery we never did that.

21 Q. Okay. Did you ever try and go over it with him? Did
22 you ever send him letters; make phone calls about wanting
23 to go through the discovery with him?

24 A. Yes.

25 Q. And still that just never happened?

1 A. No, ma'am.

2 Q. And did you tell him that you wanted to plead guilty
3 or did you tell him that you wanted to go to trial?

4 A. We didn't discuss none of that. I mean he told me let
5 him obtain the discovery and we'll go from there, but we
6 never really got in to it. And I kept on writing and
7 asking him the status of the case and what do I need to do,
8 but I never really got a standing response.

9 Q. And you had told Mr. Swerling about your family
10 lawyer, Mr. Schwartz from Tennessee, you had told him about
11 that?

12 A. Yes.

13 Q. And you asked Mr. Swerling to contact Mr. Schwartz?

14 A. Yes.

15 Q. And when you asked Mr. Swerling to contact Mr.
16 Schwartz what did Mr. Swerling say? Did he say he'd do it?

17 A. Yes.

18 Q. Why did you want him to contact Mr. Schwartz?

19 A. So it could be like some type of co-counsel. So I
20 would know that South Carolina does not grant preliminary
21 hearings and things of that nature to where, instead of
22 just a drop of a dime coming to court and entering a guilty
23 plea without knowing the status of any of the defense or
24 any trial strategy or anything to my advantage.

25 Q. So you thought that Mr. Schwarz would be able to

1 better explain what was going on?

2 A. He could -- Mr. Swerling could explain - - -

3 Q. Okay.

4 A. - - - through Mr. Schwartz, and Mr. Schwartz could
5 explain it to me and that would be like a conference.

6 Q. Okay.

7 A. There would still be some type of communication but
8 that never happened.

9 Q. And your testimony today is the first time you heard
10 about that twelve year recommendation was during that July
11 22nd meeting?

12 A. Yes.

13 Q. You had never gotten a letter or phone call or
14 anything prior to that?

15 A. The Thursday prior to the meeting and that led up to
16 the meeting when I asked him, I was like, if you can't get
17 a continuance just relieve yourself in open court. Because
18 that's what the new lawyer said you would need to do.

19 Q. And you testified that after that July meeting you
20 went and hired a Mr. Lawson from Imhoff and Associates out
21 in California; is that correct?

22 A. Yes.

23 Q. And did you tell Mr. Swerling you had hired Mr.
24 Lawson?

25 A. Yes.

1 Q. When?

2 A. On July 26th.

3 Q. And what was the purpose of hiring Mr. Lawson if you
4 already had two attorneys on the case?

5 A. For one I was -- Since Mr. Swerling was not
6 communicating with Mr. Schwartz in the case, Mr. Lawson was
7 going to take over from there and try to more like work the
8 case and deal with Mr. Schwartz and me by me being in
9 Tennessee. That way I could...

10 Q. Okay, so he was gonna basically take over Mr.
11 Schwartz' role.

12 A. No, he was going to take over Jack's role.

13 Q. Okay. I see. And so you told Mr. Swerling about Mr.
14 Lawson on July 26th, and did you ask him to contact Mr.
15 Lawson?

16 A. Mr. Lawson contacted him. Well, not Mr. Lawson, but
17 Bill Carter of the firm.

18 Q. So someone from his firm contacted Mr. Swerling?

19 A. Yes.

20 Q. So the morning of the plea you were attempting to have
21 Mr. Lawson substitute Mr. Swerling?

22 A. Yes.

23 Q. And that was a letter that you showed the Judge
24 talking about that representation?

25 A. The Judge would not accept it. He would not let me

1 show it to him.

2 Q. Okay. Now your testimony today is that you felt the
3 Judge was coercing your plea?

4 A. Yes.

5 Q. And it was because he was saying things such as the
6 offer is gone if you don't take it today, it's the best
7 offer you're gonna get, things of that nature, that was
8 what was coercive?

9 A. Yes.

10 Q. But wasn't he just restating what the solicitor had
11 said? Did the solicitor come in and say those exact same
12 things and he was just reiterating those points?

13 A. Yes, he probably was. I don't know. But at the same
14 time he told me Jack did all he could do. He did he went
15 through the rules of evidence, the rules. He knows the
16 rules of court and this and that, but how could he know
17 that when he never even established a chain of custody in
18 the case? And I feel that if he would have started there,
19 that could have helped my plea, or try.

20 Q. Okay. And one of the other things you've testified
21 about today is you felt that in the break after the plea
22 hearing, that twenty or twenty-five minute break, you felt
23 like Mr. Swerling kind of coerced you into taking that
24 plea?

25 A. Yes.

1 Q. But when you pled guilty when the Judge asked you if
2 you'd been coerced, you said no. Why did you say that if
3 you felt like you'd been coerced?

4 A. Because he told me if I don't -- if I go in there and
5 say anything different that he's going to revoke my bond
6 and throw me in jail.

7 Q. And the same type of question, when you told the Judge
8 you were satisfied with Mr. Swerling and you said yes, you
9 again did that because you were afraid your bond would get
10 revoked?

11 A. Yes.

12 Q. Okay. And the State, during the plea, listed out kind
13 of the facts of the case about the buy with the
14 confidential informant. And when the Judge asked you if
15 those facts were true you said they were true. Are you
16 saying now that that is not true?

17 A. When the what?

18 Q. When the State at the plea went through the facts of
19 the case and kind of set up, explained to the Judge about
20 how the confidential informant set up the buy and that
21 there was a wire and an audio tape. After that the Judge
22 asked you are those facts true, and you said yes.

23 A. I didn't under --

24 Q. Were you lying to the Judge when you --

25 A. I didn't understand what they was asking. But as far

1 as the audio and wire, I never knew that was there. If I
2 knew that was there why would I make a - why would I even
3 attempt to be in something like that?

4 Q. So when the State kind of told the story of the arrest
5 and the charges in this case, and the Judge said are those
6 facts true, you did not understand the question?

7 A. No, ma'am.

8 Q. But you answered it anyway?

9 A. Yes.

10 Q. So by -- So your testimony today is when you said you
11 agreed to the fact that that was untrue?

12 A. I answered a question 'cause Mr. Swerling told me to
13 answer the question.

14 Q. Did he tell you to go into court and lie that day?

15 A. No. He looked at me when they answered -- when they
16 asked the question and shook his head like say yes.

17 Q. So he told you how to answer the questions is what
18 you're saying?

19 A. Basically.

20 MS. RATIGAN: That's all we have, Your Honor.

21 MR. WATSON: Nothing in redirect, Judge.

22 THE COURT: You may step down.

23 MR. WATSON: I have a short witness. Tina Berry.

24 THE COURT: Ms. Berry, if you will come around.

25 MR. WATSON: You need to speak up real loud.

1 MADAME CLERK: Please raise your right hand,
2 place your left on the Bible.

3 (WHEREUPON: TINA BERRY,
4 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

5 MADAME COURT REPORTER: Ms. Berry, Judge Burch
6 needs to hear every response you make, ma'am. I am going
7 to make an accurate record, too. Thank you. And please,
8 just keep your voice up.

9 DIRECT EXAMINATION

10 TINA BERRY BY MR. WATSON:

11 Q. If you can you speak loud enough like you're talking
12 to your brother, we'll be okay. All right?

13 A. Okay.

14 Q. Tell me your name please.

15 A. Tina Berry.

16 Q. And how are you related to Mr. Brown?

17 A. I'm his sister.

18 Q. All right. And where do you live now?

19 A. Tennessee. Chattanooga, Tennessee.

20 Q. All right. You were aware when your brother was
21 arrested; is that correct?

22 A. Yes.

23 Q. All right. And you were aware that he hired Mr.
24 Swerling.

25 A. Yes.

1 Q. All right. Do you recall about when your brother
2 got out of jail?

3 A. Yes.

4 Q. When was that?

5 A. It was in August of 2006, the day of, that evening.

6 Q. When he was arrested?

7 A. Yes, sir.

8 Q. Okay. I'm talking about when he got out of jail.

9 A. When he got out of jail?

10 Q. Yeah.

11 A. And what was the question again? When he got out of
12 jail?

13 Q. Do you know when he got out of jail?

14 A. He got out in December 2007.

15 Q. Okay. All right. Were you around your brother,
16 talking to your brother about the case between January of
17 '07 after he got out of jail and July of '07 when he went
18 to meet with Mr. Swerling?

19 A. Yes.

20 Q. Did you in fact go to that meeting with your brother
21 on July 26th of '07?

22 A. Yes.

23 Q. During the course of that six month or seven months
24 when you're talking to your brother about the case, did he
25 express any sort of frustration? And if so, what was his

1 frustration?

2 A. He was very frustrated with Mr. Swerling 'cause he was
3 not staying in touch with my brother or our family.

4 Q. Were you aware or did you participate in hiring Mr.
5 Schwartz to assist in the case, the Tennessee attorney?

6 A. Yes, sir.

7 Q. When you went to the meeting on July 26 of '07 in Mr.
8 Swerling's office, did you know at that time that there was
9 a court date coming up or that there was a plea negotiation
10 in the case?

11 A. No, sir.

12 Q. Is that the first time you learned about it?

13 A. Yes, sir.

14 Q. All right. Were you involved in helping your brother
15 hire an attorney out of Los Angeles or out of California
16 right about the time of that meeting, and before he went to
17 court?

18 A. Yes, sir. Me and my family.

19 Q. Okay. And were you all wiring money out to California
20 for his representation?

21 A. Yes, sir. Yes, sir.

22 Q. All right. Did you go to court with Mr. Brown on
23 August the 9th of '07?

24 A. Yes, sir.

25 Q. When you went to court, did you think he was gonna

1 enter a plea? What did you think was gonna happen?

2 A. I thought he was going to court to get a continuance,
3 'cause we had hired another lawyer.

4 Q. Okay. Let me back up. I don't mean to jump around,
5 but that meeting on July 26 of '07 at Mr. Swerling's
6 office, you learned about the plea negotiations for the
7 first time.

8 A. At the end.

9 Q. And the end of the meeting?

10 A. Yes, sir.

11 Q. How long was that meeting?

12 A. Probably about twenty-five minutes, thirty minutes.

13 Q. What did Mr. Swerling say about the negotiations for
14 twelve years?

15 A. He had to take it.

16 Q. He said what?

17 A. He had to take the twelve years, or either do twenty-
18 five.

19 Q. Okay. And then were you in court the whole time your
20 brother appeared before Judge Alford?

21 A. Yes, sir.

22 Q. And as I understand from looking at the transcript
23 there were sort of two different appearances; is that
24 correct?

25 A. Yes, sir.

1 Q. Did -- Were you there when your brother tried to talk
2 to the Judge about getting another attorney on the record?

3 A. Yes, sir.

4 Q. How long was the break between the two different
5 hearings to your memory?

6 A. About thirty minutes.

7 Q. Okay. Where did y'all go after the first time that
8 Mr. Brown appeared before Judge Alford and the second time
9 he went in?

10 A. We brought all of -- The family and I, we walked out
11 into the hallway. We was trying to talk to Mr. Swerling
12 with my brother, Victor.

13 Q. Okay.

14 A. And he told all of us to go over and stand against the
15 wall.

16 Q. Okay. Did he say why y'all needed to go stand against
17 the wall?

18 A. He said y'all are making the Judge very angry.

19 Q. Okay. Did you hear Mr. Swerling talking to Mr. Brown
20 after y'all - did y'all go over and stand next to the wall?

21 A. Yes, sir.

22 Q. And did you hear Mr. Swerling talking to Mr. Brown at
23 that point?

24 A. Yes, sir, I did. We heard him telling my brother you
25 need to take this twelve years or else you're gonna do

TINA BERRY: CROSS EXAMINATION BY MS. RATIGAN

43

1 twenty-five.

2 Q. That's all I have. Answer any questions the Attorney
3 General has for you.

4 CROSS EXAMINATION

5 TINA BERRY BY MS. RATIGAN:

6 Q. Just a couple of quick questions. So you and your
7 family hired Mr. Schwartz, he's the Tennessee lawyer?

8 A. Yes, sir. Yes, ma'am.

9 Q. Were you involved in talking to him and hiring him in
10 that process?

11 A. I would only talk to him when we hired him.

12 Q. Okay. And when did you hire him? Do you remember
13 about what time that was?

14 A. It was probably back in like mid-January, February.

15 Q. And that would be --

16 A. Of '07.

17 Q. '07, okay. And when y'all said you hired him, you
18 retained him, you paid him a fee?

19 A. We didn't have to pay him. We didn't pay him a fee.

20 Q. And did you ever communicate with him and tell him he
21 had to talk to Mr. Swerling since Mr. Swerling had already
22 been hired?

23 A. Yes.

24 Q. Now Mr. Lawson from California, you were also involved
25 in hiring him on this case?

1 A. Yes.

2 Q. Okay. And when did you hire him?

3 A. It was August the 6th.

4 Q. August the 6th? So that would have been about three
5 days before the plea?

6 A. Yes.

7 Q. And the same questions, did you actually pay him a
8 fee, or did you just --

9 A. Yes. We paid him a fee.

10 Q. And again, did you tell him that he had to contact Mr.
11 Swerling because Mr. Swerling was the attorney of record?

12 A. Yes.

13 Q. Did you ever have any conversations with Mr. Lawson
14 about the case?

15 A. I only had one conversation with him.

16 Q. And did he ever tell you if he had spoken to Mr.
17 Swerling?

18 A. No.

19 Q. So that initial conversation when you hired him was
20 the only conversation you had?

21 A. Yes.

22 Q. Okay.

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

24 REDIRECT EXAMINATION

25 TINA BERRY BY MR. WATSON:

TINA BERRY: REDIRECT EXAMINATION BY MR. WATSON

45

1 Q. You said you hired him on August the 6th. Is that
2 when the money got to him, or --

3 A. The money got to him the next day.

4 Q. Okay. So how many conversations did you have with the
5 California office?

6 A. I had approximately one conversation with them and my
7 other family members had another conversation with them.

8 Q. So were those conversations over several days? Or
9 just on one day?

10 A. Several days.

11 MR. WATSON: That's all I have, Your Honor.

12 You can step down.

13 (WITNESS LEAVING WITNESS STAND.)

14 MR. WATSON: Judge, that's all we have.

15 MS. RATIGAN: Judge, the State calls Mr.

16 Swerling.

17 MADAME CLERK: Jack, I need to swear you in.

18 MR. SWERLING: All right.

19 (WHEREUPON: MR. JACK

20 SWERLING WAS DULY SWORN IN AND TESTIFIED AS FOLLOWS.)

21 MADAME COURT REPORTER: I don't have to tell you
22 what to do.

23 DIRECT EXAMINATION

24 JACK SWERLING BY MS. RATIGAN:

25 Q. Mr. Swerling, were you present for Mr. Brown's

1 testimony this morning?

2 A. Yes.

3 Q. What I'm gonna do is just kind of go through -- he's
4 laid about nine different points. I'm gonna go through
5 them in the order raised just for ease of keeping everybody
6 on the same page. But obviously feel free to expand on
7 whatever you need to expand on.

8 A. Sure.

9 Q. When were you hired to represent Mr. Brown? Do you
10 recall?

11 A. Sometime in September, late August or September.

12 Q. Would that be of '06?

13 A. Yes.

14 Q. Was he still in jail at the time?

15 A. He was.

16 Q. Okay. And did you represent him at the bond that
17 eventually got him released to Tennessee? That hearing?

18 A. Well the bond hearing had already been held.

19 Q. Okay.

20 A. And, but he was released at some point. I don't know
21 exactly the date he was released, but he was released and
22 he was allowed to go back to Tennessee. So I don't know
23 what he was talking about. I think there was an objection
24 to it eventually. It seems like we worked it out, but my
25 understanding was he was in Tennessee and all the letters

1 we wrote him were to Tennessee.

2 Q. Now how many meetings did you have with him prior to
3 him being released, while he was still in jail?

4 A. Well I'm not really sure what date he was released,
5 but I met with him on September 27, 2006. I met with him
6 on November 9th, 2006. I met with him on January 8th,
7 2007. And I met with him on February 7th, 2007. And I
8 don't know exactly when he got out of jail.

9 Q. Did you file a Rule 5 discovery mentions in this case?

10 A. I did and I received the discovery package from Ms.
11 Horton around October 30th of 2006 and I forwarded it to
12 Mr. Brown. So it would have been -- We would have
13 discussed that at our November 9th 2006 meeting.

14 Q. Now each circuit does things a little bit differently.
15 Were you provided, as far as discovery, a copy of the audio
16 tape from the state?

17 A. Now they have a policy up here that -- which
18 apparently has been upheld that they're not going to reveal
19 -- they're not going to turn over the tapes because they
20 don't want to identify the confidential informants. And of
21 course if you go into trial you will then get it. And we
22 were told that the day we came up here for the plea that if
23 we were going to go to trial at the end of the month then
24 we would get the tapes. Of course I had been made aware of
25 what was on the tapes pursuant to my meetings with the

1 solicitor in the case, Misty Horton, as well as Marvin
2 Brown and other detectives in the case. We had conference
3 with them and I was made fully aware of it. I do have a
4 copy of the tape which is very -- which pretty much tells
5 you what this case is all about. And I can play it if you
6 want me to.

7 Q. I don't think we'll need it quite this second. But
8 aside from the audio, you sent Mr. Brown everything else
9 you got from the State?

10 A. Yes.

11 Q. Did you explain to him during one of your meetings the
12 impact the audio tape would have on the case at trial?

13 A. Well, the impact of that and everything else. You
14 know, basically, I mean, I'll give you a short summary of
15 what happened here. The -- he was involved - he was the
16 middle man, an admitted middle man in a drug deal. And he
17 came to South Carolina with another fellow named David
18 Steele, I believe was his name. Chris Wellborn represented
19 him. And he acted as a middle man for a five kilo drug
20 deal. He went to a motel. He met with the confidential
21 informant. The tape shows the meeting with him and the
22 confidential informant and David. At one point, several
23 points during the audio, he is on the phone with the guys
24 who have the money and instructing them where to go, what
25 hotel to go to, what room to go to. And then at some

1 point, which is on the video -- and all of this is on video
2 and the audio, the discussions he's having with the
3 purchasers and the informant. And at some point he left
4 the room because they wanted to see some cocaine, or he
5 wanted -- the confidential informant wanted to see some
6 cocaine. Victor Brown came back in the room with a kilo of
7 the cocaine. And after he came back in the room the law
8 enforcement came in the door, arrested him and Dave -- I
9 keep saying his name is Steele, but I may be wrong about
10 that. Seems like it was -- Seal, maybe, something like
11 that. But anyway, at that point then law enforcement went
12 to the other motel where Victor Brown had rented a room and
13 found, if I recall correctly, the individuals who were
14 purchasing this -- selling the cocaine left. When the
15 police hit the door they were gone. But they found four
16 other kilos. So we had five thousand grams of cocaine
17 involved in this case, in this drug conspiracy.

18 Q. And you went through all the facts with Mr. Brown
19 during representation?

20 A. Well I did and I went into all of those facts with
21 him. The fact that he was recorded. The fact that there
22 was a CI. The fact that there was a video. He also
23 confessed to the crime. There was a confession where he
24 admitted that he was involved in this drug transaction.
25 And said he was -- basically what he said, well I was only

1 the middle man. Which I tried to explain to him really was
2 not an excuse. That makes you guilty of the conspiracy
3 which is what he was charged with. And then of course,
4 anything over a hundred grams is twenty-five years
5 mandatory, no parole. This was his third offense according
6 to the State.

7 Q. And had you discussed with him during the course of
8 your representation the risks and advantages and
9 disadvantages of a plea versus a trial on these facts?

10 A. Sure. I mean, here's the problem, and I explained
11 this to him and to his family. If he is convicted of the
12 hundred grams or more, and of course he was charged in a
13 conspiracy involving nearly five thousand grams, he
14 personally had on his possession one thousand grams. So
15 even if there was some basis to argue about the other four
16 grams, he was well over the amount required for a mandatory
17 twenty-five year sentence, where the judge would have no
18 discretion but impose a twenty-five year sentence on him.

19 Q. So did you -- would it be fair to say that pretty soon
20 after you were retained he started going into plea
21 negotiations with the State?

22 A. Well we talked about it very early on because this was
23 -- I mean, this case with a audio/video, with a confession,
24 with five thousand grams of cocaine was pretty much a case
25 that was by anybody's evaluation would have been difficult

1 to win. And risks of going to trial were substantial,
2 because, as I said, there is no discretion on the part of
3 the Judge as far as the sentence is concerned. Anything
4 over a hundred grams is twenty-five years, no parole. And
5 Mr. Brown would have been a fool to go to trial.

6 Q. So right before we get in to the individual issues,
7 when did you get that twelve year offer from the State?

8 A. Well what happened was, when we met -- let me get my --
9 -- Mr. Brown had told the police he wanted to cooperate when
10 he was arrested. And that's when he gave his statement.
11 Of course, I followed that up with Ms. Horton and what we
12 agree to was a meeting between Mr. Brown and myself and at
13 that time I think Elizabeth Franklin was with me. And we
14 went up to the police department. It was either the City
15 of Rock Hill or the Sheriff's Department. I can't
16 remember. But that was on, let's see, February 7th we had
17 a meeting with law enforcement and the solicitor. At that
18 time my notes reflect that he was -- they said he could
19 have a plea offer of fifteen years that was communicated to
20 him; however, the solicitor told me that if he did anything
21 as a result of that meeting, which he said he could do and
22 he was willing to do, he was willing to cooperate. That
23 that offer could improve. He never did do anything as a
24 result of that meeting or anything he told the police that
25 he could do. And so when it came down to the case being

1 called, I mean I must have talked to her a dozen times.
2 But even though he had not done anything, I guess as a
3 result of my constantly calling her, she went down to
4 twelve years and she said that was it. It wasn't getting
5 any better than that.

6 Q. And about how far in advance of the plea was that?
7 You pled on August 9th of '07.

8 A. Well, actually when she offered me the twelve years, I
9 believe that was in July before the -- when she said she
10 was gonna call the case for trial, because they had not
11 heard -- by the way, they'd never heard from Victor Brown
12 about the cooperation. So she was gonna call the case for
13 trial. And that's as a result of several phone calls
14 between she and I after she told me that the case would be
15 called for trial. I talked her down to twelve years. The
16 -- it shows that I had a number of phone calls with her
17 sometime in the week of July 3rd, and that was probably
18 when that offer was communicated.

19 Q. And you relayed that twelve year offer to Mr. Brown?

20 A. Yeah. If I can give you just a little bit of a
21 history.

22 Q. Sure.

23 A. We had that meeting in February. The letter that was
24 offered, Cayman's letter, it's not a dated letter so I'm
25 not -- I don't know exactly when I got that. But when I

1 was not hearing from him, and it could have come as a
2 response to this letter on July 27th. I'm sorry. I had
3 not heard from Mr. Brown. On March 27, 2007 I sent him a
4 letter telling him to get in touch with me. And that was
5 in March. And my office is pretty good about -- we --
6 every phone call that comes in the office for me is
7 recorded in an email and is sent to me immediately
8 contemporaneously with the phone call. My office nor I had
9 any indication that Mr. Brown called or wrote us after that
10 March 27th letter when I asked him to please get in touch
11 with me. 'Cause I had not heard from him. And he
12 obviously knew he had an obligation to cooperate with the
13 police and that was the only way that he was going to
14 improve himself. The letter I gave him -- the letter dated
15 March 27th says I was in York County last week and I saw
16 the solicitor on your case. He mentioned to me that on one
17 had heard anything from you, and time is growing short. If
18 you are going to do anything you need to do it now. Please
19 get in touch with me, not only about your assisting the
20 State but also about the balance of the fee. Which, you
21 know, was not, had not been paid at that point. So as I
22 said, there was no indication that I got any communication
23 from him after March. In July is when I had several
24 conversations with Misty, and -- Misty Horton about the
25 case being called for trial. On July 3rd, I had a phone

1 conference with Mr. Brown. Told him what was happening.
2 This was July 3rd, by the way. And I also made a phone
3 call to his wife. On July 16th I hadn't heard anything
4 back from him and I called and left a message for Victor to
5 contact me -- or my paralegal did, I'm sorry. On July 18th
6 I called -- my paralegal called and left a message for him
7 to call me. On July 18th we still hadn't heard from him so
8 we sent him a letter, which I have a copy of, telling him
9 to get in touch with us. On July 23rd we still hadn't
10 heard from him so we sent him another letter, which I have
11 a copy of. And then on July 27th, this is when I had --
12 they came down to Columbia and it was about fifteen or
13 twenty people from the family came down. Of course, they
14 came down because they knew that the case was coming up for
15 trial. So I'm not sure what they're talking about. They
16 were supposed to be there on Friday evening, I recall, and
17 they didn't come 'til late. And I said I wasn't waiting
18 any longer and I would meet them Saturday morning. My
19 recollection is -- my records reflect we met for over two
20 hours where I spoke with them about the problems in the
21 case, the fact that there was an audio/video tape. The
22 fact that there was a search, the fact that there was a
23 confession, and the fact that he had wanted to cooperate
24 but never did. And the case was coming up for trial.
25 Q. And you relayed, again, reiterated the twelve year

1 plea offer?

2 A. That was definite. There was no question I
3 communicated it on that day, but I probably got it and
4 probably communicated that in that phone conversation to
5 him back the first of July. So July 28th I had a
6 conference with him. On August 2nd I had a phone call with
7 the solicitor again. On August 5th I sent Mr. Brown a
8 phone call -- I made a phone call to him and sent him a
9 text. Got no response. And then I -- I have some notes
10 that I recorded contemporaneously with these events. And
11 I'm using them to refresh my memory. We met Saturday July
12 28th, me and numerous members of the family. I answered
13 questions and gave my opinion. The meeting lasted over two
14 hours. The end result is if he could get more info on
15 Pedro, which is the individual, I would do what I could to
16 delay the case. But I would try anyway even without new
17 information. Monday and Tuesday I called the solicitor
18 while I was in a murder trial. Did not reach her until
19 Wednesday. She did not think that he would be interested
20 anymore about the information. I called a sister and the
21 wife back on Wednesday but got no return calls. On
22 Thursday, I tried to call the solicitor. On Friday, I
23 called again and spoke with the solicitor, and not
24 interested. Thursday was set for the plea. On Wednesday
25 the solicitor also told me that the case was available for

1 trial. I told her, based upon my conversation, it would be
2 a plea and that's what I understood it was going to be. I
3 texted at that time Mr. Brown, and called him. No
4 response. On Friday, I texted him again. Called him and
5 spoke with his uncle who had the phone, his phone. Mr.
6 Brown was in the mountains at that point. I left a
7 message. I called Tina, the person who just testified, on
8 Saturday. Spoke with her and told her to have Mr. Brown
9 reach me. On Monday that week of the plea, during the
10 trial, she called my office about Thursday. And I told her
11 that I still had not heard from Victor. On Tuesday on the
12 way to Chester, I called him. Asked him why he -- I
13 reached him that time. I asked him why he had not called.
14 He said he had called the office yesterday. I checked with
15 my office and they said no, he had not. I asked him what
16 he was going to do. He would not give me an answer. Said
17 he was making plans considering things, spending time with
18 kids, got short with me. He said he would call at noon.
19 He did not call. I got a call from an attorney in Florida.
20 I want to talk about this attorney he's talking about. The
21 first time I've ever heard about an attorney in California
22 was about thirty minutes ago when he was on the witness
23 stand. I did get a call from a Ron Guralnick in Florida
24 at 305-373-0066. I spoke with him. I answered his
25 questions. And I also faxed him the discovery in the

1 case, which is what he requested. Of course, I never heard
2 anything back. I called the solicitor and there was no
3 response as of the date of this writing, which was sometime
4 during that week of August 6th. And I just lost my paper.
5 As far as this attorney in California, I am not aware of
6 anything about that.

7 Q. Okay. Let's go -- now that we have kind of the
8 general from start to finish, let's go and hit some of
9 these individual issues. His first main issue was that you
10 did not advise him about parole eligibility, which you have
11 advised him this was a parole ineligible offense.

12 A. That's one of the most non-sensible statements I've
13 ever heard. This is a no parole case. I've been
14 practicing law thirty-seven years. That is -- you must
15 tell the defendant that, and obviously he knew that. I
16 don't know why he said he didn't. As a matter of fact, on
17 page thirteen of the transcript, the Judge tells him it's a
18 no parole offense twice.

19 Q. Now his next big issue is that there was the family
20 lawyer named Schwartz in Tennessee and that you failed to
21 communicate with him. Can you tell us a little bit about
22 any interaction you may have had with Mr. Schwartz?

23 A. He told me about Mr. Schwartz in Tennessee. He never
24 told me he had hired him. He asked me if I would consult
25 with him. I said I would. Mr. Schwartz never filed an

1 appearance, never sent -- I have no letter in the file from
2 Mr. Schwartz. He never filed an appearance in court. I
3 did not know we were supposed to be co-counsel until he
4 just testified to that. I told him I would speak with him,
5 however. I remember sometime in the Spring, or maybe -- I
6 don't remember exactly when because I don't have a record
7 of it for some reason, but the reason I remember it so well
8 it because it's my pet peeve. I called Mr. Schwartz. And
9 I got left on hold for several minutes. Then I called back
10 and got left on hold again for several minutes and then I
11 called the secretary and chewed her out and said I wasn't
12 holding anymore. And that was the end of that
13 conversation. Then I did not -- I did speak with Mr.
14 Schwartz sometime in July, the day before they came, July
15 27th. And I told Mr. Schwartz what the situation was about
16 the evidence against him, what the plea offer was, and that
17 was it. Mr. Schwartz never said he was coming, never said
18 he was gonna do anything. Actually I had two
19 conversations, it looks like, with him on that day, On July
20 27th.

21 Q. And this --

22 A. Or, I'm sorry. I spoke with him on July 27th. I made
23 a phone call to him again that day, apparently.

24 Q. And this attorney that was mentioned this morning, Mr.
25 Lawson from Imhoff and Associates, your testimony is that

1 the first time you heard that name was today?

2 A. Yeah. The only other name I ever heard was this
3 fellow from Florida named Guralnicknic. And I did send him
4 discovery, but never had anything else. Now as far as some
5 letter from California, there is no letter that I ever got
6 from a lawyer in California. I never got a phone call from
7 a lawyer in California. And I would point out that in the
8 trial transcript -- I mean in the plea transcript there's
9 no mention of the fact that he had had another lawyer. In
10 fact, the Judge said, you know, I'm gonna -- we're gonna
11 revoke your bond because as a condition of the bond, you
12 have to have a lawyer. That's what, of course, Misty
13 Horton also said. That was a condition of bond. You had
14 to have a lawyer. So during that colloquy there is no
15 reference to the fact that he had a lawyer. And it's
16 obvious that if he'd had a lawyer, that would have been the
17 time to tell the Judge.

18 Q. Now moving on to his next issue, chain of custody.
19 Did you review all of the chain documents in this case?

20 A. I reviewed what I was given, and I also spoke with Ms.
21 Horton. I -- first of all, I don't know what he's talking
22 about. The evidence was not sent to SLED. It was analyzed
23 right here in York County, and that is what they do up here
24 in York County. They have their own lab. I am not aware
25 of any problem in the chain of custody. Chris Wellborn

1 tried the codefendant in the fall of 2007. And it ended in
2 mistrial because Mr. Wellborn had an excellent mere
3 presence defense for his client. But the evidence was
4 admitted and I've spoken to Mr. Wellborn and he has no idea
5 what the evidence that was admitted in that case. He has
6 no idea about any chain of custody problems. And in his
7 case the five kilos, I believe, were admitted.

8 Q. Now, getting to the next issue which is that it
9 appears Mr. Brown is trying to argue you should have
10 objected to Judge Alford being unduly coercive during the
11 plea.

12 A. Well, Judge Alford was not coercive at all. Judge
13 Alford -- what happened was, when we got up here the case
14 was presented to the Judge. And we went in front the
15 Judge. Ms. Horton stated on the record that twelve years
16 was the offer. It wasn't getting any better. And it was
17 gonna be withdrawn that day. And he would have to proceed
18 with trial, I believe, on the 27th, I think, or something
19 like that. What Judge Alford did was try to explain to Mr.
20 Brown. He explained that the offer was going to be
21 withdrawn, that the State was saying -- he really was
22 repeating what Ms. Horton had said, that the offer was
23 gonna be withdrawn. He would have to go to trial. And it
24 wasn't going to get any better. So, my reading of the
25 transcript, my understanding what was happening that day is

1 is Judge Alford was trying to help him. Because he tried
2 to help him understand that if he went to trial, or if he
3 didn't do anything that day and accept the twelve years
4 that day, that it was going to be withdrawn and he would
5 have to go to trial. And essentially what was going to
6 happen is, if he got convicted, he was going to get twenty-
7 five years. I don't think he could have made it any
8 clearer than that.

9 Q. And this next issue, he has testified he believes that
10 you coerced him to take the plea specifically in that break
11 in the plea, that twenty to thirty minute break, that you
12 coerced him, maybe were a little heavy handed. Do you
13 recall what that conversation with him was like?

14 A. Well, I mean, I recall we took a break so we could
15 discuss. The Judge let us take a break so we could discuss
16 the merits of the plea versus going to trial. I mean,
17 obviously then and my opinion now is that, based upon
18 video, the audio of the phone calls, and the confession and
19 the five thousand grams of cocaine, that he would have been
20 convicted. I expressed that to him that day. And I told
21 him what my opinion was. That's what he paid for. I have
22 never, in thirty-seven years, ever coerced a plea. I've
23 tried hundreds of cases. Whether or not someone pleads
24 guilty or goes to trial is of no consequence to me, after I
25 give them my best advice. And my best advice was for him

1 to take the twelve years. Still is.

2 Q. Mr. Brown also testified today that you basically
3 coached his answers during the plea. Is that something you
4 would have done?

5 A. That's absolute nonsense.

6 Q. Did you ever tell him to lie to the Judge?

7 A. Absolutely not.

8 Q. And had you explained to him that day regarding the
9 level of trafficking that it had been reduced down in terms
10 of weight and in terms of the number of offense?

11 A. Well, yeah. In order to get where we were getting, it
12 had to be reduced.

13 Q. And you explained all that to him?

14 A. Yeah. Yeah.

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

16 CROSS EXAMINATION

17 JACK SWERLING BY MR. WATSON:

18 Q. Just a few questions. When was the conversation with
19 the Florida attorney?

20 A. He apparently called me sometime, let's see...

21 Q. And I missed it. I was just talking to my client.

22 A. Well it would have been in that period of time around
23 the 26th 27th, because what I have it -- I have it in
24 those notes that I wrote at that time. Let me go ahead and
25 get that. I'm sorry, Judge. My papers fell here.

1 THE COURT: Take your time.

2 BY MR. WATSON:

3 Q. Do you have a specific date on your notes, or...

4 A. No, but what I wanted to read - these were written
5 after the meeting on the 28th of July.

6 Q. Okay.

7 A. I sat down and wrote some notes that day and the next
8 couple of days. And I indicated in there that I had
9 received -- got a call from an attorney in Florida named
10 Ron Guralnicknick. Spoke with him, answered his questions,
11 and faxed him the discovery.

12 Q. Okay. And you wrote those notes after that meeting on
13 the 26th and before coming in to court on the 9th.

14 A. It was written at several different times. It looks
15 like because I was trying to record exactly what was going
16 on because Mr. Brown -- I mean, I could see what was
17 coming. Let's put it that way. I wanted to make sure I
18 had it documented because when -- as Mr. Brown has done he
19 got up here and told a lot of things that weren't true.
20 And I don't like that.

21 Q. I appreciate that. I appreciate your opinion. You
22 could have talked to this Florida attorney before the
23 meeting on the 26th, you're just not sure. You made the
24 notes afterwards.

25 A. Correct. I don't have it actually logged in as to

1 when. I just made a note about his name, his number and
2 the fact that we faxed him the discovery.

3 Q. Are you aware that there are outfits around the
4 country that they take clients' money and then they go find
5 another attorney to handle the case?

6 A. I'm not aware of any outfit that takes twenty-five
7 thousand dollars and only has one phone call with a client
8 and then they never follow up with them, because, I mean,
9 I've never heard of somebody giving somebody twenty-five
10 thousand dollars for one phone call.

11 Q. Well, if he was gonna represent him, then... Did the
12 Florida attorney that you talked to ever say anything about
13 he was being associated by the outfit in LA?

14 A. I have no recollection about that. I mean, there's
15 nothing in my notes. It was just a guy from Florida named
16 Ron Guralnick and I sent him the discovery and I never
17 heard anything more.

18 Q. Did he say that he had been retained?

19 A. No. He said he got -- to the best of my knowledge, he
20 had gotten a call from the family. He wanted to know about
21 the case, and I said, I -- look, I'll be glad to send you
22 the discovery. Any lawyer, Mr. Watson, would have come to
23 the same conclusion I did. Even a lawyer first year out of
24 law school.

25 Q. And the conclusion was to send him the discovery?

1 A. Well, no, that he should take the plea.

2 Q. No, I understand that. What you said was you --

3 A. So I had no problems that he could have -- I would
4 have sent him the discovery. I would have sent him
5 anything he wanted me to.

6 Q. What you said was he would have been a fool to go to
7 trial.

8 A. Absolutely.

9 Q. And you expressed that to him?

10 A. I didn't tell him -- call him a fool. I said that he
11 should go to -- he should not go to trial because they had
12 an audio/video, he was on the phone with the ER. He was
13 acting as the middle man. He was on tape talking about the
14 five kilos. He had the kilo on him when he came in the
15 room. I don't -- you were a solicitor. That would have
16 been a slam dunk for you.

17 Q. Would you agree that he would have the right to make
18 the decision to go to trial?

19 A. Sure. But he's paying me for his advice -- my advice.

20 Q. And he's got the right to make the decision to go to
21 trial uncoerced. Do you agree with that?

22 A. Oh, yeah. And he was not coerced.

23 Q. You made the -- you said that you met with him the
24 first time on September the 27th of '06. You weren't sure
25 when he got out of jail, but he got out in December.

1 A. Yeah, I really don't know.

2 Q. He just clean cleared himself. He's already had a
3 five hundred thousand dollar bond before you got involved.

4 A. Something -- if I recall correctly, that was the
5 amount of the bond.

6 Q. Okay. And you never went forward -- you never got a
7 bond reduction, so you never actually represented him after
8 that bond hearing.

9 A. No, because we -- he and I talked about it when I
10 decided to go ahead with him. He said he wanted to go for
11 a bond reduction. I spoke with Ms. Horton about it and she
12 said, well, you know, this guy has got, you know, this five
13 kilo deal. We're not -- we're gonna call the case for
14 trial if you move for bond.

15 Q. And you told him that.

16 A. Oh, absolutely.

17 Q. And I'm not going to -- if you want to go to trial
18 real quick I'll move for a bond hearing.

19 A. Absolutely.

20 Q. He got out in December. So would you agree -- when
21 you say you had a meeting with him in September, November,
22 January and February, and let me just go briefly. The
23 September 27th, would have been the initial meeting with
24 him?

25 A. That's my recollection.

1 Q. You would not have had discovery at that time.

2 A. No. I got it on October 30th and met with him on the
3 9th of November.

4 Q. Okay, and that's consistent with what he said. And
5 then he said in November you did meet and you had the
6 discovery.

7 A. Correct.

8 Q. But you talked with him. And he asked about a bond
9 hearing and that's when you said we don't want a bond
10 hearing, or you're gonna go to trial.

11 A. Well I told him that if he asked, if he pushed for the
12 bond hearing, the case was gonna get scheduled for trial.

13 Q. And your advice was don't go for a bond hearing.

14 A. He understood what that meant.

15 Q. And then you met with him on January the 8th. That
16 would have been at your office after he got out on bond.

17 A. If he got out in December then it would have been
18 included.

19 Q. Okay. He got out, so - and that's when you signed the
20 fee agreement with him, I think.

21 A. I sent him a copy of it that day as well. And he said
22 that's, I don't know, it was the 8th and I'd also made an
23 entry that we had a conference on the 8th. But I want to
24 clarify. On the 9th and on the 8th of January, we would
25 have reviewed the discovery in the case. We would have

1 reviewed the allegations. We would have reviewed the
2 problems in the case. So, he's not telling the truth
3 about that.

4 Q. And on February the 7th, would that have been the
5 meeting in Rock Hill?

6 A. Right.

7 Q. Okay.

8 A. He came in from Tennessee Ms. Franklin and I went up
9 and met him at the office there. I know Marvin Brown was
10 there because his name is indicated in my notes. And also
11 Ms. Horton was there, because they were very interested.
12 Here's the thing, the guys who had the five kilos, when
13 the police --

14 Q. They jumped out the window.

15 A. Yeah, they left from one motel where Victor and the CI
16 were, and Mr. Wellborn's client. They went to the other
17 motel. By the time they got there, these guys jumped out
18 the window. So they were very interested in finding out
19 who these guys were. I think one of them is named Pedro.

20 Q. Okay. Now, I'm jumping ahead, but he ultimately did
21 not work with the police. Did Mr. Brown ever tell you he
22 was having trouble with his bondsman letting him leave the
23 state and come do the things they wanted him to do, the
24 police?

25 A. The bondsman leave which state?

1 Q. The Tennessee bondsman that had signed Mr. Brown's
2 bond, would not let Mr. Brown leave Tennessee to come and
3 work undercover for them.

4 A. Well I seem to remember there was something about
5 that, but he also, my understanding was, he had, he had
6 there was information about some folks in Tennessee. And
7 then there was a group down in Georgia where he said he
8 could infiltrate. And so we talked about -- there were
9 some discussions about if that could possibly help him as
10 well, because he could inform the Feds about that. So, you
11 know, I mean, they were willing to take whatever
12 cooperation he would give. I could look at my notes about
13 that.

14 Q. I really don't need you to unless you want to.

15 A. Okay.

16 Q. I don't want to cut you off and have you not expand on
17 your answer.

18 A. No. I just wanted you to...

19 Q. I'm ready to move on if you are.

20 A. Go ahead.

21 Q. Okay. And again, I was talking to my client so I
22 missed a little of your testimony. Did you ever listen to
23 the tapes? I know you did -- you said --

24 A. I wasn't allowed to.

25 Q. Okay. You were not even allowed to listen to them?

1 A. Because their reason up here in the court has been
2 upheld as far as I know, that they don't disclose that to
3 anybody because they do not want to disclose the informant.
4 And they're not gonna do that unless you're going to trial.
5 If you're going to trial they would do that. Because if
6 you listen to the tapes, then you'll know who the informant
7 is. Of course, Mr. Brown knew who the informant was,
8 because he met him in the room. And he was the one that
9 arranged the deal. So he knew.

10 Q. Did you say that you had a transcript of it even
11 though you didn't - couldn't listen to the tape?

12 A. No.

13 Q. Okay. I missed that. What did you say you had a
14 transcript of?

15 A. I didn't say I had a transcript of anything. What I
16 said was that I had been informed what was on the tapes.

17 Q. Okay.

18 A. Yeah.

19 Q. What was your - remind me, when is your recollection
20 you talked to Schwartz for the first time?

21 A. I'm sorry?

22 Q. Mr. Schwartz, the Tennessee attorney. When would you
23 --

24 A. Well, I have a phone conversation recorded on the 27th
25 of July.

1 Q. Okay. Are you saying that you had -- were not aware
2 of Mr. Schwartz being involved before the 27th?

3 A. No. I wasn't aware that I was supposed to be co-
4 counsel with Mr. Schwartz. The first time I heard that was
5 today. What I heard was, before he asked me if I would
6 consult with Mr. Schwartz and I said I would.

7 Q. Okay. And I think that --

8 A. But I have no -- Mr. Schwartz never wrote me a letter.
9 I have no phone calls from him. The time that he may have
10 called and I called back, at the time I said I got
11 frustrated, because I'm not gonna hold on the phone for
12 anybody after twice. And I told his secretary that. And
13 so, the last time I spoke with Mr. Schwartz -- he never
14 called me either, by the way. I guess we spoke on the 27th
15 or the 26th of July.

16 Q. Okay. So you don't think you talked to him much
17 earlier than that, like in February, March, something like
18 that?

19 A. Not that I'm aware of, but I could have.

20 Q. Okay.

21 A. I can't dispute that if that's what somebody said.

22 Q. Well I think the allegations were that they wanted Mr.
23 Schwartz involved to help in the communication. I think
24 Mr. Schwartz would have said that he did talk to you on one
25 occasion before that 27th.

1 A. That's possible.

2 Q. Okay.

3 A. And if he had, I would have talked to him and I would
4 have sent him the discovery if he had asked for it.

5 Q. Okay.

6 A. But I have nothing in my file to indicate that Mr.
7 Schwartz ever asked for the discovery or we sent it to him.
8 Certainly, if he would have asked for it, I would have sent
9 it to him.

10 Q. All right.

11 A. I mean, I wasn't in -- well, let me say -- I was not
12 aware that Mr. Schwartz was going to have any kind of role
13 in this thing except, you know, he was the family lawyer up
14 there. In fact, they didn't retain him. You know, they
15 came up here and said they hired him --

16 Q. All right. I think their allegations are that they
17 wanted him to help with communications and they're
18 frustrations were that you weren't communicating with Mr.
19 Brown or with Mr. Schwartz.

20 A. Well, I was communicating with Mr. -- I was trying to
21 communicate with Mr. Brown. I sent him a letter on May
22 (sic) -- March 27th asking him to give me a call. And I
23 never heard from him until July.

24 Q. I understand. You said that you thought the Judge was
25 trying to help Mr. Brown.

1 A. Well, I think what the Judge was trying to -- what the
2 Judge was doing was restating what Ms. Horton was saying.

3 Q. Okay.

4 A. And to try and put it in language, you know, that --
5 the way he wanted it -- the way he was gonna put it, but he
6 was really repeating what Ms. Horton said and was letting
7 her know -- letting him know that that was her position.
8 That if he didn't accept it, he was looking at twenty-five
9 years. That's basically what he was doing.

10 Q. And when the Judge said that this is a better deal
11 than they offer other defendants in cases like that, that
12 wasn't restatement of what the Prosecutor said?

13 A. No. But it was my understanding it was.

14 Q. I understand that. And when he said that F. Lee
15 Bailey couldn't do a better job than Jack Swerling, that
16 wasn't what the Prosecutor said.

17 A. Well, I think that's the truth. Bailey had the -- the
18 offer was twelve years. It wasn't getting any better. And
19 if you have a video tape, and an audio, and the confession
20 and five thousand grams of cocaine, it's a pretty difficult
21 case to overcome.

22 Q. I understand all that.

23 A. And after -- even F. Lee Bailey couldn't do anything.

24 Q. Thank you. (Inaudible) Would you dispute -- let me
25 just ask you, would you dispute that he sent you some money

1 on the 21st -- in a letter on the 21st, when you were
2 saying that you wrote him in March and he wasn't
3 responsive. And you didn't meet him until the July
4 meeting. He could have contacted you in June.

5 A. In June?

6 Q. Yes.

7 A. If he had contacted me, I was pretty cognizant of the
8 fact that what was happening here. That he was not -- he
9 was -- let me, let me just say this. The reason that I --
10 we were recording these communications back and forth was
11 only because he had agreed to do, in February, he had
12 agreed to help the police.

13 Q. I understand.

14 A. And he wasn't communicating with me or the police
15 about what he was going to do. So, I was very aware of
16 when he was calling, when we were communicating, and the
17 fact that he was not. If he had spoken to me in June, I
18 believe I would have written it down. But I did send him
19 the letter in March saying that basically I need to hear
20 from him.

21 Q. All right.

22 MR. WATSON: That's all I have.

23 MS. RATIGAN: I have nothing further, Your Honor.
24 The State would rest at this time.

25 MR. WATSON: Nothing from the plaintiff.

1 THE COURT: Anything further?

2 MR. WATSON: I would like to hand you a couple of
3 cases, Judge. I don't know if you want to take any brief
4 arguments from

5 THE COURT: I don't usually do but I will if you
6 insist.

7 MR. WATSON: I don't insist, Judge, but I would,
8 I know you're going to read the transcript and I know you
9 know the law. Again, I think Mr. Swerling probably said it
10 best that this was a great deal and he should have taken
11 the deal. And I think Judge Alford was trying to help him
12 understand that. But if you look at the chronology of
13 cases from Cross up to Freddy Owens, a Judge cannot
14 participate to the extent that Judge Alford did in the plea
15 negotiations and in giving information to a defendant. And
16 if you look at, I think it's Pearce and that Freddy Owens,
17 in those cases the Judge, drawing on their vast experience,
18 gave information to a defendant. The defendant did not
19 actually follow the Judge's advice in those cases. He
20 actually took the course that was against the Judge's
21 advice. And yet the Court said, the Supreme Court said you
22 cannot make those kind of comments. You cannot participate
23 to this extent. If you -- I know you're gonna look at the
24 record, and if you look at Judge Alford's comments
25 throughout the record, he's telling him that this is a good

1 deal. You better take the deal. This is a better deal
2 than they give any other defendant. When he's talking
3 about whether he should, you know, get another attorney or
4 not, it's on the record; he's saying, Judge, me and my
5 family think we need another attorney. And, in fact,
6 according to his testimony, he had an attorney in place.
7 Mr. Swerling had sent this discovery to an attorney. But,
8 you know, when he says things like, you know, another
9 attorney is not going to do any better than anybody else,
10 he's not gonna do any better than Mr. Swerling he is
11 putting himself in the middle of that plea and those
12 negotiations and that's the coercion. I would submit that
13 the PCR should be granted.

14 MS. RATIGAN: I waive any type of closing, Your
15 Honor. You have the record before you. You have Mr.
16 Swerling's very detailed testimony about each of the issues
17 raised. We would just leave it in your discretion, Judge.

18 THE COURT: All right. Be patient and let me
19 look at that transcript. I'll try to get a decision out in
20 a week.

21 MS. RATIGAN: Thank you, Your Honor.

22 MR. WATSON: All right. That's it. Thank you,
23 Your Honor.

24 (END OF TRANSCRIPT IN THE MATTER OF VICTOR BROWN
25 VERSUS STATE OF SOUTH CAROLINA.)

CERTIFICATE

I, THE UNDERSIGNED WANDA NELSON, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE SIXTEEN JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY
THAT THE FOREGOING TRANSCRIPT 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 YORK
COUNTY, SOUTH CAROLINA, ON THE 2ND DAY OF FEBRUARY, 2011.

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

Wanda Nelson

WANDA NELSON, CVR
OFFICIAL COURT REPORTER
NOTARY PUBLIC IN AND FOR THE
STATE OF SOUTH CAROLINA
DATE:

MY COMMISSION EXPIRES:
01/21/2021

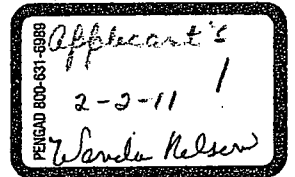
DATE: 8 / 12 / 2011

State of South Carolina
County of York

) In The Court of Common Pleas
) Case No: 06-GS-46-3641
) C/A No: _____

Victor Brown, #323433,
Applicant,
vs.
State of South Carolina,
Respondent.

INITIAL BRIEF
OF
APPLICANT



Submitted, This 4 Day of Nov, 2008.

Respectfully Submitted By,

Victor Brown 323433

Victor Brown, #323433

B.R.C.I., Murray 195

4460 Broad River Road

Columbia, S.C. 29210

State of South Carolina)
)
 County of York) In The Court of Common Pleas
) Case No: 06-GS-46-3641
) C/A No: _____

Victor Brown, #323433,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)
)

MOTION TO ADDRESS

ALL ISSUES

Now comes the Applicant, Victor Brown, #323433, by and through his Court appointed attorney, who ask this Honorable Court to require the attorneys involved in this Post-Conviction Relief Action and any Amendment thereof, to be meticulous in the preparation of any "Order" prepared in this matter.

Specifically, the Applicant requests that each and every issue in the Post-Conviction Relief Application and any Amendment thereof, at the hearing, be addressed in the "Order" of the Court at the conclusion of the Evidentiary Hearing in this matter.

The Applicant request this Motion Pursuant to S.C. Code, § 17-27-80. Citing, Pruitt v. State, 423 S.E.2d 127 (1992); Bryson v. State, 493 S.E.2d 500 (1997).

Wherefore, Applicant request the Motion be granted.

Sworn to before me
 this 4 Day of NOV, 2008.


 Notary Public For South Carolina:

My Commission Expires: _____
 My Commission Expires April 4, 2018

Respectfully Submitted By,

Victor Brown #323433

Victor Brown, #323433

B.R.C.I., Murray 195

4460 Broad River Road

Columbia, S.C. 29210

Table of Authorities:

	<u>Pages:</u>
<u>Ashe v. Styles</u> , 67 F.3d 46 (4th Cir. 1995)	<u>8</u>
<u>Boykin v. Alabama</u> , 395 U.S. 238 (1969)	<u>9/6, 21, 22, 23</u>
<u>Brady v. U.S.</u> , 397 U.S. 742, 90 S.Ct. 1463 (1970)	<u>24</u>
<u>Dover v. State</u> , 405 S.E.2d 391 (1991)	<u>21</u>
<u>Easter v. State</u> , 584 S.E.2d 117 (S.C. 2003)	<u>11</u>
<u>Hill v. Lockhart</u> , 474 U.S. 52, 106 S.Ct. 366 (1985)	<u>22, 23</u>
<u>Johnson v. Catoe</u> , 531 S.E.2d 294 (2000)	<u>24</u>
<u>Jordan v. State</u> , 374 S.E.2d 683 (1988)	<u>24</u>
<u>Marchibroda v. U.S.</u> , 368 U.S. 487, 82 S.Ct. 510 (1962)	<u>9</u>
<u>McCarthy v. U.S.</u> , 394 U.S. 459 (1969)	<u>15, 21</u>
<u>Noland v. French</u> , 134 F.3d 208 (4th Cir. 1998)	<u>24</u>
<u>Ostrander v. Green</u> , 46 F.3d 347 (4th Cir. 1995)	<u>2, 22</u>
<u>Pittman v. State</u> , 524 S.E.2d 623 (1999)	<u>22</u>
<u>Rivers v. Strickland</u> , 213 S.E.2d 97 (1975)	<u>11</u>
<u>Rollison v. State</u> , 552 S.E.2d 290 (2001)	<u>24</u>
<u>Sanders v. Leeke</u> , 175 S.E.2d 796 (1970)	<u>21</u>
<u>Santobello v. New York</u> , 404 U.S. 257, 92 S.Ct. 495 (1971)	<u>7</u>
<u>State v. Armstrong</u> , 211 S.E.2d 889	<u>22</u>
<u>State v. Crisp</u> , 608 S.E.2d 429 (2005)	<u>11</u>
<u>State v. Cross</u> , 240 S.E.2d 514 (1977)	<u>9</u>
<u>State v. Downs</u> , 604 S.E.2d 377 (S.C. 2004)	<u>12</u>
<u>State v. Gentry</u> , 610 S.E.2d 494 (2005)	<u>11</u>
<u>State v. Hazel</u> , 271 S.E.2d 602 (1980)	<u>21</u>
<u>State v. Lambert</u> , 225 S.E.2d 340 (1976)	<u>21</u>

Issue Presented:

Issue A: Did the Plea Court's participation in the plea agreement make this plea invalid?

Issue B: Did the conditions of this plea make it invalid?

Issue C: Was there a fatal variance between the factual basis presented and the allegations in the charge for Trafficking Cocaine?

Issue D: Was the plea involuntary in this case?

Issue E: Was the plea Counsel ineffective in this case?

Issue A: Argument:

Issue A: Did the Plea Court's participation in the plea agreement
make this plea invalid?

Factual Basis:

At the beginning of the plea proceedings in this case the State made an offer to allow the Applicant to plead to "trafficking in cocaine" in the amount of between twenty eight (28) to one hundred (100) grams for what the State calls a negotiated plea of twelve (12) years (tr.p. 2, lines 3-15).

The Solicitor insinuates that the Applicant may be aware of her leaving the Solicitor's office soon, however, the Solicitor (Ms. Horton) had discussed the case with Ms. Cotton, who she will turn the case over to and she would not give the Applicant the twelve (12) year offer again. (Tr.p. 2, lines 16-24).

The Solicitor starts off here by suggesting the twelve (12) year sentence could not be offered again due to the change of Solicitors and there's nothing else that would change the Applicant from facing twenty five (25) years if he would go to trial.

The Solicitor then suggest for the Applicant benefit she would like to add to the record that because of the Applicant's record is why the State holds firm to the 12 year sentence (Tr.p. 4, line 20-Tr.p. 5, line 7). The Solicitor is somewhat misleading to these factors of negotiation here (Tr.p. 4, line 20-Tr.p. 5, line 10). First of all, the State doesn't show any prior drug or otherwise offense's to use against the Applicant

Issue A: Argument Continued:

participation, as argued, was coercive and placed in the mind of the Applicant that he had no other choice but to take the 12 year plea deal. This was so detrimental to the plea because the Court's participation took away the Applicant's ability to accept or refuse the plea offer. The Court has a duty to review the plea bargain, because such agreements made with a defendant must be strictly complied with, as the plea rests upon that significant premise and violates a defendant's Due Process Rights when breached, and thus, such a promise must be fulfilled. Furthermore, Courts are guided in interpreting plea agreements by the general principles of contractual law, as they are not simply ordinary contracts, but implicate important constitutional rights and their negotiation and execution require the utmost circumspection on the part of the State and our Circuit Court Judges. Ashe v. Styles, 67 F.3d 46 (4th Cir. 1995); U.S. v. McQueen, 108 F.3d 64 (4th Cir. 1997); U.S. v. Williams, 102 F.3d 923 (7th Cir. 1996).

Rule 11 of Federal Rules of Criminal Procedure prohibits the Court from participating in plea negotiations. Rule 11 proscribes against any Court participation in plea negotiations regardless of whether prejudice is shown.

Although plea agreements are generally analyzed under contract, analogy to contract law is not complete because guilty plea involves waiver of fundamental constitutional rights; plea agreement must be knowing and voluntary. U.S. v. Harvey, 791 F.2d 294, 301 (4th Cir. 1986). Further, the Due Process

Issue B: Argument:Issue: Did the conditions of this plea make it invalid?Factual Basis:

There was numerous conditions placed upon the plea in this case.

First, we must note that the State's chemist was not available for trial, so the State decided to extend their offer of 12 years and schedule the plea for today. The prosecutor believed the plea would go through although the Applicant did not want to plead (Tr.p. 2, lines 7-15).

Further; in belief that the case would be going to trial, (Tr.p. 2, lines 13-15) a discussion began about discovery that hasn't been turned over to the defense yet. That discovery material was the informant tapes and information (Tr.p. 2, line 25-Tr.p. 3, line 14). Both the Chemist and this late discovery was crucial to the State's case in chief and it is used to place conditions on the Applicant pleading guilty to the trafficking charge. See: (Tr.p. 18, line 9-Tr.p. 20, line 1, The States factual basis for the charge) and specifically (Tr.p. 20, line 21-Tr.p. 21, line 12) and special reference to (Tr.p. 25, line 17-Tr.p. 26, line 11, by Plea Court).

Basically the State and the Plea Court made this plea conditional to not disclosing the tapes and information about the State's informant which gave the State an easy conviction prejudicing Applicant tremendously. Furthermore, the plea Court added yet another condition to the plea by advising the

Issue B: Argument Continued:

plea as conditional and thus invalid in South Carolina in accordance to our South Carolina Laws and Case Law precedents. See: State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (S.C. 2004).

For these reasons, the guilty plea in this case should be remanded for further proceedings by another Circuit Court Judge.

Issue C: Argument Continued:

definitely alleged against the Applicant, although he had never been charged by indictment or otherwise for such.

Let us now review the State's factual basis given. A confidential informant (C.I.) met with the York County Drug Unit on July 22, 2006. The informant made phone calls to the Applicant and a hispanic male and a deal was set up. The C.I. then met with Applicant and his (codefendant) David Sleet at Motel 6 in room 324 in York County (Tr.p. 18, line 8-20).

It is important to note that Applicant did not have any drugs on him. He was the go between the informant and some unknown hispanic males (Tr.p. 18, line 22-24). The hispanic males had the cocaine (Tr.p. 18, line 24-Tr.p. 19, line 2). There was talk of money being exchanged before the hispanic males would give the informant the other four (4) kilos of cocaine. One (1) kilo of cocaine was recovered from room 324 of the Motel 6, however, there is no mention of the Applicant possessing the one (1) kilo of cocaine when it was recovered (Tr.p. 19, lines 3-14). The remainder of the cocaine was recovered at the Sleep Inn. Officers did see one of the hispanic males but they were unable to locate them or to gain any information regarding them (Tr.p. 19, lines 14-19).

The State's factual basis reflects that this was a drug deal with many conspirators involved in it, however, the State is pleading the Applicant to a non-accomplice liability trafficking cocaine charge, but the factual basis alleges a conspiracy from beginning to end.

pp. 18/19

Issue C: Argument Continued:

acceptance of the charge was incorrect, unconstitutional, and violated the mandates set forth in Boykin v. Alabama, 395 U.S. 238, 242 (1969). Had the Applicant proceeded to trial, he may not have been found guilty by a jury at all.

The plea in this case was deprived of the character of a voluntary act and is void. U.S. v. French, 719 F.2d 387, 104 S.Ct. 2175 (1984); Boykin v. Alabama, supra, note 3, 395 U.S. at 240 (1969); U.S. Const. Amend. Six.

When constitutional requirements or mandates are violated, a plea cannot be said to establish a valid plea. That plea must be vacated or reversed in accordance to the well established constitutional rights of an accused.

Relief is well warranted in this instant case.

Issue D: Argument Continued:

the State was also misleading about her replacement, "Ms. Colton, when Ms. Colton wasn't available to verify if in fact any discussion took place between the current Solicitor, Ms. Horton, and her about this case or plea negotiations. This bit of hearsay was coercive in nature, just by itself.

Let us further note that the State's chemist was not available for trial, so the State decided to extend the 12 year offer and scheduled the plea for that day. The prosecutor believed the plea would go through even though the Applicant did not want to plead (Tr.p. 2, line 7-15). Here is where coercive techniques start taking form in this case by the State.

In belief that the case would go to trial, due to the Applicant not wanting to accept the plea (Tr.p. 2, lines 13-15), a discussion about the discovery regarding the informant tapes and information began. The State hadn't disclose this vital material to the defense yet (Tr.p. 2, line 25-Tr.p. 3, line 14).

Both the chemist and this late discovery was very crucial to State's case in chief and there are the State's reason (motive) for using these factors in a most coercive manner. See: (Tr.p. 18, line 9-Tr.p. 20, line 1) and specifically (Tr.p. 20, line 21-Tr.p. 21, line 12) with special references to (Tr.p. 25, line 17-Tr.p. 26, line 11; by Plea Court). It should be quite obvious to any prudent person of reasoning that the revealing of the informant tapes and information was the basis for the State coercing (forcing) the Applicant into the plea.

Issue D: Argument Continued:

line 25-Tr.p. 8, line 12; Tr.p. 9, lines 15-18).

There's more to the involuntariness of this plea. The State on one occasion informed the Plea Court that they were seeking to plea the Applicant to "trafficking cocaine" in the amount of between ten (10) to twenty eight (28) grams of cocaine. Then the plea court swiftly changed that to trafficking between twenty eight (28) to one hundred (100) grams first offense for the negotiated twelve years (Tr.p. 16, lines 7-15). This had to be very confusing to the Applicant given the fact that the plea court had informed the Applicant that the trafficking cocaine in the amount between 28 and 100 grams carried a minimum of 7 years prior to this. See: (Tr.p. 12, line 25-Tr.p. 13, line 3). What would be the minimum amount of time one could receive for "trafficking cocaine" in the amount between ten (10) and twenty eight (28) grams first offense; one would wonder?

After examination of these circumstances it is apparent that this plea was coerced because if the Applicant hadn't pled to the trafficking charge, the State may well not have been able to convict anyone for the illegal drugs in this case. See: (Tr.p. 4, lines 15-19) and before sentencing (Tr.p. 20, line 21-Tr.p. 21, line 12; Tr.p. 25, line 23-Tr.p. 26, line 11). This plea was far from being voluntary under these circumstances and this legal analysis that now follows proves this plea is invalid because of it being involuntary.

Issue D: Argument Continued:

v. Green, 461 F.3d 347 (4th Cir. 1995); State v. Armstrong
263 S.C. 594, 211 S.E.2d 884 (1975); Pittman v. State, 337
S.C. 597, 524 S.E.2d 623 (1999); Hill v. Lockhart, 474 U.S.
52, 106 S.Ct. 366 (1985); Boykin v. Alabama, 395 U.S. 238,
242 (1969).

This case should be vacated or reversed for further
proceedings.

Issue E: Argument Continued:

of action to the defendant. This plea does not represent a voluntary and intelligent choice among the courses of action opened to the Applicant in this case. Brady v. U.S., 397 U.S. 742, 90 S.Ct. 1463 (1970); Noland v. French, 134 F.3d 208 (4th Cir. 1998).

For counsel to stand by and allow the Applicant to plead guilty to these charges without assuring that he understood the charges and that the Applicant voluntarily accepted the plea deal, instead of Counsel assisting in the coerciveness involved in the Applicant involuntary plea, as well as, allowing him to waive his constitutional rights prejudiced the Applicant by being convicted under an invalid plea. Counsel could not have been ~~more ineffective~~ had he actually tried to be. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052; U.S. Const. Amend. Six.

Defense Counsel was indeed ineffective. The Applicant was prejudiced by that ineffectiveness, and would certainly proceeded to trial in this case had he known counsel would be so ineffective. Hill v. Lockhart, 106 S.Ct. 366 (1985); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Rollison v. State, 552 S.E.2d 290, 292 (2001); Johnson v. Catoe, 340 S.C. 112, 531 S.E.2d 294 (2000); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); U.S. v. Bowman, 348 F.3d 408, cert. denied, 124 S.Ct. 1523 (C.A. 4, S.C. 2003); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2529, 156 L.Ed.2d 471 (2003).

A vacation or reversal is well warranted in this instant case.

Dear Clerk of Court,

Please find enclosed my PCR Application, with Initial Brief, and copy thereof.

Please file the original, clock the copy and return copy to me in the envelope provided.

Thank you for your most kind services.

Respectfully,

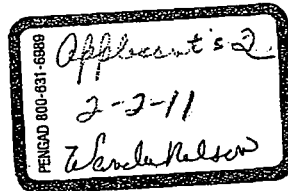
Victor Brown 323433

Victor Brown, #323433

B.R.C.I., Murray 195

4460 Broad River Road

Columbia, S.C. 29210



MR. JACK SWERLING

I am writing you this letter to inform about things that are going at this state of my life. I recently lost my father to his struggle with Cancer. Which I wrote you while I was in York Country.

I was his only support threw this battle with his illness.

As a result of this matter I had to take on the arrangements. I realize that your fee is very important. And I'm not doing the things that I was a year ago so money is very tight for me right now here is a payment. Also my family and I would like for you to please communicate with our family attorney Mr. Allen Schwartz not to say that we don't have confidence in your services. And I understand that this is a serious matter I just would like to be informed of the status of my case. Thank You in advance for everything I look forward to talking to you my new phone # (865) 525-2194 is my mother new number and my home number is still the same but my cell is (865) 773-9868. I'm still working and attending A&D treatment. Mr. Schwartz can be reach at (865) 637-0134

THANK YOU VERY MUCH
Victor L. Brown

FILED-RECEIVED
 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2011 APR 27 AM 11:42) SIXTEENTH JUDICIAL CIRCUIT
 COUNTY OF YORK)
 DAVID HAMILTON
 C.C.C.P. & GS
 YORK COUNTY, SC
 2008-CP-46-3051
 DAVID HAMILTON
 C.C.C.P. & GS
 YORK COUNTY, SC
 Victor D. Brown, 323433,)
)
 Applicant,)
)
 v.) ORDER OF DISMISSAL
)
 State of South Carolina,)
)
 Respondent.)
)

This matter comes before the Court by way of Application for Post-Conviction Relief filed August 6, 2008, and Amended Application filed June 28, 2010. The Respondent filed its Return on November 14, 2008. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on February 2, 2011. The Applicant was present at the hearing and was represented by Joseph J. Watson, Esquire. The Respondent was represented by Karen C. Ratigan, Esquire, of the South Carolina Attorney General's Office.

The Applicant testified on his own behalf at the hearing. Applicant's trial counsel, Jack B. Swerling, Esquire, also testified at the hearing. This Court had before it the records of the York County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, and Applicant's guilty plea transcript.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the November 2006, term of the York County Grand Jury for Trafficking Cocaine (2006-GS-46-3641). Jack B. Swerling, Esquire, represented the Applicant. On August 9, 2007, Applicant pled

guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of twelve (12) years. The Applicant did not appeal his conviction or sentence.

In his application for post-conviction relief and at the evidentiary hearing, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel/ Involuntary guilty plea
 - a. "[P]lea was entered into without sufficient advice and understanding of the consequences of my plea"
 - b. Counsel failed to investigate chain of custody issue
 - c. Counsel failed to develop defenses and trial strategies
 - d. Counsel failed to object to the trial court's coercive conduct
 - e. Counsel failed to communicate with Applicant after his bond hearing
 - f. Counsel failed to communicate with Applicant's family attorney from Tennessee
 - g. Counsel failed to give Applicant adequate notice of 12 year plea offer
 - h. Counsel failed to advise Applicant as to what level of trafficking he was pleading guilty to

SUMMARY OF TESTIMONY

The Applicant testified he was arrested on August 5, 2006, and hired plea counsel in October of 2006 while he was still in jail. He testified he was released from prison on bond in December of 2006. He testified counsel failed to sufficiently communicate with him in person, by phone, or otherwise, and testified the meetings were usually brief. He stated he met with counsel two times while incarcerated, and each meeting lasted about thirty minutes. He testified that at the first meeting they discussed counsel's representation, and at the second meeting

discussed his bond. He testified that after he got out on bond, he met with counsel three more times in person. He stated that he met with counsel once in January of 2007 for forty-five minutes to an hour. He stated that the second meeting was with the police in Rock Hill to discuss his desire to cooperate. He stated that he also met with counsel on July 22, 2007, in counsel's office. He testified counsel never provided him with the State's discovery, and never discussed with him potential defenses or trial strategies; however, he stated counsel did discuss his version of the facts with him. He further testified he had difficulties reaching or communicating with plea counsel. He stated he tried to call counsel once or twice a month, but could not always reach him. He stated he had a total of three phone conversations with counsel.

The Applicant testified he also hired another attorney, Allen Schwartz from Tennessee, at the same time he hired plea counsel. He testified that although counsel and Mr. Schwartz spoke at least once, there was a lack of communication between the two attorneys and this frustrated him. He testified he told counsel to contact Schwartz so he could be co-counsel, and stated he sent a letter to counsel addressing this issue. He testified that after his July 22 meeting with counsel, he hired a third attorney from California to represent him because counsel would not communicate with Schwartz. He testified he told plea counsel he hired someone else on July 26, 2007, and the attorney from California contacted trial counsel as well. He stated he told counsel to request a continuance, and believes plea counsel should have done so.

The Applicant testified his guilty plea was involuntary and the result of plea counsel's coercion. He testified that at his July 22, 2007 meeting, counsel first notified him of the State's second offer. He testified counsel told him the State made a twelve year offer, it was the best deal he could get, and the plea hearing would be the next week. However, the hearing was subsequently continued to the next week. He testified that at his plea hearing, counsel told him

to plead guilty because the trial court was "pissed off," he would have to go to trial next week, and he would get twenty-five years if he went to trial. He stated counsel did not tell him to lie, but told him how to answer the trial court's questions.

The Applicant testified plea counsel failed to adequately advise him with regards to the consequences of his plea he did not know he was pleading guilty to a no-parole offense, and counsel never advised him regarding parole eligibility. He testified that, based on his colloquy with the trial court, he thought he would still have a chance for parole eligibility. He stated that he would not have pled guilty if he had known he would not be parole eligible. He testified he was confused with regards to the level of trafficking he faced. He testified that as a result of counsel deficient performance, he was unable to make adequate decisions with regards to the decision to plead guilty.

The Applicant also testified plea counsel should have objected to the trial court's statements that coerced him to plead guilty. He testified the trial court told him the State's plea offer would be gone if he did not accept it, and told him it was the best offer he would get. He then acknowledged the trial court probably made these statements because the solicitor made these same assertions to the trial court. He testified he told the trial court he was not coerced to plead guilty and was satisfied with his attorney's services because the trial court told him he must say these things or have his bond revoked.

The Applicant's sister, Tina Berry ("Berry"), testified she attended Applicant's July 22, 2007 meeting with plea counsel. She testified Applicant was frustrated with the lack of communication he had with counsel. She further testified she helped Applicant hire his second and third attorneys. She stated that she spoke with each attorney, the attorneys were paid fees, and she told them to contact plea counsel.

Plea counsel testified he was hired to represent Applicant in September of 2006 while Applicant was still in jail. He testified he met with Applicant on September 27 of 2006, November 6 of 2006, January 8 of 2007, and February 7 of 2007. He stated he received the State's discovery on October 30, 2006, forwarded it to Applicant, and then he reviewed it with Applicant at the January meeting. He testified the only evidence missing was some audio tapes the State had not yet provided pursuant to the solicitor's office policy; however, the State informed him of what was on the tapes. He testified he explained to Applicant the impact the State's evidence would have on Applicant's case if he proceeded to trial.

Plea counsel testified he discussed the facts of the case with Applicant, and Applicant provided him with his version of the facts. He stated that Applicant was the middleman of a drug deal involving five thousand (5,000) grams of cocaine. He further stated that Applicant confessed to him that he committed the offense with which he was charged.

Plea counsel testified he discussed with Applicant and his family the comparative risks and benefits of pleading guilty or proceeding with trial. He testified he discussed plea negotiations with Applicant, and advised him that he would face a mandatory minimum of twenty-five years if he proceeded with trial and was found guilty. He testified Applicant expressed a desire to cooperate with the State and gave a statement. He stated that on February 7, 2007, the State made a fifteen (15) year offer, which he communicated to Applicant. However, he said the State told him the offer could improve. He testified he sent numerous letters and made numerous phone calls to Applicant to which Applicant did not respond. He testified he sent Applicant a letter on March 27, 2007, telling Applicant to contact him. He testified Applicant did not call him back until July of 2007. He stated that in early July, the State

made a twelve (12) year offer even though Applicant did not cooperate with them. He testified he communicated this offer to Applicant by phone on July 3, 2007. .

Counsel testified he met with Applicant and his family on July 27, 2007, for about two hours to discuss their problems with the case and the State's plea offer. He testified that a week before Applicant's plea, he received a call from a Florida lawyer regarding Applicant's case. He stated he answered the lawyer's questions and faxed him a copy of the State's discovery. He testified Applicant never told him he hired Schwartz, the lawyer from Tennessee, but Applicant did ask him to consult with Schwartz. He stated he received no letters from Schwartz, but did speak with him on the phone twice on July 27, 2007. He testified that he never heard anything about a lawyer from California until today, the day of his present testimony. He received no calls or letters from any such attorney, and Applicant never made reference to this lawyer at his plea hearing.

Counsel testified Applicant was not coerced to plead guilty. He testified the trial court merely restated to Applicant the State's positions regarding Applicant's plea offer and the sentence the State would seek if Applicant proceeded to trial. He further testified he did not coerce Applicant to plead guilty or tell Applicant how to respond to the trial court's questions. He stated that he advised Applicant that accepting the twelve year deal was the best thing for him to do. He testified the State's evidence was overwhelming. He stated that he explained to Applicant that if he pled guilty the State would reduce the charge from a third offense to a first, and would also reduce the amount of drugs involved from over 400 grams to less than 100 grams. He further testified that he advised Applicant that he was pleading guilty to a no parole offense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel/ Involuntary Guilty Plea

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the post-conviction relief hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

As to the allegation plea counsel failed to conduct sufficient meetings, or failed to otherwise sufficiently communicate with Applicant, this Court finds this allegation is without merit. In his testimony, Applicant referenced at least five face-to-face meetings and three phone conversations he had with counsel. Counsel also testified Applicant generally failed to respond to his letters and phone calls, and testified Applicant specifically failed to respond to one letter he sent on March 27, 2007, for over a month. This Court finds Applicant has failed to show that

counsel's preparation was inadequate based on the number or brevity of the meetings, phone calls, or other forms of communication conducted with Applicant. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) ("brevity of time spent in consultation with defendant, without more, did not establish that trial counsel was ineffective") (citing Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980)). Further, this Court finds the Applicant failed to provide any testimony, evidence, or information that could have been used in his favor had counsel conducted additional conferences, and thus has failed to show any resulting prejudice. See Harris at 75, 659 S.E.2d at 145 ("mere speculation and conjecture . . . is insufficient to substantiate allegation that counsel's deficient performance was prejudicial") (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). The Applicant has failed to meet his burden of proof. This claim is therefore denied and dismissed.

With regards to the allegations concerning counsel's failure to investigate the chain of custody evidence, his failure to communicate with Applicant's attorney from Tennessee, or his failure to request a continuance, this Court finds Applicant has also failed to meet his burden of proof. The Applicant has failed to provide any evidence or testimony indicating he was prejudiced by counsel's alleged failure to request a continuance, communicate with another lawyer, or otherwise further investigate. See Harris. Therefore, these claims are denied and dismissed.

As to the allegation plea counsel failed to adequately advise Applicant with regards to the offense he pled guilty to and the consequences thereof, this Court finds Applicant's testimony not credible. Specifically, the Applicant testified he did not know what level of trafficking offense he pled to, counsel never advised him regarding parole eligibility, and he thought was pleading guilty to an offense for which he was parole eligible. However, the plea transcript

reveals the trial court told Applicant on the record that he was pleading to the charge of trafficking cocaine in an amount between twenty-eight and one hundred grams, first offense, and twice clearly told Applicant this was a no-parole offense. (Tr. p. 12, line 25 – p. 13, line 13; p. 14, lines 8-13). The Applicant further stated under oath that he understood he was pleading guilty with a negotiated sentence of twelve years, and he understood the State was reducing his charge of trafficking over four hundred grams, third offense, to trafficking less than one hundred grams, first offense. (Tr. p. 16, lines 11-18). Further, counsel testified he advised Applicant of the same, and further advised Applicant he was pleading guilty to a no-parole offense. The Applicant's further assertion counsel failed to give him sufficient notice of the State's plea offer is conclusively refuted by Applicant's own testimony before this Court. The Applicant testified counsel informed him of the State's twelve year offer on July 22, 2007. The record shows the Applicant pled guilty on August 9, 2007, well over two weeks later. Therefore, this Court finds these claims are denied and dismissed as without merit.

Moreover, this Court finds Applicant's claims concerning parole eligibility are without merit as counsel was under no duty to inform Applicant of such matter. Parole eligibility is "a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea." Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997). "However, if the defendant's attorney undertakes to advise the defendant about parole eligibility and gives erroneous advice, then the plea may be collaterally attacked." Id. The Applicant's testimony, even if believed, was that counsel simply failed to advise him with regards to parole eligibility. Therefore, this claim is without merit, and is denied and dismissed.

As to the allegations regarding the voluntariness of Applicant's plea, this Court finds these allegations are without merit. This Court also finds Applicant's testimony with regards to

the voluntariness of his plea is not credible. The Applicant testified the trial court and counsel coerced him to plead guilty, and also testified counsel told Applicant how to answer the trial court's questions. However, at the plea hearing the Applicant stated under oath that he was not coerced by anyone to plead guilty, and he was pleading of his own free will. (Tr. p. 16, lines 19-24; p. 18 lines 3-7). This Court further finds plea counsel's testimony was credible, and further notes, as did the trial court in this case, that plea counsel is an experienced and highly recognized criminal defense attorney. (Tr. p. 24, line 24 – p. 25, line 6). Counsel testified he did not instruct the Applicant how to answer the trial court's questions. Counsel also stated he advised Applicant the State's twelve year offer was the best offer he would get, he would lose the offer if he did not plead, and the State would then seek a conviction of twenty-five years or more at trial. The trial court similarly advised Applicant to consider these facts in his decision of whether to plead. This Court finds counsel did not improperly pressure or threaten the Applicant with regards to Applicant's plea. This Court also finds counsel had no basis for objecting to the trial court's colloquy with the Applicant. Further, this Court finds counsel adequately conferred with Applicant, adequately sought and discussed Applicant's plea options, and was thoroughly competent in his representation of Applicant.

Furthermore, Applicant's testimony before this Court is inconsistent with the sworn statements he made at his guilty plea. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct.App.2007). "Therefore, statements made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874. At Applicant's plea hearing, he testified under oath he understood that by pleading guilty he was waiving his right to remain

silent, and his right to a trial by jury, including his rights to assert legal defenses, confront witnesses, present his own witnesses, and testify on his own behalf. (Tr. p. 14, lines 15-24). He testified he was not otherwise promised anything, threatened, or coerced by anyone to plead guilty. (Tr. p. 16, lines 19-24). He stated he was pleading guilty of his own free will, was in fact guilty of this charge. (Tr. p. 18, lines 3-7). Further, he stated he was satisfied with his attorney, and his attorney had fully discussed with him the charges against him, the State's evidence against him, and any legal defenses available to him. (Tr. p. 16, line 25 – p. 17, line 13). This Court finds the Applicant has failed to present valid reasons why he should be allowed to depart from these statements. This Court further finds the Applicant knowingly and intelligently pled guilty based upon the effective assistance of counsel. Therefore, the allegations regarding the voluntariness of Applicant's plea are denied and dismissed.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence trial counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, the allegation of ineffective assistance of counsel is denied.

CONCLUSION

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

with prejudice.

This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1st day of Apr., 2011.


Paul M. Burch
Presiding Judge
Sixteenth Judicial Circuit

Pageland, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF York
STATE VS.

Victor Brown

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS4603641

A/W#: J161651

AKA:

CERTIFIED TRUE COPY

Date of Offense: 08-05-2006

Race: B Sex: M

S.C. Code § : 44-53-0370

DOB: 5/1/72 SS#: 1

S.C. Code #: 2359

Address:

DL#: 7EUV SID#: 872997450

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: TRAFFICKING COCAINE 28 - 100 GRAMS 1ST OFFENSE

in violation of § 44-53-0370 of the S.C. Code of Laws, bearing CDR Code # 2359

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45 w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTY:

Solicitor:

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 12 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §7-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv Surcharge) \$100 \$ 100

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35.13 (Public Def/Prob) \$500 \$ _____

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25§ 33.7, 1B TP (Drug Court Surcharge) \$100 \$ 100

§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

TOTAL

\$ 225⁰⁰

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 211113Sentence Date: 8-9-07Court Reporter: S. McGilberry

000016

SCCA/217 (9/2006)

WITNESSES

DEU Anderson

DOCKET NO. 2006-GS-46- 03641

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

November 9, Term 2006

jm

ARREST WARRANT NUMBER

J161651

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

THE STATE

vs.

VICTOR DEMONT BROWN

Indictment for

TRAFFICKING COCAINE

SC Code: §44-53-370
CDR Code: 281After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or tox Victor Brown
DefendantWitness:
C.C.C. PLS. AND G.S.
Crt. Sec.CERTIFIED TRUE COPY
2006 AUG 12 AM 11:56
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

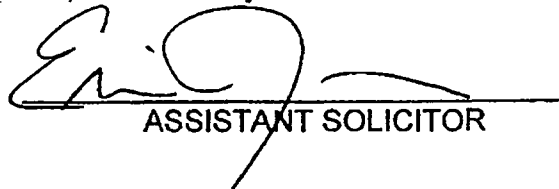
INDICTMENT

At a Court of General Sessions, convened on November 9, 2006, the Grand Jurors of York County present upon their oath:

TRAFFICKING COCAINE

That on or about August 5, 2006, in York County, South Carolina, the Defendant, Victor Demont Brown, did, unlawfully and knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of a quantity of cocaine, as defined and otherwise limited in Sections 44-53-110, 44-53-210(b)(4), 44-53-210 (d)(1), or 44-53-210(d)(2), and did traffic in cocaine in an amount being ten grams or more, in violation of Section 44-53-370, Code of Laws of South Carolina, (1976, as amended).

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


ASSISTANT SOLICITOR