

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable R. Lawton McIntosh, Circuit Court Judge

ERNEST FLOYD JACKSON II,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001931

APPENDIX

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RECEIVED

Jul 25 2024

S.C. SUPREME COURT

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State of South Carolina.,)	In the Court of General
)	Sessions for York
)	
County of York.)	Case No.: 2016-GS-46-01958
	2017-GS-46-02576

State of South Carolina.,)	
)	
Plaintiff.,)	
)	
-vs-)	Transcript of Record
)	Of Record
Ernest Floyd Jackson, III.,)	
)	
Defendant.)	
)	

April 11, 2018
York, South Carolina

B E F O R E:

The Honorable Edgar W. Dickson, Judge.

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

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Wanda S. Nelson, CVR-M
Circuit Court Reporter
Sixteenth Judicial Circuit
Union and York Counties
To the Honorable Daniel D. Hall

1

I-N-D-E-X

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

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WITNESSBY:PAGE NO.

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No witnesses were called.

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I-N-D-E-XE-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits were admitted into the record.

1 (COURT IN SESSION IN THE MATTER OF STATE VERSUS ERNEST
2 FLOYD JACKSON, WEDNESDAY, APRIL 11, 2018 AT 12:58 P.M.)

3 SOLICITOR HOGGE: Can we have Ernest Jackson from the
4 holding cell?

5 This is a negotiated seventeen year sentence.

6 THE COURT: Negotiated what?

7 SOLICITOR HOGGE: Seventeen year sentence.

8 THE COURT: Ms. Lipinski, this is mine? This is your
9 client?

10 MS. LIPINSKI: This is mine finally.

11 THE COURT: Okay.

12 MS. LIPINSKI: I've had him a long time.

13 SOLICITOR HOGGE: A long time.

14 THE COURT: And this is a negotiated sentence?

15 MS. LIPINSKI: It is, your Honor. As much as I can
16 treat it like a plea pile case for seventeen years I'll do
17 that.

18 THE COURT: Okay. Who's this gentleman?

19 MS. LIPINSKI: Ernest Jackson.

20 (DEFENDANT, ERNEST JACKSON, BLACK MALE, ENTERS
21 COURTROOM.)

22 THE COURT: All right, folks.

23 SOLICITOR HOGGE: May it please the Court.

24 Your Honor, before you is Ernest Floyd Jackson, II,
25 represented by Mindy Lipinski of the Public Defender's

1 Office. He's before you on Indictment 2017-GS-46-1958 for
2 trafficking crack cocaine second offense. It was
3 originally True Billed as a first offense so it has a true
4 - it has the CDR Code for first offense, but he's pleading
5 today to second offense to a negotiation of seventeen
6 years. That is to run concurrent with his ten-year
7 sentence on Indictment 2017-GS-46-1962, and I've noted that
8 in his Plea Waiver Form. And he has been in the jail for a
9 grand total of two hundred and two days.

10 THE COURT: All right. And, Mr. Hogge, you want to
11 tell me what happened?

12 SOLICITOR HOGGE: Yes, your Honor. On May 3rd, 2016 a
13 confidential informant told officers of the Drug
14 Enforcement Unit that he could purchase a half ounce of
15 crack for six hundred dollars. He stated that he usually
16 buys from a certain individual but they could set up a buy
17 from Mr. Jackson.

18 The CI then went to a residence at [REDACTED] Chestnut Street
19 in Rock Hill and sat outside with Mr. Jackson and his uncle
20 Dennis Watkins. After sitting for a while he was handed
21 some crack and then he went to -- or let me back up, excuse
22 me.

23 After waiting out there for a while he eventually went
24 back into his shed with Mr. Jackson and it is there that
25 the Confidential Informant gave him six hundred dollars in

1 identifiable funds that were provided by the FBI. And he
2 was then handed the 15 grams of crack cocaine. He then
3 went on to -- our CI made some other purchases from Mr.
4 Jackson. We took Mr. Jackson to trial in his absence and
5 he was found guilty and that sentence was sealed not too
6 long ago, and so we're asking that his seventeen-year
7 sentence run concurrent with the ten years that he was
8 sentenced to on Indictment 2017-1962.

9 MS. LIPINSKI: It was unsealed a while ago. The last
10 term of court.

11 THE COURT: Okay.

12 MS. LIPINSKI: So that sentence has been unsealed and
13 read. We know what that is.

14 THE COURT: All right. Sort of like Christmas wasn't
15 it?

16 MS. LIPINSKI: Not a good Christmas but okay.

17 THE COURT: Okay. And Ms. Lipinski, you have
18 represented Mr. Jackson?

19 MS. LIPINSKI: I have represented Mr. Jackson since he
20 was originally arrested, your Honor. I represented him at
21 the trial in his absence and have represented him through
22 the subsequent, pre and subsequent negotiation process on
23 all of his charges. You will note on the Plea Affidavit
24 that in addition to these two trafficking charges there's a
25 number of charges that are being dismissed consistent with

1 this plea.

2 THE COURT: Okay.

3 MS. LIPINSKI: I have been over all the evidence on
4 all occasions with Mr. Jackson and including since the CI
5 was outed showing him the videos of the respective buys.

6 THE COURT: Okay.

7 MS. LIPINSKI: So he has seen all of that, your Honor.

8 THE COURT: Okay. And you went over with him the fact
9 that this is a violent and serious offense?

10 MS. LIPINSKI: Yes. I went over with him that this
11 was a violent and serious offense. I explained to him that
12 in my opinion I think it's an eighty-five percent sentence
13 in terms of this. I also went over with him the strike
14 laws; part of that being not only as a result of this plea,
15 but if he did not accept this offer because he has a prior
16 strike from a prox in the past, if he went to trial on any
17 of his current charges after the trial in his absence, Mr.
18 Hogge had sent me correspondence indicating that the State
19 would seek life without parole on this charge itself.

20 THE COURT: Okay.

21 MS. LIPINSKI: So that has been a very integral part
22 of our discussions as it pertains to this plea, and as it
23 pertains to explain to him the risk of any future criminal
24 behavior upon his release.

25 THE COURT: Okay. And so you believe he understands

1 the seriousness of these charges?

2 MS. LIPINSKI: He does, your Honor.

3 THE COURT: And he's got the educational background to
4 understand this?

5 MS. LIPINSKI: He understands our conversations, your
6 Honor. In addition to our conversations, your Honor, he's
7 ask me to talk to community members who he considers kind
8 of mentors. He also, subsequent to the trial in his
9 absence, retained a Mr. Brooker with the Charleston Bar to
10 handle the appeal of the trial in his absence.

11 Mr. Brooker at least has participated in two joint
12 meetings with me in which Mr. Brooker has also, I think,
13 had conversations either with me in the room, or without me
14 there, explaining to Ernest exactly what his current
15 situation is as it relates to appealing the trial in his
16 absence versus the guilty plea on these other charges and
17 how that may affects him as he goes forward.

18 THE COURT: Okay. All right. And again, do you
19 believe it's in his best interest to go forward with this?

20 MS. LIPINSKI: I believe it is, your Honor.

21 THE COURT: Okay. And Mr. Jackson, you're 30-years
22 old?

23 MR. JACKSON: Yes, sir.

24 THE COURT: And Mr. Jackson, what's your educational
25 background?

1 MR. JACKSON: GED.

2 THE COURT: You got your GED?

3 MR. JACKSON: Yes, sir.

4 THE COURT: What grade did you quit going to school?

5 MR. JACKSON: No, I graduated high school.

6 THE COURT: You graduated high school but still got
7 your GED?

8 MR. JACKSON: Yeah. I got a high school diploma.

9 THE COURT: Okay. What high school did you graduate
10 from?

11 MR. JACKSON: I graduated from Rock Hill High.

12 THE COURT: Okay. And did you get any education past
13 that?

14 MR. JACKSON: I got some college.

15 THE COURT: Okay. Where were you studying in college?

16 MR. JACKSON: At Pikeville College in Kentucky.

17 THE COURT: And how did you end up in Kentucky?

18 MR. JACKSON: A football scholarship.

19 THE COURT: Really?

20 MR. JACKSON: Yes, sir.

21 THE COURT: Did you stay the full four years?

22 MR. JACKSON: No, two.

23 THE COURT: Okay. Why did you stop after two?

24 MR. JACKSON: Momma had passed away and I just came
25 home.

1 THE COURT: Okay. I'm sorry about that.

2 What position did you play in football?

3 MR. JACKSON: I played quarterback.

4 THE COURT: Okay. And have you ever been treated for
5 any mental health issues?

6 MR. JACKSON: No, sir.

7 THE COURT: How about any drug or alcohol abuse or
8 dependency?

9 MR. JACKSON: No, sir.

10 THE COURT: And you're not on any prescription
11 medication now are you?

12 MR. JACKSON: No, sir.

13 THE COURT: Are you thinking clearly today?

14 MR. JACKSON: Yes, sir.

15 THE COURT: You heard what the solicitor told me about
16 the circumstances that led to your arrest?

17 MR. JACKSON: Yes, sir.

18 THE COURT: Okay. And Ms. Lipinski went over that
19 evidence with you; is that correct?

20 MR. JACKSON: Yes, sir.

21 THE COURT: And she explained to you the law that
22 applies?

23 MR. JACKSON: Yes, sir.

24 THE COURT: And she explained to you how the
25 sentencing could affect you if you went to trial on this

1 and if you were convicted?

2 MR. JACKSON: Yes, sir.

3 THE COURT: Okay. And she also explained your
4 Constitutional rights to you?

5 MR. JACKSON: Yes, sir.

6 THE COURT: Did she answer all your questions?

7 MR. JACKSON: Yes, sir.

8 THE COURT: Did you understand everything she told
9 you?

10 MR. JACKSON: Yes, sir.

11 THE COURT: Are you satisfied with her services as
12 your attorney?

13 MR. JACKSON: Yes, sir.

14 THE COURT: Do you need any more time to talk with
15 her?

16 MR. JACKSON: No, sir.

17 THE COURT: Okay. Now, do you want a jury trial on
18 this charge?

19 MR. JACKSON: No, sir.

20 THE COURT: Okay. You are pleading guilty to this
21 because you are in fact guilty of trafficking cocaine 10
22 grams or more second offense?

23 MR. JACKSON: Yes, sir.

24 THE COURT: Okay. Now, at your request Ms. Lipinski
25 entered into negotiations with the solicitor's office and I

1 am told that you're pleading to a negotiated sentence of 17
2 years. Is that your understanding?

3 MR. JACKSON: Yes, sir.

4 THE COURT: Okay. You understand the only thing I can
5 do is either accept the negotiated sentence or reject it?

6 MR. JACKSON: Yes, sir.

7 THE COURT: Okay. All right, sir. Other than that
8 sentence of 17 years, has anyone promised you anything else
9 to get you to plead guilty?

10 MR. JACKSON: No, sir.

11 THE COURT: Has anybody threatened you or forced you
12 to get you to plead guilty?

13 MR. JACKSON: No, sir.

14 THE COURT: So you're doing this freely and
15 voluntarily?

16 MR. JACKSON: Yes, sir.

17 THE COURT: Do you understand what you're doing?

18 MR. JACKSON: Yes, sir.

19 THE COURT: And you believe it's in your best interest
20 to go forward with this plea?

21 MR. JACKSON: Yes, sir.

22 THE COURT: All right. Mr. Jackson, this indictment
23 says that this event occurred on May 3rd, 2016 here in York
24 County. Do you understand that?

25 MR. JACKSON: Yes, sir.

1 THE COURT: How do you plead to this charge of
2 trafficking cocaine 10 grams or more second offense?

3 MR. JACKSON: Guilty.

4 SOLICITOR HOGGE: And just to be clear, it's crack
5 cocaine, your Honor.

6 THE COURT: All right. Did I just say cocaine?

7 SOLICITOR HOGGE: Yes, your Honor.

8 THE COURT: Okay. Well I sit corrected. It's crack
9 cocaine, okay. And Mr. Jackson, you understand if I accept
10 your guilty plea to this charge you understand it's gonna
11 be a conviction on your record?

12 MR. JACKSON: Yes, sir.

13 THE COURT: Do you want me to accept your plea?

14 MR. JACKSON: Yes, sir.

15 THE COURT: Mr. Jackson, I find your decision to plead
16 guilty is freely voluntarily and intelligently made. I
17 find you had the advice and counsel of a competent lawyer.
18 I find you're satisfied with the services of your lawyer.
19 I find there's a factual basis on which to base your guilty
20 plea and I am going to accept your guilty plea.

21 Ms. Lipinski, anything else you want to tell me?

22 MS. LIPINSKI: If you're inclined to accept the
23 negotiation, your Honor, I won't belabor the issue.

24 THE COURT: Okay. And he has spent two hundred and
25 two days in jail?

1 MS. LIPINSKI: Yes, your Honor.

2 THE COURT: All right. Mr. Jackson, I am going to
3 accept the negotiated sentence. This is a sentence of 17
4 years. I am giving you credit for the two hundred and two
5 days you've already served. Good luck to you.

6 MS. LIPINSKI: Your Honor, for the record, it was part
7 of the negotiation, the court sentence, that run concurrent
8 to his ten-year sentence -

9 THE COURT: Oh, yeah. And I put -

10 MS. LIPINSKI: --- that he got on the first charge.

11 THE COURT: And I've actually got this in here
12 already. I just -- This is running concurrent with your
13 sentence in 2017-GS-46-01962. Is that correct?

14 MS. LIPINSKI: Thank you, your Honor.

15 THE COURT: Thank you.

16 MS. LIPINSKI: I just wanted to make sure.

17 THE COURT: No, no. No, it's a good thing. Never
18 hurt.

19 MS. LIPINSKI: All right.

20 SOLICITOR HOGGE: Thank you, Judge.

21 THE COURT: All right. We'll be back at 2:00?

22 All right, we'll be back a little after 2:00.

23 MS. LIPINSKI: Thank you, your Honor.

24 (COURT IN LUNCH RECESS AT 01:05 P.M.)

25 (END OF TRANSCRIPT OF RECORD.)

CERTIFICATE OF REPORTER

State of South Carolina }
County of York }

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 11th day of April, 2018.

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

Wanda S. Nelson

Wanda S. Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: April 17, 2019

FILED RECEIVED

2019 CP-11 00032

STATE OF SOUTH CAROLINA)

2019 FEB 20 AM 11:14 THE COURT OF COMMON PLEAS

COUNTY OF YORK)

DAVID HAMILTON

Earnest Floyd Jackson, II

C.C.C.R. 8193

Full name and prison number (if any) of Applicant

YORK COUNTY, SC

v.)

APPLICATION FOR

State of South Carolina)

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 Broad River Correctional Institution
2. Name and location of Court which imposed sentence York County Court of General Sessions York, South Carolina.
3. Name(s) of co-defendant(s) (if any) None.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2017-gs-46-01958
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 4/11/2018

Revised 3/2003

- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty Petitioner's guilty plea was accepted by the court
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Defendant beliefs his guilty plea involve issues related to ineffectiveness of counsel appropriate addressed in a PCR action rather than the appellate courts..
- (b) _____
- (c) _____

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

(a) Trial counsel was ineffective in allowing Defendant to plea to charges with trial court lacked jurisdiction to hear..

(b) The State violated applicant's right of due process, where it failed to provide applicant with all discovery under Rule 5, Brady and Giglio.

(c) Applicant plea was not voluntarily and intelligent given

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

(a) _____

(b) _____

(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. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

- (c) the disposition thereof:
- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (d) the date of each such disposition:
- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No.
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
 - ii. _____
 - iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
 - 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) These grounds involve ineffectiveness of counsel, which are PCR issues rather than appellate issues.

(b) _____

(c) _____

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

(a) your arraignment and plea? Yes

(b) your trial, if any? N/A

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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. Mindy H. Lipinski

ii. _____

iii. _____

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

i. Mindy H. Lipinski represented applicant after arraignment through sentencing.

ii. _____

iii. _____

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

Withdrawal or reverse of guilty plea

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

Yes.

STATE OF SOUTH CAROLINA)

County of Richland)

VERIFICATION

I, Earnest Floyd Jackson, II, 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.

Earnest Floyd Jackson II

SWORN to and subscribed before me this 15th
day of February, 2019.

Jennifer Washington (L.S.)
Notary Public

My Commission Expires: March 8, 2028

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

I, Earnest Floyd Jackson, II, 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.

Earnest Floyd Jackson II
Applicant

SWORN or affirmed to and subscribed before me this
15th day of February, 2019.

Jermila Washington
Notary Public

My Commission Expires: March 8, 2028

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	FOR THE SIXTEENTH JUDICIAL CIRCUIT
	)	
Earnest Floyd Jackson, II, #340086,	)	2019-CP-46-00632
Applicant,	)	
	)	
v.	)	RETURN AND MOTION FOR A
State of South Carolina,	)	MORE DEFINITE STATEMENT
Respondent.	)	

FILED-RECEIVED

2019 APR 29 AM 11:25

CLERK OF COURT
DAVID HAMILTON
C.C. & G.S.
YORK COUNTY, SC

The State (Respondent), making its return to the application for post-conviction relief filed by Earnest Jackson, II (Applicant) on February 21, 2019, and received by Respondent on March 1, 2019, would respectfully show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. During the May 2017 term, the York County Grand Jury indicted Applicant for trafficking crack cocaine, second offense (2017-GS-46-1958). On April 11, 2018, Applicant appeared before the Honorable Edgar W. Dickson and pled guilty as indicted pursuant to a negotiated plea agreement, which included the dismissal of numerous charges. Judge Dickson accepted Applicant's guilty plea and sentenced him to the negotiated seventeen year sentence, which was to run concurrent with a ten year sentence Applicant was already serving. Applicant also received credit for 202 days. Applicant did not file a notice of appeal.

II. Factual Summary

On May 3, 2016, a confidential informant told Drug Enforcement Unit officers that he could purchase a half of an ounce of crack for six hundred dollars. (GP Tr. 5.) The informant set up a buy with Applicant on Chestnut Street in Rock Hill. (GP Tr. 5.) The informant, Applicant, and Applicant's uncle were present at the residence when Applicant took the

informant to the shed and gave him fifteen grams of crack cocaine in exchange for six hundred dollars.¹ (GP Tr. 5-6.) The informant made additional buys from Applicant. (GP Tr. 6.)

III. Current Action, Allegations Raised, and Relief Requested

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

1. Ineffective Assistance of Counsel
 - a. "Trial counsel was ineffective in allowing Defendant to plea to charges with trial court lacked jurisdiction to hear."
2. Prosecutorial Misconduct
 - a. "The State violated applicant's right of due process, where it failed to provide applicant with all discovery under Rule 5, Brady and Giglio."
3. Involuntary Guilty Plea
 - a. "Applicant plea was not [voluntarily] and [intelligently] given."

As requested relief, Applicant requests "withdraw or reverse of guilty plea."

Attached to this return and incorporated by reference are the records of the York County Clerk of Court regarding the subject convictions, guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, and the application. Respondent reserves the right to further amend this return upon receipt of any relevant materials.

IV. Response to Allegations of Ineffective Assistance of Counsel

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

¹ The six-hundred dollars were indefinable funds from the FBI.

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

Respondent submits Applicant can satisfy neither requirement of the Strickland test. During the plea hearing, Applicant was informed that the negotiated plea was for trafficking crack cocaine, second offense and Applicant indicated to Judge Dickson numerous times that he wanted to plead guilty. (GP Tr. 5, 11, 13.) Counsel had no grounds to object to Applicant's plea being before Judge Dickson in General Sessions Court because Applicant was properly indicted and Applicant pleading to a second offense does not invalidate his indictment. "An indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgement to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon." State v. Scriven, 339 S.C. 333,

529 S.E.2d 71 (2000).

Additionally, Counsel told Judge Dickson she had gone over the negotiated plea with Applicant and Applicant understood their conversations. (GP Tr. 6-8.) Applicant also testified he was satisfied with Counsel, she answered all of his questions, and he did not need any more time to speak with her. (GP Tr. 11.) 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).

V. Response to Allegations of Involuntary Guilty Plea

Applicant asserts his guilty plea was involuntarily entered, however he fails to state with any specificity why his guilty plea was involuntary. The records from Applicant's plea proceeding fully support that Applicant's guilty plea was entered freely, voluntarily, and knowingly. Respondent submits this allegation is without merit.

In post-conviction relief cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing: (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging his or her guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985).

“A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”). Statements made during the plea should be considered conclusive unless the defendant presents reasons why she should be allowed to depart from the truth of those statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

In Applicant’s case, the record fully supports the knowing and voluntary nature of Applicant’s plea. Applicant indicated he was pleading guilty voluntarily because he was guilty. (GP Tr. 11-12.) He also testified no one forced, coerced, or promised him anything in exchange for his guilty plea and he was entering his plea freely and voluntarily. (GP Tr. 12.)

Accordingly, the record conclusively refutes Applicant’s allegation his plea was involuntary and Applicant has failed to set forth any facts to support this ground or to explain with any specificity whatsoever the facts upon which this claim is based. Therefore, Respondent requests Applicant be required to amend his application to set forth specifically the grounds on which his claims are based. Respondent reserves the right to move for dismissal of this allegation should Applicant fail to amend the application.

VI. Response to Allegations of Prosecutorial Misconduct

Applicant alleges the State failed to provide full discovery to him, which violated his due process rights. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. Rule 5(a)(1)(C) requires:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

State v. Kennerly, 331 S.C. 442, 453-54, 503 S.E.2d 214, 220 (Ct. App. 1998). The definition of "material" for purposes of Rule 5 is the same as that used in the context of Brady. Id. (citation

omitted). “Once a Rule 5 violation is shown, reversal is required only where the defendant suffered prejudice from the violation.” Id. (citations omitted).

The record refutes Applicant’s allegation as Counsel told Judge Dickson that she has been over all of the evidence with Applicant including the videos of the respective buys. (GP Tr. 7.) Applicant also testified Counsel went over all of the evidence with him and answered all of his questions. (GP Tr. 10-11.) Applicant has failed to set forth any facts to support this ground or to explain with any specificity the facts upon which this claim is based. Therefore, Respondent requests Applicant be required to amend his application to set forth specifically the grounds on which his claims are based. Respondent reserves the right to move for dismissal of this allegation should Applicant fail to amend the application.

VII. Motion for More Definite Statement

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

Applicant has failed to state with any specificity the specific facts giving rise to these allegations. Additionally, these allegation are not supported by any other additional information in the application. Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to

provide a more definite statement of her allegations of ineffective assistance of counsel. The Uniform Post-Conviction Procedure Act requires applicants to “specifically set forth the grounds upon which the application is based.” S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.” Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the application.

VIII. Any Future Amendments and Invocation of Discovery Process

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

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

request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

IX. Response to Any and All Other Allegations

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

X. Request for an Evidentiary Hearing

WHEREFORE, having made its return, Respondent requests an evidentiary hearing solely on the allegation of ineffective assistance of counsel. Respondent requests applicant, through his counsel, amend the application to provide the required specificity for his allegation of prosecutorial misconduct and involuntary guilty plea. Until Applicant files an amended application, Applicant has not shown sufficient cause to arrant an evidentiary hearing on those allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JANELL H. GREGORY
Assistant Attorney General

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

April 25, 2019

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

2019-CP-46-00632

EARNEST F. JACKSON, II, #340086,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

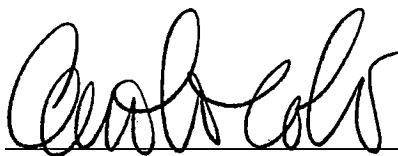
AFFIDAVIT OF SERVICE BY MAIL

FILED-RECEIVED
2019 APR 29 AM 11:26
DAVID P. MILTON
C.C.P. & C.S.
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 and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Thurmond Brooker, Esquire
Brooker Law Firm
Post Office Box 1450
Florence, South Carolina 29503-1450**

DATED this the 25th day of April, 2019.



Caroline Collins, Administrative Coordinator
For Respondent

STATE OF SOUTH CAROLINA	:	IN THE COURT OF COMMON PLEAS
	:	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	:	
	:	Case No.: 2019CP4600632
Earnest Floyd Jackson, III	:	
	:	
Petitioner/Applicant,	:	
	:	AMENDMENT/SUPPLEMENT TO
Vs.	:	PCR APPLICATION
	:	
State of South Carolina,	:	
	:	
Respondent.	:	

1. Applicant believes that trial counsel was ineffective in pleading defendant to trafficking in methamphetamine because the indictment was for trafficking in crack cocaine. Methamphetamine is a chemically distinctive drug from crack cocaine, no evidence of the existence of methamphetamine and no proof of methamphetamine existed.

2. Trial court lack jurisdiction to sentence defendant to trafficking in methamphetamine because Applicant was never indicted for trafficking in methamphetamine.

3. Appellant believes that trial counsel was ineffective in pleading Applicant to trafficking in methamphetamine because such plea violated the Double Jeopardy clauses of the constitutions of South Carolina and the United States of America. Specifically, Application's guilty plea to trafficking in methamphetamine (indictment allege crack cocaine) on May 3, 2016 was a single continuous conspiracy arising out of the same facts and circumstance of his conviction for Tracking in Cocaine on June 2, 2016.

4. Appellant believes that his guilty pleas was not knowingly and intelligently give because trail counsel erroneously informed Applicant that a conviction under indictment 2017-gs-46-1958 constituted a third serious or most serious conviction, and that the State would seek life imprisonment if he was convicted at trial. However, Applicant's conviction under indictment 2017-gs-46-1958 and 2017-gs-46-1962 constituted a single continuance conspiracy and would only have been a second serious or most serious conviction, and would not have subject Application to a life sentence. But for trial counsel's erroneous advise/statement of the law, Applicant would not have plead guilty.

Florence, SC

June 28, 2021


Thurmond Brooker

Thurmond Brooker, Esq.
Brooker Law Firm
238 Warley Street
Florence, SC 29501
(843) 679-0056 – phone
[REDACTED] – email

2021 JUN 30 AM 10:37
DAVID HAMILTON
C.C. & GS
YORK COUNTY, S.C.

FILED-RECEIVED

Certificate of Service

The undersign hereby certifies that a true copy of the above-attached Amendment/Supplement to PCR Application was served on the bellowed identified person at the below identified email address this 28th day of June 2021:

Person: Michael Neubauer

Address:

Florence, SC

June 28, 2021


Thurmond Brooker

Thurmond Brooker

FILED-RECEIVED

2021 JUN 30 AM 10:37

DAVID HAMILTON
C.C.C. # 176 GS
WORK COUNTY, SC

1 STATE OF SOUTH CAROLINA

2 -----x

3 EARNEST FLOYD JACKSON II,

4 Applicant,

5 Case No.

6 -against- 2019-CP-46-00632 &

7 STATE, 2019-CP-46-01806

8 Respondent

9 -----x

10 June 30, 2021

11 York, S.C.

12

13 B E F O R E:

14 HONORABLE R. LAWTON MCINTOSH

15

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

17 THURMOND BROOKER,

18 Attorney for the Applicant

19

20 MICHAEL J. NEUBAUER and

21 LINDSEY MCCALLISTER

22 Attorneys for the State

23

24 Aileen Butler

25 Official Court Reporter

	<u>I N D E X</u>			
	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u> <u>RECROSS</u>
1				
2	THURMOND BROOKER			
3	Mr. Neubauer	10		
4	MINDY LIPINSKI			
5	Mr. Neubauer	16		
6	Mr. Brooker		23	
7	EARNEST JACKSON			
8	The Court	27		
9	MINDY LIPINSKI			
10	Mr. Brooker	34		
11	Mr. Neubauer		71	
12	EARNEST JACKSON			
13	Mr. Brooker	92		
14	Mr. Neubauer		105	
15	MATTHEW HOGGE			
16	Ms. McCallister	110		126
17	Mr. Brooker		117	
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1	<u>E X H I B I T S.</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
3	Applicant's 1	Summary		46
4	Applicant's 2	Indictment		64
5	Applicant's 3	Indictment		64
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1 THE COURT: This is Earnest Jackson versus
2 the State of South Carolina. The State has
3 filled a motion to disqualify Mr. Booker as
4 counsel for the applicant. I will be glad to
5 hear your basis of your motion. I read your
6 brief.

7 MR. NEUBAUER: Yes, Your Honor. The basis of
8 our motion, brief procedural.

9 Applicant was indicted by the York County
10 Grand Jury in August 2016 for trafficking crack
11 cocaine ten grams or more but less than 28 grams
12 and possession with intent to distribute crack
13 cocaine within proximity of a park. He was
14 additionally indicted in May of 2017 for another
15 charge of possession of crack cocaine with intent
16 to distribute within proximity of a park, two
17 counts of trafficking crack cocaine, ten grams or
18 more but less than 28 grams another could you
19 please tell ever distribution of crack cocaine
20 within proximity of a park and conspiracy.

21 In November 2017 --

22 THE COURT: Let me do this if I may just for
23 the record. The issue according to what I read
24 earlier, was back in 2017 there's a trial in
25 absence held on the charge of trafficking cocaine

1 between ten and 28 grams, first offense. Miss
2 Lipinski represented the applicant then and he
3 had a sealed sentence of ten years.

4 Mr. Brooker represented the applicant on
5 appeal of that trial in absence and sentence.
6 Subsequently Miss Lipinski appeared --
7 represented on a negotiated plea of trafficking
8 between ten and 28 grams for a negotiated
9 sentence of 17 years and the allegations are that
10 leading up to that plea in front of Judge Dickson
11 that Mr. Brooker allegedly had conversations
12 along with Miss Lipinski potentially outside of
13 the presence of Miss Lipinski with the applicant
14 in which you seek to disqualify him now. Is that
15 correct?

16 MR. NEUBAUER: That's correct, Your Honor.
17 We believe to address the allegations contained
18 within his amended application for post
19 conviction relief.

20 THE COURT: Now certain parts of your
21 memorandum or your motion appear to be simply
22 speculation and I'm looking at page four, top
23 paragraph you said, Respondent also believes Mr.
24 Brooker additionally participated in independent
25 conversations with applicant during which Brooker

1 he may have had conversation." So that seems
2 like it's pure speculation to me, but do you have
3 any basis behind that?

4 MR. NEUBAUER: Based on the transcript from
5 the plea Your Honor page eight, Miss Lipinski
6 indicates that Brooker was involved in
7 conversations with her. Additionally --

8 THE COURT: In that quoted paragraph that you
9 cited it appears -- this is on page three. Mr.
10 Brooker at least has participated in two joint
11 meetings with me in which Mr. Brooker has also, I
12 think, had conversations either with me in the
13 room, or without me there, explaining to Ernest
14 exactly what his current situation is as it
15 relates to the appealing of the trial in his
16 absence. That's what he was doing. It sounds
17 like me to to according to what Miss Lipinski
18 said.

19 MR. NEUBAUER: Yes, sir, Your Honor, based on
20 that along with conversations I had with Miss
21 Lipinski while preparing for this, there is a
22 belief by the State that Mr. Brooker may have
23 provided additional information to Mr. Jackson
24 that could have had an effected on his decision
25 to plead guilty in this matter and the only way

1 that we could discern what was told to Mr.
2 Jackson outside of the presence of Miss Lipinski
3 would be to call Thurmond Brooker as a witness to
4 testify on these conversations that were held.

5 THE COURT: All right, Mr. Brooker, I'll be
6 glad to hear your position on this.

7 MR. BROOKER: Thank you, Your Honor.

8 Obviously, Your Honor, this is a first time I
9 think I had a motion to disqualify me and of
10 course --

11 THE COURT: This is a serious motion.

12 MR. BROOKER: It is. It is, and I'll try to
13 put this in context, Your Honor.

14 Obviously he had a trial with Miss Lipinski.
15 I think -- I think a first trafficking charge
16 which he was tried in his absence and of course
17 the sentence was sealed until he was apprehended.
18 I think later on he was apprehended and of course
19 at the time in which he was apprehended it
20 appears that the State still had additional
21 trafficking charge that they wanted to dispose
22 of. And of course what the State did is that the
23 State was discussing a plea deal. That he would
24 accept a plea deal of 17 years on that additional
25 trafficking charge to run concurrent with the

1 sealed sentence for the trial in his absence. At
2 that particular period of time how I got involved
3 is that Mr. Jackson it was his intention to go to
4 trial on that second trafficking charge and of
5 course he was in the process of retaining me to
6 represent him in connection with that trial. Of
7 course Miss Lipinski was still representing him
8 with the PD's office as a result of that. There
9 was a couple occasions in which I met with him
10 and of course I also met with him and also Miss
11 Lipinski while he was making a determination as
12 to whether or not he would plead guilty or
13 whether or not he would go to trial. If he were
14 to go to trial then I would be retained. I would
15 take over the case and I would handle the trial.
16 If he were to plead guilty there would be no need
17 to retain me because Miss Lipinski could handle
18 the guilty plea. And of course I sat in I think
19 at least with one or two conversations in which
20 Miss Lipinski did talk with him about the offer
21 that had been made by the solicitor's office and
22 also talked with him about the consequences of
23 potentially going to trial. And I think
24 specifically there was an issue with respect to
25 whether or not if he were to go to trial and

1 found guilty whether or not that would be a third
2 serious or most serious offense that would
3 subject him to life in imprisonment. And of
4 course that was the biggest thing that was
5 weighing on his mind. And of course my purpose
6 for being there was simply to -- to, you know,
7 roughly wait in the wings until he makes a
8 determination as to whether or not he is going go
9 to trial or to plea guilty. When he decided that
10 he would plead guilty then of course is that Miss
11 Lipinski plead guilty to that for that 17 years
12 concurrent and I had no further involvement.

13 THE COURT: Do you mind if I interrupt you
14 real quick.

15 MR. BROOKER: Not a problem. Not a problem.

16 THE COURT: It seems to me from a practical
17 standpoint what we should probably do for today's
18 hearing since my understanding of today's hearing
19 is only the motion to disqualify you.

20 MR. BROOKER: That's correct.

21 THE COURT: Let's swear you in.

22 MR. BROOKER: Sure.

23 THE COURT: Swear Miss Lipinski in and let
24 the State examine you and that way I have a
25 better informed basis behind which I can make my

1 decision.

2 MR. BROOKER: Yes, sir, Your Honor. I agree.

3 THE COURT: If you don't mind.

4 MR. BROOKER: I agree, Your Honor.

5 THE COURT: And I normally don't like doing
6 this at all but I think it's necessary in this
7 case.

8 If you come around please sir and be sworn.

9 MR. BROOKER: Certainly.

10 THURMOND BROOKER, called as a witness, having
11 been duly sworn by the clerk, was examined and
12 testified as follows:

13 THE COURT: Your witness.

14 DIRECT EXAMINATION

15 BY MR. NEUBAUER:

16 A Thank you. Good afternoon Mr. Brooker. When
17 were you retained by Earnest Jackson to represent him?

18 A If my memory serves me currently I was retained
19 probably -- probably a month or so -- and this is to the
20 best of my recollection -- after he had been apprehended
21 and of course after he had been found guilty I think for
22 the first trafficking offense of course at that particular
23 period of time I think they were trying to make a
24 determination as to whether or or not he would go to trial
25 or either plead guilty on the second one that was still

1 pending.

2 Q And you stated -- or were you involved in joint
3 conversations with Miss Lipinski and Earnest Jackson
4 regarding his decision whether or not to pursue a trial in
5 this matter?

6 A I was present at least once I can remember and
7 possibly twice. I know in the transcript -- I think in
8 your brief or at least in your motion it says twice. That
9 could be accurate. I'm not sure. I know that I met with
10 him once with Miss Lipinski and I sat in with her and Mr.
11 Jackson as she discussed the pros and cons of pleading
12 guilty to that second trafficking offense.

13 Q And during those meetings did you provide any
14 sort assistance, any advice and at all or were you merely
15 there to observe?

16 A If my memory serves me correctly Mr. Jackson
17 asked me on a couple of occasions my opinion as to what he
18 should do and of course one of the things that I never do
19 with any client is I never advise them whether or not they
20 should plead guilty or not. Basically what I did is I
21 talked with him about what his options were and of course
22 I may have re-emphasized what Miss Lipinski had told him
23 and the reason why I was not able to in my opinion to
24 provide with an independent assessment is I did not have
25 -- I did not have his discovery. So I did not know. I

1 could not tell him, well, this is the strength and
2 weaknesses of this case. This is what I think are the
3 problems with the State's case. You know, these maybe
4 potential defenses to you.

5 I was not able to have that conversation with him
6 because I did not have his discovery.

7 Q And prior to Mr. Jackson's plea, did you have any
8 conversations with Earnest Jackson separate from the joint
9 conversation you had with Miss Lipinski?

10 A Yes, sir, I believe I did.

11 Q And during those conversations was there any
12 discussion of the possible implications from him pleading
13 guilty via potential three strikes consequences for
14 serious or most serious offenses?

15 A To my memory no more than -- no more than
16 reiterate what -- or reinstate or at least what Miss
17 Lipinski had explained to him because like I said, I was
18 not in a position where I could independently evaluate his
19 case. And of course is should he -- to my memory, should
20 he had made a decision to not plead guilty and to go to
21 trial it was our intentions at that time is to ask the
22 judge for a continuance so that we can prepare ourselves.
23 But I could not independently evaluate his case. Anything
24 that I would have told him about the facts of his case
25 would have been re-emphasizing what Miss Lipinski had told

1 him because I did sit in at least one meeting with him and
2 Miss Lipinski and of course is I could hear exactly what
3 she explained to him about the three strikes your out and
4 the consequences of that if he were to go to trial and
5 potentially be found guilty.

6 Q And was Miss Lipinski informed of the independent
7 conversations that you had with Earnest Jackson where
8 issues regarding his decision or advance to trial or to
9 plead guilty?

10 A I don't know. I can speculate. I believe that
11 she was aware that I met with him at least on one occasion
12 outside of of her presence, but I am not sure.

13 Q And additionally one of his allegations in his
14 amended application addressed a double jeopardy issue
15 alleging that the indictment for trafficking in crack
16 cocaine was part of a single conspiracy. Were you
17 involved in any conversations prior to his plea where this
18 would have been discussed?

19 A Not to my recollection. I'm not sure, but not to
20 my recollection.

21 Q So you do recall sitting in on the conversation
22 with Miss Lipinski and Earnest Jackson?

23 A Yes.

24 Q And during those conversations and in the
25 conversations that you had independently with Earnest

1 Jackson he asked you advice regarding his options of
2 pursuing a trial or pleading guilty?

3 A Yes, and from my memory he asked me my opinion
4 with respect to whether or not it would be within his best
5 interest to either accept the plea or either go to trial
6 and to my recollection I did not advise him which would be
7 within his best interest because -- from my recollection I
8 told him that I did not have his Discovery. I could not
9 do an independent evaluation of his case and of course is
10 that primarily I was there in case he made a determination
11 that he would not accept the plea then I was in a position
12 to then take over the case and of course try the case.
13 But from my recollection, I didn't answer that question
14 when it was asked of me because I was not in I a position
15 to be abl to answer it.

16 Q Yes, sir. During the course of this conversation
17 did you provide him with the advice regarding possible
18 consequences if he were to plead guilty?

19 A I think the only thing that I could tell him I
20 think -- and I believe the only thing I did tell him is,
21 is assuming that the information that had been provided to
22 him was accurate because I said I couldn't tell him
23 whether or not this was a third strike or not because I
24 had not independently evaluates his discovery. I had not
25 looked at his prior charges. I couldn't do any of that

1 assessment at that time. But of course is, is that my
2 assumptions were -- and of course my beliefs were, is that
3 if this was a third strike then of course the law does
4 then say he is subject to a potential life in prison
5 sentence. So I would have instructed him what the law
6 was, but I couldn't tell him whether or not that was the
7 state of his situation whether that was a third strike.

8 Q And were you aware that Earnest Jackson was
9 concerned with avoiding a possible life without parole
10 sentence if he were to proceed to trial on this -- the
11 trafficking cocaine charge?

12 A Yes, I was aware of that.

13 Q And that was communicated to you during the
14 course of the representation?

15 A That was. I think from my recollection that was
16 one of the biggest motivating factors in him deciding
17 whether to plead or not to plead. He was concerned about
18 the -- the possibility that was a third strike and if it
19 was a third strike then of course he could be subject to
20 life imprisonment. So he did express that. But like I
21 said, I could not give him any advice with respect to
22 whether or not he should plead or should not plead because
23 I could not -- I was not in a position to be able to
24 evaluate his case and -- and give him the benefit of my
25 independent honest decision.

1 MR. NEUBAUER: Beg the Court's indulgence.

2 No further questions.

3 THE COURT: Thank you. All right, sir, you
4 may step down. Thank you.

5 Miss Lipinski.

6 MS. LIPINSKI: Yes, Your Honor.

7 THE COURT: Would you mind coming around
8 please ma'am. We appreciate you coming over from
9 Anderson County. It's a long drive.

10 MS. LIPINSKI: Luckily traffic on 85 wasn't
11 that bad.

12 MINDY LIPINSKI, called as a witness, having
13 been duly sworn by the clerk, was examined and
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. NEUBAUER:

17 Q Good afternoon.

18 A Good afternoon.

19 Q Do you remember when you were appointed to
20 represent Earnest Jackson?

21 A Within the normal timeframe of his original
22 arrest. I had him almost from day one. So I represented
23 Earnest for quite some time. These charges were 2016, so
24 probably the summer of 2016. What exact day I don't know
25 but I saw him almost immediately.

1 Q And you were involved in conversations with him
2 regarding his decision whether or not to plead guilty to
3 the final trafficking and crack cocaine offense?

4 A I was involved in discussions when they made the
5 original offer before he even went to trial. We had
6 numerous discussions about whether, you know, he was
7 offered something even before the trial that he should
8 take it. So obviously there were on going things. At
9 some point I drew up a document outlining all of his
10 charges. The potential penalty that he faced life without
11 parole at some point and asked Earnest to sign it which he
12 didn't, but my investigator was present.

13 Ernest had an advisor in the community that he kept
14 referring to. I spoke with that individual by phone and
15 then when he wouldn't take the deal they eventually put
16 him on the trial docket and then I went to trial in
17 absentia. So without Earnest. Represented him throughout
18 the entire trial. Then while he was on the run I think I
19 had at least one conversation with him. Kind of telling
20 him that he'd been convicted. That the jury found him not
21 guilty of some of the charges but guilty of others. There
22 was a sealed sentence out there. That he needed to turn
23 himself in.

24 He told me that he was looking to retain counsel.
25 I told him to have him call me. I will explain the

1 situation to him. I think I even talked to Mr. Brooker
2 before he was either arrested and then just trying to -- I
3 think Mr. Brooker wasn't getting a clear picture on
4 procedurally where was Earnest in that chain of events and
5 then when he was finally apprehended and in jail I
6 remember reaching out to Mr. Brooker and saying, let's
7 schedule the sealed sentence and if you want to come up
8 and preserve any issues on appeal because it was my
9 understanding that he was possibly being retained to
10 handle the appeal, you know, because when they read the
11 sealed sentence that's when all of that is triggered and
12 so I remember scheduling that sealed sentence around Mr.
13 Brooker's schedule so that he could be there if he wanted
14 to, and I think he was and I think put things on the
15 record at that time.

16 I want to say that was our first group contact
17 visit where Mr. Brooker, Earnest and I all sat down in the
18 room and kind of where did you go from here and at that
19 point it was a little perspective because we didn't know
20 what the sealed sentence would be but we knew what the
21 sentencing range was. And I had already had discussions
22 with the solicitor about if it is what we expect it to be
23 this is kind of where in the neighborhood of the offer was
24 going to be and then after the sealed sentence went back
25 speaking with Mr. Jackson on whether or not to accept the

1 new deal based on the sealed sentence and it was one of
2 those things that when I would go down there he would
3 reference conversations he had with Mr. Brooker. And I
4 just felt that -- not that anybody was giving him
5 conflicting advice, but different lawyers use different
6 words and so I reached out to Mr. Brooker and said, look,
7 I think we need to all be in the same room. I think
8 Earnest deserves the benefit of talking to me and being
9 able to ask you questions and then you giving him that
10 advice and then vice versa and so we set up a second
11 meeting where we had that conversation.

12 I know I had subsequent contact visits or at least
13 went down to the jail to see Earnest by myself in which he
14 would reference talking to Mr. Brooker and I remember on
15 the day of the plea asking him, do you need any more time
16 with him? Have you talked to him? You know, that kind of
17 thing before we even went forward with the plea.

18 Q Yes, ma'am, and you stated you met with Earnest
19 Jackson following your second group meeting with Thurmond
20 Brooker, Earnest Jackson and yourself. Do you know if
21 Earnest Jackson and Thurmond Brooker had any meetings
22 independently following that group meeting?

23 A From my recollection Mr. Brooker did come up here
24 one time and met with Earnest on his own where I was not
25 involved in that meeting, but that is all because I think

1 Mr. Brooker reached out to me in terms of, you know, the
2 logistics of setting that up with the jail and who to
3 contact and that kind of thing. But beyond that, I know
4 that they were talking on the phone just because Earnest
5 would reference it and say, you know, Mr. Brooker says
6 this. Mr. Brooker says that. So I mean, yes we were
7 handling two different things but they were obviously
8 overlapping at that time.

9 Q And during any of the conversations you had with
10 Earnest Jackson following your group conversation with
11 Thurmond Brooker and Earnest Jackson was there any
12 indication that Earnest Jackson had received some sort of
13 advice or some sort of information regarding the
14 consequences of him pleading guilty to his final
15 trafficking in crack cocaine charge?

16 A It wasn't -- they were all embedded. You have to
17 understand from Earnest's prospective he's now been
18 convicted at trial. I think he had reached out to Mr.
19 Brooker in hopes of getting an appeal and undermining that
20 trial.

21 If he plead guilty to other charges the concern was
22 that what rights on appeal he would then forfeit fight
23 from the original conviction, but then also, he had to
24 also understand that if he didn't plead guilty to the
25 other offenses because they're were like three dates in

1 question that what would happen to him. So everything was
2 very interconnected, especially in Earnest's mind, about
3 what do I do. Like, do I need to plead and save myself
4 over here, but if I do do I jeopardize everything to try
5 and attack what's already behind me. So it was a very
6 interconnected concept that, yes, really didn't focus fact
7 heavy on what Earnest had done, but did focus procedurally
8 on the unique position in which he found himself which is,
9 you know, arguably some solicitors once they would have
10 convicted him at trial would have let the other stuff go,
11 but they weren't and wanted additional time. And so, they
12 were going for more and so that obviously was a concern.

13 In all candor, you know, I've always been a trial
14 attorney. I was a solicitor for a awhile. I've been a
15 public defender. I'm back being a solicitor, but while
16 I've handled a few appeals here and there or interlocutory
17 appeals, that's not my wheelhouse.

18 PCR's are not -- I testify in them. I don't
19 represent people in them. So being able to effectively
20 advise Earnest what collateral attacks he was forfeiting
21 and how they impacted each other was something that I
22 deferred to Mr. Brooker on, and quite quite frankly in
23 reality, you know, because Mr. Brooker is a paid attorney
24 and I'm a public defender. No matter what, what he says
25 is going to carry more weight in that room than what I

1 said. So that's why I felt it was important that, A, we
2 both be in the room so he has the benefit of that dual
3 advise but, B, also because there were things in terms of
4 you're facing life without parole that had Mr. Brooker not
5 endorsed I don't know that Earnest would have necessarily
6 accepted it as readily as he did. If that makes sense.

7 Q So you would say at least some of the advice that
8 Earnest Jackson received from Thurmond Brooker leading up
9 to his plea had a -- in your opinion had an effect on his
10 decision whether or not to plead?

11 A Yes. If Mr. Brooker had told him, if you plead
12 guilty to this other stuff and you give up any right to
13 challenge the original conviction and you give up any, you
14 know, appeals. Have less collateral attacks and you have
15 more with a trial and, yes, you're risking life, but
16 that's the only way to ultimately turn the wheels of time
17 completely back to zero. I believe Earnest would have
18 done that. I think it was only because, quite frankly, he
19 had a prior trike from 2008. Then the strike he picked
20 approximated up at trial, and then with the other charges
21 that would have been a third, and us both endorsing
22 unfortunately they have, you know, over it this barrel
23 with three strikes, your going to get life and maybe if he
24 wasn't facing life the advice would have been, make them
25 try you on everything. Look half the charges got

1 dismissed at the first trial -- or found not guilty, not
2 dismissed. You know, they started with their best case,
3 they didn't start with their worse one maybe you'll be
4 able to dodge the bullet going down the road that was all
5 part of that, you know, decision that Earnest
6 unfortunately found himself in. And so I think he relied
7 heavily on both of us, but I think had Mr. Brooker told
8 him you need to go to trial in order to have any rights to
9 attack this down the road and I'm just sitting there going
10 if they're going to convict you again -- I don't know -- I
11 believe he would have listened to Mr. Brooker and we would
12 have been in trial again the following week.

13 MR. NEUBAUER: Beg the Court's indulgence.

14 At this point I have no further questions.

15 THE COURT: Would you like to cross examine
16 this witness.

17 MR. BROOKER: Just one question.

18 CROSS EXAMINATION

19 BY MR. BROOKER:

20 Q Miss Lipinski, do you know whether or not -- and
21 I know you said is you believe that he would have been
22 influenced by my decision, but do you know specifically
23 whether or not I told him that you need to plead guilty or
24 you need to go to trial? One verses the other?

25 A I think attorneys are always loathed to make that

1 ultimate decision for their client. Ultimately it is
2 Earnest's life. So I don't know if those words came out
3 of you, but I think that certainly you participated in the
4 conversations endorsing that if he went to trial and they
5 convicted him that the State would be able to seek life
6 without parole. So I think it was more that you helped
7 handicapped that decision for him. I think your
8 characterization had you ever watch the drug buy videos,
9 were you aware of all at issues with the confidential
10 informant, the text messages, the bailiwick so to speak of
11 the drugs deals in this case, your right. I don't know
12 that you ever got on board in terms of the facts specific
13 aspect of that conversation. But I do think that you were
14 very much a part of the ultimate deciding factors of that
15 in terms of if you don't plead guilty -- I think if you
16 said no, they could not get you for life he would have
17 listened to you over me and I say that only because
18 Earnest didn't listen to me for a grand portion of our
19 relationship.

20 I mean he would come in. He would met with me. He
21 was very polite. He was very attentive. He wasn't
22 somebody who just kind of ignored me the way a lot of my
23 clients do. Earnest and I spent a lot of time before he
24 made bond and once he was eventually out talking to
25 people. He called him this advisor on the phone and he

1 listened to him because I was like, they will get you for
2 life and he just didn't agree with the three strikes law.
3 That really ought to be because in this situation it was
4 one of those things where the narcotic officers go out and
5 make three buys in close proximately to each other, you
6 know, but why do they get to stack the deck like that
7 because that's not really what the legislature envisioned
8 when they came up three strikes. They envisioned, guy
9 gets one strike goes to jail for a while. Comes back out.
10 Deals drugs again. Goes to jail for a while. Gets back
11 out and still dealing drugs. Not we make three buys in
12 close proximity and the solicitors gets to stack them.
13 And so I think Earnest had a hard time wrapping himself
14 around that concept and believing me that that's what they
15 could do and that's why I drew up a document telling him
16 that and tried to get his advisor to come in and meet with
17 me because I was like -- you know, are you an a lawyer?
18 What are you doing? And I think eventually I talked to
19 the guy on the phone and he was a guy who graduated from
20 Winthrop who was educated and possibly a businessman of
21 some sophistication, but I was like if you're not a lawyer
22 and you don't understand these drug laws then I think you
23 need to get out of kitchen so to speak. So Earnest never
24 really, you know, was inclined to listen to me. I'm a
25 public defender. I'm a white female. I mean, I'm not

1 somebody that he just puts a whole lot of faith and stock
2 in regardless of how many times I met with him or how many
3 times I went over the evidence with him or anything. I
4 think a paid lawyer was always going to carry more weight
5 in any conversation than a public defender. I'm going to
6 get a real lawyer. He was position he had a public
7 defender and a real lawyer. He was always going to defer
8 to you and that's just what I mean by that. He put more
9 weight in what you said.

10 Q Okay, and just one more question is, during the
11 conversations in which myself, Mr. Jackson and you had,
12 was there any conversation -- was this any discussion with
13 respect to whether or not the trafficking charge in which
14 he was found guilty of in absentia and of course the
15 trafficking charge in which you were trying to negotiate a
16 plea with, was there any discussions with respect to
17 whether or not those two events constituted one single
18 conspiracy and should not have been treated as two
19 separate conspiracies?

20 Did we get into that conversation with Earnest to
21 your recollection?

22 A I don't recall. I certainly -- I think can they
23 stack them and if they were part of the same conspiracy
24 the fact that they couldn't stack them would have been
25 something, but that specifically I don't recall. I don't

1 recall that aspect of the conversation.

2 MR. BOOKER: No further questions Your Honor.

3 THE COURT: Any redirect?

4 MR. NEUBAUER: No, Your Honor.

5 THE COURT: All right. Thank you. Please
6 don't leave yet.

7 MS. LIPINSKI: I won't.

8 THE COURT: All right. Mr. Jackson do you
9 mind standing up please sir.

10 EARNEST JACKSON, called as a witness, having
11 been duly sworn by the Court, was examined and
12 testified as follows:

13 EXAMINATION BY

14 THE COURT:

15 Q All right. Mr. Jackson, is it your desire that
16 Mr. Brooker continue on as your lawyer in this post
17 conviction relief action?

18 A Yes, sir.

19 Q And you do feel like it would be a hardship to
20 you if he was not allowed to continue to represent you?

21 A Yes.

22 Q At the time that you decided to enter into the
23 negotiated plea in front of Judge Dickson where you
24 received 17 years, did you make that decision to enter
25 that plea based on the advice from Mr. Jackson or was it

1 made based on your representation from Miss Lipinski?

2 A It was based on my trial counsel.

3 Q From Miss Lipinski?

4 A Yes, sir.

5 Q Not based on Mr. Brooker's advice?

6 A No, sir.

7 Q All right. Thank you sir.

8 THE COURT: Hang on. Any questions of Mr.
9 Jackson based on my questioning of him.

10 MR. NEUBAUER: Beg the Court's indulgence,
11 Your Honor. No, Your Honor.

12 THE COURT: Thank you. I will deny your
13 motion. I understand the basis for it. I think
14 it is fairly close, but in deference to Mr.
15 Jackson's desire to have counsel of his choosing
16 it seems to me based on what I heard from Mr.
17 Brooker's testimony that actually he was giving
18 him general law. That he wasn't involved in the
19 factual aspect as Miss Lipinski testified to.
20 That that was her job. So basically really not
21 something that's a contested issue in this case.
22 If I am a wrong, I'm wrong, but I will defer to
23 Mr. Jackson's desire to have his own counsel.

24 I want this hearing to be as part of the
25 record on the post conviction relief.

1 With that being said, we got everybody here
2 today. I know that you told me yesterday we were
3 proceeding on the motion only, but I will give
4 everybody the opportunity if either side wants to
5 go forward but since we're here, since Miss
6 Lipinski has traveled from Anderson to come here
7 today I want you all -- I'll take a few minutes
8 out of the courtroom. Let you all decide whether
9 you want to go forward with your hearing today.
10 If you do not want to go forward today either
11 side that's no hair off my back. I don't care.
12 But I will give you the opportunity out the
13 judicial economy to get this case done today. So
14 you all discuss it and send word back to me.

15 All right. Thank you.

16 (WHEREUPON, there was a brief recess.

17 THE COURT: We are back on the record of
18 Earnest Jackson versus State of South Carolina.
19 For the record earlier today we had a State's
20 motion to disqualify applicant's counsel from the
21 record and that will be made part of the record
22 on this post conviction application.

23 Now, counsel you mentioned that you still may
24 want to call Mr. Brooker. I will let you think
25 about it over lunch. My inclination was not to

1 let you because we already resolved that. Did
2 you have any other grounds that you wanted me to
3 consider?

4 MR. NEUBAUER: Yes, Your Honor. At this
5 point we are uncertain what the testimony will be
6 from all other witnesses at this point so we
7 would ask the Court to reconsider our request to
8 call Mr. Brooker at the appropriate time.

9 THE COURT: At this point I'm not going to
10 let you, however, if you think that evidence
11 comes in that would give you fresh cause to
12 research your claim to call him as witness then
13 just bring it up of the.

14 MR. NEUBAUER: Yes, sir.

15 THE COURT: Mr. Brooker, if you would outline
16 your grounds for this application for the record.

17 MR. BROOKER: Thank you, Your Honor.

18 THE COURT: If you would, drop your mask.

19 MR. BROOKER: I apologize.

20 THE COURT: I have a hard time hearing.

21 MR. BROOKER: Your Honor, can I pass up the
22 amendment slash supplements to the PCR
23 application.

24 THE COURT: I do have those and I brought
25 them.

1 MR. BROOKER: Okay.

2 THE COURT: Those are your present grounds or
3 are there grounds other than your amended PCR
4 supplemented PCR application?

5 MR. BROOKER: Your Honor, with respect to the
6 amendments that we have is that one and two is I
7 don't think there is need to proceed on one and
8 two. We will be proceeding on three and four and
9 of course the reason why for the record as to why
10 we are not proceeding on one and two is, is that
11 we looked at the sentencing sheet I think for
12 both offenses and of course there's on the
13 sentencing sheet for both offenses it indicates
14 that the conviction was for crack cocaine as
15 opposed to meth.

16 THE COURT: That is correct, and it was clear
17 in the colloquy between Judge Dickson and Mr.
18 Jackson as well.

19 MR. NEUBAUER: We would just like to clarify
20 for the record the applicant's application for
21 post conviction relief is limited to his guilty
22 plea and does not cover anything that may have
23 occurred during his prior trial.

24 Additionally, we would like to clarify
25 whether Mr. Brooker intends to proceed with the

1 allegations contained within the original
2 application for post conviction relief.

3 THE COURT: Mr. Brooker?

4 MR. BROOKER: Your Honor, I think the
5 allegations contained in and of course let me
6 pull them up within the original application -- I
7 think at least one or two of them maybe very
8 similar to at least our amendments.

9 THE COURT: Let do this -- I don't know mean
10 to interrupt you. So the record is clear because
11 it's not clear to me at this point. It's clear
12 that you are not proceeding on the grounds of one
13 or two as stated in the amended supplements to
14 the PCR application but you are proceeding on
15 three and four. That you're not proceeding on
16 any allegations as to the trial in absence but
17 simply the negotiated deal from Judge Dickson.
18 But are there other allegations in the
19 application in addition to grounds three four
20 that you're are seeking to cover?

21 MR. BROOKER: I think in the application I
22 think on 10A and I think these are probably
23 cumulative. I think 10A says that trial counsel
24 was in effective in allowing the defendant to
25 plead to charges on -- which trial Court lacked

1 jurisdiction to hear. I think that is very
2 similar to the argument that we're making in
3 three and four of the amendment slash supplement.
4 And 10B which says State violated appellant's
5 right to due process where it failed to provide
6 applicant with all discovery under rule Brady --
7 under Rule 5 Brady and Giglio.

8 Your Honor, we are not proceeding on that and
9 of course then C, appellant's plea was not
10 voluntarily intelligently given, is that. Your
11 Honor, we are proceeding on that because I think
12 there is some relationship I think to three and
13 four in that our argument in three and four is
14 that there was -- there was substantive
15 information in reference to the law that trial
16 counsel failed to provide him and of course is
17 that had he known about that information, known
18 about the potential defense that was available to
19 him, that he would not have plead guilty. And so
20 I think -- I think there's relevance there. I
21 think C relates to three and four in the
22 amendment slash supplement.

23 THE COURT: Thank you, very much for that.

24 MR. BROOKER: Thank you, Your Honor.

25 THE COURT: Are you ready to proceed?

1 MR. BROOKER: Yes, sir, Your Honor.

2 THE COURT: Call your first witness.

3 MR. BROOKER: Your Honor the first witness
4 that we would call would be Linda Lipinski.

5 THE COURT: Come around Miss Lipinski please.

6 MS. LIPINSKI: It's Mindy just for the
7 record. Do you want me sworn in again?

8 THE COURT: You are still under oath from
9 this morning so I will let you take the stand.

10 DIRECT EXAMINATION

11 BY MR. BROOKER:

12 Q I apologize Miss Lipinski. The minute I said it
13 I realized I misspoken your name.

14 A That's okay. I still get called by my maiden name
15 half the time. I'm fine.

16 Q Miss Lipinski, I think you represent Mr. Jackson
17 -- I think in connection as you testified before with in
18 connection -- indulge me for a second while I grab the
19 Indictment. In connection I think Indictment
20 17-GS-46-1962, is that correct?

21 A Yes.

22 Q And of course it's my understanding is that
23 indictment was for a trafficking in crack cocaine, is that
24 correct?

25 A Yes.

1 Q And it's my understanding is that with respect to
2 that indictment -- and you correct me if I'm wrong -- does
3 that indictment allege that on -- that indictment alleges
4 -- I apologize, Your Honor. That indictment alleges on
5 June 2nd in 2016 in York County that Mr. Jackson knowingly
6 sell, manufacturer, delivered, purchase or brought into
7 the State or did provide financial assistance or otherwise
8 aid, abet, attempt or conspired to sell, manufacturer,
9 deliver, purchase or bring into the State I think a
10 quantity of crack cocaine, is that correct?

11 A I don't have it in front of me but that sounds
12 correct.

13 Q Okay. I can provide you with a copy of it.

14 A I can see you are reading from it. I'm just
15 saying I don't have that copy in front of me but that
16 certainly sounds like the standard language on
17 trafficking.

18 Q And of course that trafficking cocaine was in
19 violation of section 44-53-575-C of South Carolina code of
20 laws, is that correct?

21 A Yes.

22 Q Now, did you receive the discovery or receive
23 discovery in connection that charge?

24 A Yes.

25 Q Okay. And of course is I have in my hand what is

1 listed as a general sessions case file from the York
2 County Multi-Jurisdictional Drug Enforcement Unit

3 MR. BROOKER: Your Honor, may I approach?

4 THE COURT: Yes, sir.

5 Q I will hand you a copy, Miss Lipinski, if you can
6 take a look at that and tell me whether you recognize that
7 as being part of his discovery?

8 THE COURT: The date on that indictment is
9 June 2, 2016?

10 MR. BROOKER: I think that's the day of the
11 event. I apologize.

12 MR. NEUBAUER: The date of the indictment was
13 May 11, 2017.

14 THE COURT: Thank you.

15 A Yes, that appears to be the general case summary
16 from all three incidents.

17 Q Do you remember receiving that as part of his
18 discovery?

19 A Yes.

20 Q Okay. I want you to turn the third page?

21 A Okay.

22 Q Better yet, if you can please turn back to the
23 first page.

24 A Okay.

25 Q Now, I think -- is this a summary of actually I

1 guess a drug distribution that resulted in Mr. Jackson
2 being charged with trafficking in cocaine pertaining to I
3 think the 1962 Indictment that I just asked you about?

4 A Yes.

5 Q And of course it also identifies the facts
6 surrounding --

7 MR. NEUBAUER: Your Honor, the State does not
8 have a copy of the document.

9 MR. BROOKER: I apologize. (Handed)

10 Q This document outlines I think three drug
11 distributions in which Mr. Jackson was involved in, is
12 that correct?

13 A Yes, there a May 3rd buy a May 20th buy and the
14 events of June 2nd which was the subject of this trial.

15 Q Okay, and the June 2nd which was the subject of
16 the trial, is that correct?

17 A Yes.

18 Q And of course is that the May 3rd of 2016 was the
19 subject of the plea, is that correct?

20 A Yes, and I think they dismissed the May 20th
21 event.

22 Q That's correct. I think they dismissed the May
23 20th. But on the first page of that case file summary on
24 May 3, 2016 is that I believe that it indicates that the
25 -- that the York County Muti-Jurisdictional Drug Unit used

1 a confidential informant to actually set up Mr. Jackson
2 with a controlled buy, is that correct?

3 A Yes.

4 Q And of course is my understanding is there were
5 three persons that were involved in that controlled buy on
6 May 3rd of 2016 and those three persons were Mr. Jackson,
7 there was a gentleman by the name of Peanut that was later
8 identified as Dennis Watkins and of course there was the
9 confidential informant, is that correct?

10 A So there are three buys that in essence that
11 takes place at a relative to Mr. Jackson's family. I
12 don't know if it was a grandmother, an aunt or something,
13 but there was some type of maternal relative that owed the
14 house where all three buys take place. He had an uncle
15 who went by Peanut by the name of Dennis Watkins who for
16 the most part sat out in the front yard of this residence
17 every day all day long. And so in the three buys the C.I.
18 would come to the house, engage in a narcotic buy most
19 often in a shed out back of the house but often times
20 Peanut was sitting out front. But was Peanut aware of
21 what was going on, yes. Did Peanut ever participate in
22 anything I saw that I don't recall other than being there.

23 Q Okay. And of course is that I think in that --
24 in that case report specifically the case summary that
25 deals with the March 26 of 2016 transaction, does that

1 summary indicate that the -- that -- does it state -- and
2 we are on page two of the first paragraph. Does it state
3 that law enforcement -- that the C.I. stated to officers
4 that they have not purchased crack from Black before but
5 knew of a male at [REDACTED] Chestnut Street who is nickname was
6 Peanut and that Peanut could help the C.I. set up a deal
7 with Black. Is that what it says?

8 A It does say that. So my recollection is that the
9 C.I. -- I know his name was Calvin Ricky I want to say
10 Henderson -- the C.I. grew up his grand ma'am lived right
11 next to the maternal Jackson relative home. So he had
12 kind of grown up with this family and so Earnest would be
13 around this house but I don't know that he ever lived
14 there. But because the C.I. had more or less grown up
15 next to Peanut and this either grandmother or aunt he knew
16 Peanut and that Peanut could make the introduction. I
17 think he even knew Earnest but I don't know that Earnest
18 would have sold to him or trusted him without Peanut
19 making that introduction. So at some point that
20 introduction probably transpired. That's is not on the
21 tapes and the text messages indicate at some point a
22 business relationship develops between Calvin Ricky, the
23 C.I. and Earnest where they are communicating not through
24 Peanut. So yes, I believe Peanut did make the
25 introduction or may have, but that's not -- other than in

1 that report that's not in -- that's not something you see
2 on the tapes.

3 You see them all sitting out in front of the house.
4 There's a bunch of lawn chairs. There is one tape in
5 particular they sit there for a long time and there are
6 times where you see the C.I. talk to Peanut without
7 Earnest being there. Earnest arrives later. Sometimes
8 Earnest is there when he gets there. It depends on the
9 buy.

10 I don't remember the exact breakdown other than the
11 trial incident because they set up the buy but Earnest
12 doesn't have the drugs and so he has to go get them from
13 somebody else and so Peanut and the C.I. sit out front
14 talking about the weather and this person down the street
15 waiting on Earnest to finally show up and then C.I. and
16 Earnest go out back into the shed and the drug deal goes
17 down.

18 Q But the case summary does say that the C.I.
19 indicated to law enforcement --

20 A That Peanut would make the introduction to
21 Earnest.

22 Q Absolutely.

23 A Yes.

24 Q It does state that, is that correct?

25 A Yes. Yes.

1 Q So if it does state that of course Peanut would
2 have played a role I guess in that first transaction that
3 took place on May 3rd of 2016, even if it's just an
4 introduction, is that correct?

5 A Yeah. I am just saying I don't -- that's not in
6 the -- you don't see that introduction on the videos. You
7 see it memorialized there but that's all you see.

8 Q Okay. Okay, but officers are implicating him?

9 A Yeah, and I think there was some belief that
10 Peanut obviously knew what was going on and knew that
11 Calvin was buying from Earnest. I mean, I think that was
12 it.

13 Earnest and I had several discussions about why Peanut
14 wasn't charged and, you know, could he be implicated and I
15 told him that even if Peanut -- could they have charged
16 Peanut, probably. You know, it wasn't exactly clear. I
17 never saw anything on the tape where Peanut definitively.
18 The drugs never passed through Peanut. The money never
19 passed through Peanut. That kind of thing. So I didn't
20 feel that that was going to get Earnest acquitted.

21 Q But, yeah, I understand that, but it's not
22 necessary in order for someone to be charged as a -- as a
23 conspirator, it's not -- in connection with a drug
24 transaction, it's not necessary that person actually pass
25 the drugs. It's not necessary that the person pass the

1 money. If that person plays any role however slight in
2 facilitating that drug transaction, is it your
3 understanding that person can be charged as a conspirator?

4 A I think -- I think they would have to know that
5 they were making the introduction for the purpose of
6 engaging in a drug conspiracy. If I'm just going to
7 introduce you to my nephew and you don't know that the two
8 of you are going to later buy dope for one another I don't
9 know that makes you a party. But your right, the drugs
10 and the money would not have to pass through him per se
11 for him to be implicated.

12 Q And of course is that doesn't -- I think that
13 --still on page two, of the -- of the case file summary
14 and of course is so we can make this clear is that --

15 MR. BROOKER: Your Honor, we would move to
16 offer this into evidence as Applicants exhibit
17 number 1.

18 THE COURT: Any objection?

19 MR. NEUBAUER: Your Honor, we're uncertain
20 whether Miss Lipinski identified this as being
21 part of the initial packet.

22 MS. LIPINSKI: It would have been part of the
23 initial discovery packet.

24 THE COURT: Don't. Don't. Overruled. It is
25 submitted. Would you have it marked please.

M. Lipinski - Direct by Mr. Brooker

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1 MR. BROOKER: Thank you, Your Honor.

2 (WHEREUPON, Applicant's exhibit number 1 was
3 received in evidence.)

4 Q Still referencing Applicants number 1. I think
5 Applicant's number 1 I think on page two, law enforcement
6 indicated that officers have dealt with Peanut before and
7 knew his real name to be Dennis Watkins. So it suggests
8 that law enforcement, that the -- that the
9 Multi-Jurisdictional Drug Enforcement Unit had a
10 familiarity with Peanut, is that correct?

11 A Yes. Peanut had a record I believe for drugs. I
12 think it was substantially older, but I think he did have
13 a record going back. I also suspect and perhaps recall
14 that at times Peanut had been -- because he sat out front
15 all day and a lot went down on this street that Peanut
16 would occasionally I think be a source of information for
17 law enforcement.

18 Q Okay. This transaction took place on May 3rd and
19 would you agree with me that this transaction involved
20 three people and that is Earnest Jackson involves the
21 individual that we referred to as Peanut and of course the
22 confidential informant, is that correct?

23 A I will acknowledge that Peanut was there. I
24 don't know that the report says that Peanut participated
25 other than beyond the introduction. I don't think the

1 introduction happened on that day. My recollection is
2 that there were conversations or text messages between the
3 two of them that day and it also references an unknown
4 male which would have Earnest's source for the narcotics
5 who drove up and brought Earnest the drugs before Earnest
6 goes back into the shed and does the buy with the C.I.

7 Q Now, roughly -- that was on May 3rd and roughly
8 17 days later there was a second transaction that is
9 evidenced I think on page two of Applicant's exhibit one,
10 is that correct?

11 A Yes.

12 Q And of course that second transaction was on
13 Friday, May 20th of 2016, 17 days later, is that correct?

14 A Yes.

15 Q And of course is on this transaction it says that
16 the confidential informant met with the officers at a
17 predetermined location and of course is is that was
18 searched and of course the confidential informant was
19 provided funds in which to construct a controlled buy with
20 Earnest again, is that correct?

21 A Yes.

22 Q And of course is on page three it says -- it
23 indicates that -- an indulge me just a second, Your Honor,
24 let me find my location.

25 It indicates -- let's go back to page two. On page

1 two the last paragraph to the bottom -- from the bottom,
2 it says that the C.I. and the YCMDEU agents left the
3 meeting location and drove towards [REDACTED] Chestnut Street.
4 It says the C.I. arrived at the residence and stood
5 outside with Watkins. Watkins is Peanut, is that correct?

6 A Yes.

7 Q Okay. So Peanut is also involved in this
8 controlled drug transaction to some extent. I know that
9 you don't know to what extent but of course he has
10 mentioned as being present.

11 A He is there that day. He is not in the shed, but
12 he is there that day.

13 Q He is present that day when the drug transaction
14 took place?

15 A Yes, he is there. He does not go out back into
16 the shed where you kind of get the dope for money exchange
17 going on. That's always Earnest. So it doesn't happen in
18 front of Peanut. I don't believe there ever being, hey,
19 I'm here to buy and an eight ball from Earnest. Sometimes
20 it might have been I'm here waiting. You can't always
21 hear the conversation. It's hard to understand Peanut and
22 what he's saying some times. So, yes, Peanut is there
23 because he's there every day, but is he an active
24 participate in the drug sale that I don't recall.

25 Q Did you talk with Earnest in reference to what

1 role Peanut played in the drug transaction on May 20,
2 2016?

3 A Yes. He was always upset that Peanut hadn't been
4 charged. There was some concern that Peanut had set him
5 up. He would raise the issue about why wasn't Peanut
6 charged and my answer to that was even if they charged
7 Peanut that's not going exonerate you because you're the
8 one who always passes the drugs for the money because you
9 were the one that has the text messages back and forth
10 with the C.I. on. There case is stronger against you.
11 Bringing Peanut into the fold would not exonerate you.

12 Q I understand that, but of course his testimony to
13 you was or at least his statement to you during your
14 conversations was is that Peanut had knowledge of these
15 drug transactions and that he told you that Peanut was a
16 participate in those drug transactions.

17 A I don't recall him saying Peanut was a
18 participate. He was just like why wasn't Peanut charged.
19 Peanut is there. Because the background is that he always
20 thought whether true or not, Earnest always believed this
21 was a set up. That he had been a suspect in a murder
22 early on in his life. He had been charged with that
23 murder. That they have been trying to get him for years
24 unsuccessfully and so that's why they went to some
25 extraordinary length and he had been set up. So it came

1 up in reference to that as to whether or not Peanut
2 participates in this set up. Why wasn't Peanut charged?
3 I think he was suspicious that Peanut had set him up and
4 wanted me to kind of flush that out which I was never able
5 to do and I said I don't know why they didn't and even if
6 they do that's not -- under hand of one, hand of all
7 because you're the one in the shed with the dope and the
8 money you're still going to be held accountable. It's not
9 like Peanut is going to come in here and say, I'm the one
10 that went in the shed with Ricky. That's me, not Earnest.
11 You know, don't convict him.

12 Q Okay. And of course I believe is on page two of
13 -- of exhibit, applicant's exhibit 1, is that it goes on
14 to say that after -- that the C.I. and the YCMDEU agents
15 left the meeting location and drove towards [REDACTED] Chestnut
16 Street. Says the C.I. arrived at the residence and stood
17 outside with Watkins. So it indicates that the C.I. and
18 Watkins or Peanut were standing outside, is that correct?

19 A Yes.

20 Q Okay. And it says, after standing around with
21 Watkins for a few minutes Jackson drove up to the
22 residence in a black Nissan. Jackson exits the vehicle
23 and walked to side of the house where the C.I. and Watkins
24 was standing?

25 A Yes.

1 Q And it says that Black, which is your
2 understanding is is Earnest Jackson, is that correct?

3 A Yes.

4 Q Gave the C.I. approximately 3.5 grams of crack
5 cocaine and the C.I. gave Jackson \$180 in government
6 funds, is that correct?

7 A Yes.

8 Q Okay. So, that statement seems to suggest that
9 Peanut was there when the transaction went down?

10 A I think we're making -- Peanut is always at this
11 house. My recollection is that the drug exchange always
12 happens in the shed out back and Peanut never leaves the
13 front yard. There are other people in the front yard as
14 well. Occasionally other guys would walk up. They'd talk
15 to either Peanut. One of the videos there's probably
16 three to five children running around the front yard while
17 they're sitting around talking for a good long while. So,
18 its kind of house people kind of walk by and hang out at.
19 Yes, Peanut is there. Some times -- one time he get there
20 before Peanut is at the front of the house so he's talking
21 to him at the side of the house and he's dusting the chair
22 off or something like that before he goes to the front of
23 the house. But my recollection is all the drug buys
24 happen in the shed and the only people in the shed are
25 Earnest and the C.I.

1 Q And the text messages don't involve Peanut. They
2 only involve Earnest and the C.I..

3 Q And of course the third transaction that is
4 identified in Applicant's exhibit three took place on June
5 2nd of 2016, is that correct?

6 A Yes.

7 Q Okay, and of course I think in that transaction
8 it says that the C.I. met with officers at the
9 predetermined location. Got money and of course
10 eventually left the predetermined location where the C.I.
11 and the combined drug unit met and looks as if he drove
12 over again to [REDACTED] Chestnut Street, is that correct?

13 A Yes.

14 Q And it says that when the C.I. arrived at [REDACTED]
15 Chestnut Street standing outside was Watkins and it says a
16 few minutes later Jackson arrived in a silver Honda. It
17 says Jackson exited the vehicle and walked to Watkins and
18 the C.I.. So again, Watkins was present when the
19 transaction took place between Jackson and the C.I.?

20 A Again, he is there in the front yard. I don't
21 believe that -- I don't know even believe the money
22 exchange happens right there in the front yard. I think
23 they walk to the side of house and then Earnest leaves in
24 the car, or maybe the C.I. walked up to him.

25 I rememberer Earnest pulls up. It was a big buy for

1 them to get clearance to put \$1,100 out there. That was a
2 substantially larger than their normal purchase and so I
3 think they even got DEA or the FBI involved and got even
4 more money cleared for this purchase. And so, my
5 recollection is the C.I. gives Earnest the money. Earnest
6 his girlfriend had drove him there. Earnest leaves. Goes
7 and gets the dope from it somebody else. Earnest comes
8 back after a long time because the C.I. was getting
9 nervous. The DEU was getting impatient. The C.I.'s
10 girlfriend had driven him there. She was getting nervous.
11 So C.I. and Peanut sit around and talk for ever and then
12 eventually Earnest comes back and they either go out back
13 behind the house or again back into the shed and Earnest
14 -- because they weren't going to deal drugs right there in
15 the front yard. They were always going to go off into
16 some more secluded area where they wouldn't be visibly
17 seen from the road.

18 Q And according to the narrative it says that once
19 the C.I. gave Jackson the \$1,100 Jackson left for about 25
20 minutes and of course came back with the drugs.

21 A Yes.

22 Q And then of course provided the drugs to the
23 C.I., is that correct?

24 A Yes.

25 Q Now those three transactions that we just talked

1 about all of those three transactions took place in
2 relatively within a month's period of time, is that
3 correct?

4 A Yes.

5 Q May 3, 2016 to June 2, 2016, is that correct?

6 A Yes.

7 Q And of course is that the place where those three
8 transactions took place, all of those transactions took
9 place at the same -- took place at the same location?
10 That would have been [REDACTED] Chestnut Street, is that correct?

11 A All three of the drug buys happened at that
12 location. The summary also details that after the third
13 buy, the June 2nd buy, Earnest leaves with his girlfriend.
14 There's a traffic stop a short distance away. At the
15 traffic stop they find approximately another ten to 14
16 grams in the car. That they interview Earnest and his
17 girlfriend who is also in the car that day. That either
18 they get a search warrant or they consent to search her
19 apartment where she stated that Earnest stayed with her
20 off and on and when they go to the apartment more drugs
21 are found at the apartment I believe in a man's shoe. So
22 at the trial for whatever reason the State jettison the
23 drugs found at the apartment. I can't remember if the guy
24 who did the search warrant or did the consent to search
25 that FBI agent wasn't available, but for some reason they

1 weren't going forward on the apartment drugs and so the
2 trial also involved the drug stop or the traffic stop a
3 short distance away where they found more drugs on
4 Earnest.

5 Q Okay.

6 A So that's why there's a multitude of charges for
7 June second. That's why you see that. That's more than
8 just a distribution or that kind of thing.

9 Q Yeah, I understand. I understand that. But of
10 course is he only plead guilty to the trafficking -- he
11 only plead guilty to the trafficking, is that correct? On
12 that trafficking charge that took place as a result of the
13 drugs that they got off of -- that he gave to the C.I. and
14 also the drugs that they discovered in the car and of
15 course there's the apartment after he was apprehended
16 shortly after the drug transaction on June second, is that
17 correct?

18 A I remember at trial he wasn't found guilty of
19 either everything or they found him guilty of only half
20 the drugs. So they had stacked the dope from the buy and
21 the dope in the car to get over 28 grams and so the jury
22 came back I think with the lesser level of trafficking or
23 only convicted -- or not convicted him of the
24 distribution, but convicted him -- I can't remember. It
25 was kind of one of those things where they kind of split

1 the baby because there was so many issues with the C.I.
2 and then he would have plead to -- I think the dope buy on
3 the one -- I'm sorry. I'm getting them all confused. He
4 plead to the dope by on the third. I think the video on
5 the third was better. The video on the 20th, so the
6 intervening one is not quite as good. You don't see
7 Earnest's face that well for that often. He's wearing
8 similar clothes or similar shoes, but I think the State
9 believed they had a stronger case on one. So two of the
10 three of videos were really good. The one where he sits
11 out there with him for 45 minutes it's very clear he was
12 involved. And then one is kind of very short and the
13 angles aren't that great, but you do see dope and money in
14 the shed and you can tell it's Earnest and Ricky in the
15 shed. So I think they dismissed one and he plead to the
16 other.

17 Q I understand. Now I think we establish the fact
18 that all three of these transactions occurred within
19 thirty days?

20 A Yes.

21 Q I think we established that. Do we agree on
22 that?

23 A Yes.

24 Q And of course we agree that all three of the
25 transactions took place at [REDACTED] Chestnut Street?

1 A Yes.

2 Q Okay. And of course is we agree -- and I know
3 that obviously there is some contention with respect to
4 Peanut or Watkins's involvement, but we agree that at all
5 three of those transactions at some point in time is that
6 Jackson was present, that Peanut was present and also the
7 C.I. was present, is that correct?

8 A Yes, and other people were present.

9 Q Okay. And of course is would we also agree is
10 that at all three of those transactions the conduct was
11 very similar at all three transactions and that is that
12 the C.I. -- the C.I. would present to [REDACTED] Chestnut. The
13 C.I. would purchase a quantity -- would drive there to
14 [REDACTED]. The C.I. would meet Jackson at [REDACTED] Chestnut and of
15 course the C.I. would then purchase a quantity of crack
16 cocaine at [REDACTED] Chestnut before departing, is that correct?
17 That's pretty much how it appeared in all three
18 transactions?

19 MR. NEUBAUER: Objection. Compound question
20 and additionally this question is bordering on
21 testimony by Mr. Brooker himself.

22 THE COURT: Overruled. Go ahead.

23 Q Did you agree that pretty much that these
24 transactions, all three transactions occurred very
25 similarly?

1 A Yes.

2 Q Okay. And of course is would you also agree is
3 -- is that Mr. Jackson was convicted -- was convicted at
4 trial for the June 2, 2016 drug trafficking transaction,
5 is that correct?

6 A Yes.

7 Q And of course the charge was drug trafficking, is
8 that correct?

9 A Yes.

10 Q And of course is that for the May 3, 2016 conduct
11 he was also charged with drug trafficking for that, is
12 that correct?

13 A Yes.

14 Q So for each one of these -- each one of these
15 events he was charged with the exact same thing and that's
16 trafficking in drugs, is that correct?

17 A I think the 20th event just involved
18 distributions because it didn't involve the requisite
19 weight, but yes, they all involved drug buys.

20 Q They all involved drug buys and all -- and all
21 resulted -- all resulted in charges under the same
22 statute, the drug trafficking statute, is that correct?

23 A Yes. Yes.

24 Q Okay. All right. Now, I know -- I may have
25 asked you this before I think is when we were having our

1 motion is -- is -- are you familiar with State versus
2 Amerson?

3 A Not off the top of my head.

4 Q That's fine. That's fine. Are you familiar with
5 the fact is that -- that there is a law out there that
6 basically says -- that basically says that some times when
7 a defendant is involved in multiple transactions that the
8 Court has an established a five-prong test in determining
9 whether or not those two transactions are actually two
10 separate conspiracies or either a single conspiracy? Are
11 you aware of the fact that there is five-prong test that
12 -- that South Carolina has adopted in determining whether
13 or not you're dealing with a single conspiracy or two
14 separate conspiracies chargeable separately?

15 A I'm aware of the test on whether or not you can
16 charge separate incidents together.

17 Q And of course is -- if I can hand you a copy of
18 State versus Amerson, Your Honor so you can take a look at
19 if it's okay and I will hand one to everyone. (Handed)

20 What I just handed to you, Miss Lipinski, is State
21 versus Amerson, which a 1992 Supreme Court case. I'm
22 going to flip to the second page. This is the fourth
23 paragraph. The last paragraph on the second page and
24 course it says -- and if you can take a look at it and
25 make sure that I'm reading this correctly. And of course

1 is to make sure that this is also your understanding of
2 the law. It says generally the agreement which is the
3 essence of the conspiracy is proven by various overt acts
4 committed in furtherance of conspiracy. And it says
5 therefore, a single conspiracy may be established by
6 completely different aggregations of proof so that there
7 appears to be several conspiracies. And of course there's
8 a citation. I'll admit that. And it says accordingly, a
9 multiple prong flexible totality of the circumstances test
10 is applied to determine whether there are two conspiracies
11 or merely one. Am I reading correctly?

12 A I haven't got that far yet.

13 Q I'm on the second page. I apologize. Where is
14 says generally, this is the fourth paragraph down on the
15 second page where it says generally the agreement --

16 A Okay.

17 Q Okay. It says accordingly a multiple prong
18 flexible totality of the circumstances test was applied to
19 determine whether there were two conspiracy or merely one
20 and it said the factors considered are it says the time
21 period covered by the alleged conspiracies and of course
22 in this particular situation the time period alleged by
23 the two I guess what is alleged to be conspiracies
24 involving Earnest was I think the first one was May 3,
25 2016, is that correct? And the second one was June 6th?

1 The last one was -- excuse me, June 2nd of 2016, is that
2 correct? So roughly thirty days is that correct?

3 A Well, other than the fact that they charged him
4 with conspiracy only on the June 2nd event and even that
5 didn't indicated that the conspiracy is with Peanut
6 because that's the one where he went and got dope from
7 somebody else and came back. The allegation here isn't
8 that there was a conspiracy. So, I get it, but that is
9 the breakdown of how they would evaluate.

10 Q Okay, and of course you would agree with me is
11 that sometimes is when you have a criminal defense there
12 maybe unindicted co-conspirators?

13 A There are often unindicted co-conspirators.

14 Q So the fact that Peanut was not charged doesn't
15 necessarily meant that Peanut was not a co-conspirator, is
16 that correct?

17 A True.

18 Q And of course it says is that -- but with respect
19 to prong one that deals with the period of time we're
20 talking about a 30 -- roughly a 30 day time period between
21 these two events, is that correct?

22 A Yes.

23 Q And of course is that prong two for consideration
24 says the place where the conspiracies are alleged to have
25 occurred each and every one of those events that occurred

1 within the 30 days I think, the May 3, 2016 event, the May
2 20th event and also the June 2nd event, all of these took
3 place at [REDACTED] -- took place at [REDACTED] Chestnut Street, is that
4 correct?

5 A Yes.

6 Q So, there is commonality at least in the
7 locations where they took place. Okay.

8 A Yes.

9 Q Number three it says, the parties charged as
10 conspirators. So number three at least the third prong
11 deals -- deals with who are the conspirators and would you
12 agree that although Peanut was not charged in each and
13 every one of these events is that the three characters
14 present were always the same; it was Jackson, it was
15 Peanut and it was C.I., is that correct?

16 A Those three are always there, yes.

17 Q Always there during all three of those
18 transactions. And of course there is number four says the
19 overt acts alleged to have been committed in furtherance
20 of the conspiracy or any other descriptions of the
21 offenses charged which indicate the nature and scope of
22 the activities being prosecuted.

23 Would you agree with me is that in each and ever one
24 of these occurrences -- each and every one of these three
25 occurrences that we just discussed that the way in which

1 they were conducted that were relatively similar or almost
2 identical were the where the C.I. would come to [REDACTED]. When
3 the C.I. comes to [REDACTED] is that Peanut -- Peanut and Jackson
4 would be present. The C.I. would purchase from Jackson
5 and then of course the C.I. would then depart and then of
6 course meet up with law enforcement to I guess turn in the
7 drugs that the C.I. had purchased. Pretty much very,
8 very, similar in the way all three of them took place, is
9 that correct.

10 A Also very similar to every drug transaction.
11 Other than the three actors and they all happen at the
12 same place.

13 Q Okay.

14 A And I think, you know, again there's one time
15 where Earnest is already there and there's another time
16 where Earnest comes up and do the dope buy and Earnest
17 leaves and then I think the third time the money is
18 exchanged and then Earnest leaves for a significant amount
19 of time and then Earnest comes back. So, there is some
20 fluctuation and again, there are other people. There's
21 one transaction where there are a number of kids present.
22 There is one transaction where there is another guy around
23 for a little bit. There's another transaction where there
24 is a guy that walks down the street. The last one where
25 they are there separately for a long time. There is some

1 other people in and out. So, there is some some variation
2 but arguably it doesn't effect the drug deal itself and
3 they all tack place in the shed out back.

4 Q And of course is -- and I understand what you're
5 saying is that they are not absolutely identical. They
6 are slight variations but as far as the drug transactions
7 themselves they all were very similar?

8 A They did not use separate C.I.'s. They did not
9 make buys at different locations.

10 Q Okay. And of course that is my next question is
11 the C.I.'s that law enforcement were using the C.I. in
12 each one of these three transactions was the same C.I., is
13 that correct?

14 A Yes.

15 Q And of course the law enforcement agency the
16 multi-jurisdictional of -- the York County
17 Multi-Jurisdictional Drug Enforcement Unit is that all of
18 these operations were controlled by York County
19 Multi-Jurisdictional Drug Enforcement Unit?

20 A I believe they control every drug buy in York
21 County.

22 Q And of course there is number five, the fifth
23 factor to consider is that the substantive statutes -- the
24 substantive statutes alleged to have been violated and of
25 course in this situation is the two statutes in that which

1 he was convicted of for the -- for the May 3, 2016, drug
2 transaction and the June 2, 2016 drug transaction he was
3 charged under the identical statute with the identical
4 penalty, is that correct?

5 A Well, the June 2nd transaction he was charged
6 with 28 to 100, which is slightly different then the 10 to
7 28. They're the same things but they're aggravated
8 penalties for the elevation in dope.

9 Q So the weight is different?

10 A Right.

11 Q But he was charged under the same statute, is
12 that correct?

13 A Yes, but he is also charged with distribution and
14 proximity and various other offenses depending on the day
15 in question, but those are all underneath the drug
16 statutes. One day doesn't involve and armed robbery or
17 burglary or anything like that.

18 MR. BROOKER: If I can approach, Your
19 Honor, for just a second.

20 THE COURT: Yes.

21 Q If you take a look as those and tell me if you're
22 familiar with those.

23 A 1958 is from the May 3rd buy. 1962 is from it
24 the June second event.

25 Q Okay. So 1958 I think you said is from the --

1 A May 3rd buy.

2 Q Is May 3rd buy. 58 is from the May 3rd buy and
3 62 is from the June 2nd buy and the June 2nd buy that is
4 the -- that is the buy in which he was tried in his
5 absence and of course is was found guilty, is that
6 correct?

7 A Yes, but again, I think the weight was based on
8 it being the weight in the car and the weight for the buy.
9 So I think they had a ten gram buy -- or 14 gram buy and
10 then ten in the car and that's how they got to the 28
11 grams. Because I think the jury found him guilty of the
12 lesser included ten to 28 range.

13 Q That's correct. But the -- but the indictment
14 number ending in 1962 that is the indictment in which he
15 was -- in which he was convicted at trial in his absence,
16 is that correct?

17 A Yes.

18 Q And of course that indictment alleges -- alleges
19 a violation of 44-53-375(C), is that correct?

20 A Yes, as does 62.

21 Q As does 62.

22 A As does 58, I apologize.

23 Q And of course 58 -- 58 is for the drug
24 transaction. The indictment ending in 1948 is for the
25 drug transaction that occurred roughly 30 days later on

1 June 30th of 2016, is that correct?

2 A No, he was tried on the last one. He plead to
3 the May 3rd one. So it happened 30 day prior not later.

4 Q Thirty days prior. I apologize. It happened 30
5 days prior, is that correct?

6 A Yes.

7 Q And of course that indictment is that again for
8 violation of 44-53-375(C), is that correct?

9 A Yes.

10 Q Okay.

11 MR. BROOKER: Your Honor, if I could move to
12 enter both of these into evidence as Applicant's
13 two and three.

14 THE COURT: Any objection?

15 MR. NEUBAUER: No objection, Your Honor.

16 They should already be part the record.

17 THE COURT: Right. They're admitted.

18 (WHEREUPON, Applicants exhibits two and three
19 were received in evidence.)

20 Q Now, Miss Lipinski, based upon the factors that
21 we identified, the five factors that -- that South
22 Carolina says that you should consider in making a -- you
23 should consider in making a determination as to whether or
24 not two events -- two events constitute two separate
25 conspiracies, charged separately, or whether or not they

1 consist of one conspiracy with only a single charge, would
2 you agree with me that based upon those five factors is
3 that -- that -- that there was reason to consider -- that
4 this was real reason to consider, whether or not these two
5 events is that whether or not the indictments end 1958 and
6 indictment ending in 1962, there was a reason to believe
7 that those two if events could have constituted one grand
8 conspiracy and should have only been charged as one event
9 as opposed to two separate events.

10 A I did not consider -- I'm not saying that you
11 could not have made that argument, in my opinion because
12 he is charged with trafficking and not conspiracy, in my
13 opinion because there is not any evidence that Peanut is
14 involved in the drug deal in any way other than the
15 initial introduction, in my experience judges at pleas
16 tell defendant routinely you are entitled to a separate
17 trial for every drug buy because that would have also
18 allowed them to stack the drugs for all three buys which
19 would have also have put him over a 100 gram weight. So
20 it might have been one of those thing where you won the
21 battle but lost the war. I did not go there. I did not
22 believe the evidence was there that that would carry the
23 day.

24 Q Did you consider it to be a possibility? I know
25 your saying --

1 A No.

2 Q You never considered it whatsoever?

3 A I mean, it's certainly something we looked at
4 and, you know, Earnest and I discussed it in terms of
5 being the fairness that they go out there and they do
6 three drug buys and they don't arrest him after the first
7 one and you know why are they allowed to stack them and is
8 that really what the legislature evinces, then yes, it was
9 something that was discussed. But it was also discussed
10 in terms of I can't prevent them from doing it. You
11 certainly dealt drugs on three separate days and that I
12 don't know -- you know, that in two of the buys Earnest
13 goes and buy drugs from somebody else. I don't know who
14 that person is. We talked about giving up that person
15 because I think he had briefly talked to FBI about trying
16 to identify his source and either wasn't willing to give
17 him up or couldn't give them up with another information
18 that the FBI was satisfied or DEU was satisfied. So
19 certainly those things were part of it, but did I tell him
20 don't worry they can't try you for three separate events.
21 Go ahead and go to trial. This conspiracy argument is
22 going to save you, no, I never had that discussion.

23 Q Okay. Okay. At any point in time I think after
24 -- and I think you testified is that he was tried in his
25 absence?

1 A Yes.

2 Q For the June 2nd event and then of course there
3 is that after he was captured then of course is that the
4 prosecutor then presented an offer for the -- for the May
5 3, 2016 event. When he was trying to make a decision as
6 to whether or not he would plead guilty to the 17 years
7 and run it concurrent with the concealed sentence that the
8 judge gave him for what he -- for what he received in the
9 trial in his absence, did you ever talk with him about,
10 hey, this may present a double jeopardy issue on the fact
11 that they've already tried you for the June 2nd offense
12 and the June 2nd offense and the May 3rd offense may
13 constitute one single conspiracy.

14 Did you ever thought about talking with him about
15 that, hey, there maybe an argument for double jeopardy?
16 Did you ever talk with him about that?

17 A I remember him and I talking about whether or not
18 it was fair for them to do that. Why they weren't just
19 satisfied with the sentence that they got on on the first
20 trafficking. Whether they had the lawfully authority to
21 try him again because I think he was even -- I don't if
22 the docket had been formerly published or not when he
23 accepted the final deal, nor do I remember you raising
24 that issue when you were part of that and that we did talk
25 about how they could try him successively. Meaning they

1 will get the strike on this one and then they'll come back
2 and double tap you on the other one and whether or not
3 legally that was capable. So yes, those conversations did
4 take place. I do not remember telling him no, let's --
5 because I think to be fair, if that was the case, then I
6 think I could have made double jeopardy argument before he
7 accepted the deal without being on the trial docket. I
8 think that if that was avenue that either you or I thought
9 he should explore then certainly that's an argument I
10 could have made as soon as he was convicted of the first
11 trafficking charge. And so, you know, were those words
12 used? Was this case discussed? Did we discuss that
13 legally they could stack them, yes.

14 Q Did you discuss double jeopardy, the offense of
15 double jeopardy?

16 A I believe so yes, because he felt that it was
17 grossly unfair that they were trying him again and that
18 they weren't satisfied. In my opinion I didn't think that
19 this would prevent them from doing it because I have seen
20 them stack them like that. So I have seen it done before
21 and I certainly knew the State was motivated.

22 Q Did you ask him his opinion with respect to
23 whether or not he wanted to proceed on a double jeopardy
24 defense?

25 A Not a double jeopardy defense, no, but we had

1 several discussions of do you want to go to trial. The
2 C.I. had a host of issues. He was a registered sex
3 offender. He had been on the run for a while. I think
4 even after he testified and they had let him out on bond
5 he picked up more drug charges. So we certainly had the
6 conversation that, you know, the jury had had issues with
7 him in the first trial. This's certainly a chance they
8 would have issues with him again. But the overwhelming
9 concern was that if we didn't prevail and it was a third
10 strike that he was looking at life without parole and
11 unfortunately I think that was something that weighed
12 heavily on his mind.

13 Q I'm almost finished Miss Lipinski.

14 A That's fine.

15 Q But it's also my understanding is had you
16 prevailed on the double jeopardy defense and of course is
17 of those two events that are identified -- that -- that's
18 identified in Indictments I think, Applicant's exhibit
19 three and two, if you had prevailed on that double
20 jeopardy defense is that those two Indictments, those two
21 charges would have constituted one single event and that
22 would simply be a second serious or more serious event and
23 would not trigger this potentially life imprisonment, is
24 that correct? And I know that is assuming. Assuming if
25 you had prevailed on that defense.

1 A Assuming I had prevailed on a double jeopardy
2 defense then -- and I'm just trying to think of the other
3 charges he had outstanding because that's limited to --
4 assuming I had prevailed, I think the other ones are so
5 interconnected they would have come under that number

6 Q Sure. But you would agree with me that it's our
7 job as attorneys to present all options to the client and
8 of course that is so the client can make an intelligent
9 decision with respect to whether or not the client wants
10 to plead or whether or not the client wants to take the
11 risk and of course is that is to proceed to trial?

12 A That was my concern. That's why I brought you
13 up to meet with him because it was very complicated
14 situation in which he found himself. That very rarely are
15 they having been found guilty of one, looking at another
16 trial, concerned whether or not he would waive any
17 collateral challenges he had with a trial, where that put
18 him if he plead. What things he waived if he went ahead
19 and plead guilty, and so, it was somewhat unfair I think
20 in terms of how badly they had cornered Earnest. But I'll
21 also say they offered him largely a global deal to that or
22 maybe less or he would have at least had an argument for
23 lease before he ended up on a trial docket where he would
24 plead to one charge and they dismiss the others and I
25 think the offer I got him was a 10 to 15. They started at

1 20, but I think I got them down a cap of 17 or a cap of 15
2 and he would have had a floor of ten and that was kind of
3 best thing and even that Earnest didn't take.

4 MR. BROOKER: If you can indulge me for a
5 second to make sure I don't have any additional
6 questions.

7 I don't have any further questions, Your
8 Honor.

9 CROSS EXAMINATION

10 BY MR. NEUBAUER:

11 Q Good afternoon Miss Lipinski.

12 A Good afternoon.

13 Q How long have you been practicing criminal law?

14 A Since 1997.

15 Q And what percent of that have been in criminal
16 defense?

17 A All of it.

18 Q And the charges for Earnest Jackson stem from two
19 separate events, correct?

20 A Three total. He was convicted of one, plead to
21 another and they dismissed the third.

22 Q So regarding the event on May 3, 2016 he was
23 arrested for possession of 15 grams of crack cocaine, is
24 that correct?

25 A Trafficking 15. I think ten to 28, but yes, and

1 a distribution charge from May 3rd. So he had a
2 trafficking and distribution charge from May 3rd, a
3 distribution and proximity charge on May 20th and then
4 June 2nd involved a proximity, two trafficking, a
5 distribution within proximity and conspiracy to violate
6 the drug laws.

7 Q Now for the May 3rd event, the 15 grams that he
8 was found with, that alone would have been sufficient to
9 indict him for trafficking crack cocaine, correct?

10 A Yes, anything over ten grams.

11 Q And additionally on June 2nd the amount that he
12 was found with I believe was just under an ounce, correct
13 or in total it ended up being greater than a ounce
14 combining the drugs found within the car?

15 A I think the dope deal was for -- either the deal
16 was for 14 and they found ten -- another 14 in the car.
17 Somehow they split that baby. But I remember the total
18 drug weight of the dope in the car and the dope from the
19 buy was well over 28 grams.

20 Q Now with conversations with Earnest Jackson
21 throughout the time of your representation you discussed
22 any involvement that Peanut had in this matter?

23 A Yes.

24 Q And to your recollection Peanut's involvement was
25 merely limited to being present at the scene, outside of

1 his initial introduction of the confidential informant to
2 Mr. Jackson?

3 A I believe so. We went out and talked to Peanut.
4 My investigator and I did one day. He was not -- just
5 basically didn't want have anything to do with us. I
6 talked to Earnest about whether or not he could get his
7 uncle to come in and testify and fall on the sword for him
8 or anything of that nature. We talked about his role,
9 but, you know, also beyond the initial introduction there
10 was for every drug buy I believe there is text message
11 between Earnest and C.I. saying, I got X amount of dollars
12 today. Can I buy an eight ball from you or can I get this
13 much from you or can you get this much so that I can buy
14 on the third day. So, they're not going through Peanut in
15 any way shape or form. It's not like the C.I. shows up
16 and get Peanut to call Earnest and then Earnest appears
17 and then, you know, Peanut facilitates the deal. Really
18 Peanut just happens to be at the house in the front yard
19 as I believe every day because it didn't take to find him
20 he just sits out there every day. But I also think there
21 was some -- I think they Earnest and the C.I. knew each
22 other not just that well. I think Peanut may have vouched
23 for the C.I. or something like that but that's about it.

24 Q So there was independent text messages between
25 the confidential informant and Earnest Jackson arranging

1 these drug buys, correct?

2 A Yes.

3 Q And the buys happened on three distinctly
4 different days though during the course of a month?

5 A Yes.

6 Q And the two buys that Earnest Jackson was in
7 indicted for trafficking on, both of those independently
8 had a sufficient weight to charge him for trafficking
9 cocaine or crack cocaine?

10 A The May 20th buy did not involve trafficking, but
11 the one he got convicted on at trial and the one he plead
12 to were both for over trafficking level weight.

13 Q And the conspiracy charge indictment ending in --

14 A 1962.

15 Q Yes, ma'am. That was dropped prior to trial,
16 correct?

17 A I think the State elected not to go forward on
18 that. Just as they elected not to go forward on -- he had
19 two trafficking charges from that day. I think one
20 stemmed from the drugs found in the apartment and the
21 State elected not to go forward on that charge as well.

22 Q And are you aware if the evidence from the drugs
23 buys on June 2nd and May 3rd both came from the same
24 person being Earnest Jackson?

25 A Yes.

1 Q And did Mr. Jackson ever explain his theory of
2 the facts of the events that lead to his arrest?

3 A Certainly it's something we discussed in terms of
4 -- you know, why he was involved in selling drugs. You
5 know, I don't remember him being very interested in
6 throwing Peanut under the bus, so to speak, although as I
7 stated he had mixed feelings and I think there was a part
8 of him that suspected Peanut as having been one of the
9 ones that set him up. But, also times in terms of asking
10 him to bring Peanut in to talk to us to help exonerate him
11 or help get him off he never really pursued that either.

12 The only person we ever met with was Earnest. As a
13 matter of fact on multiple occasions we asked Earnest to
14 bring someone with him, a family member, which we often
15 do. Earnest would talk about he talked to certain people
16 and they couldn't do this to him and that he wanted to go
17 and retain private counsel and encouraged him to do that
18 as I encourage any of my clients as a public defender. If
19 you want to go retain someone go ahead. I would even tell
20 them you can probably get a free consultation at least let
21 them look at it and I think I had, you know, a
22 relationship with any number of the heavy hitters in the
23 criminal defense bar that if my clients wanted to go for
24 them and just pay for a second opinion, you know, I would
25 call and tell them what the evidence is and have no

1 problem. As long as the client was okay with it with kind
2 of handicapping the case for them. And you know, those
3 were all things just as I did with Mr. Brooker. We talked
4 about what evidence they had against Earnest and how the
5 trial would go and problems with the C.I. which there were
6 more than any C.I. I have ever seen. So certainly that
7 was all done.

8 Q And you discussed the possible defenses, possible
9 issues being issues regarding the C.I.?

10 A At length.

11 Q And all possibly issues could have been presented
12 at a pretrial motion or during the trial, correct?

13 A I think if the trial transcript was reviewed you
14 could see that I exhausted every avenue to attack the
15 credibility of the C.I.

16 Q And regarding the charges, you as defense
17 attorney you you have no control over who is charged,
18 correct?

19 A No. Nor do I get to hand pick what charges the
20 State elects to bring against my client. I don't know if
21 I could have forced them into an a conspiracy theory if it
22 I wanted to.

23 Q Now, your conversation or brief conversations
24 with Peanut, was there anything that came to light that
25 made you believe he had any knowledge of what was

1 happening between the confidential informant and Earnest
2 Jackson?

3 A I certainly think he knew that Earnest was
4 selling dope at the time, but his attitude was I don't
5 want to get involved in that. I don't want to talk about
6 that. He was concerned about Earnest. He would talk to
7 you about, you know, is he in trouble, but in terms of
8 trying to pin him down on you were involved in this or did
9 you know how much this was for? His attitude was. I
10 don't want to be involved in that because I think he was
11 afraid of getting charged.

12 Q And they needed to be a conspiracy charge of
13 Earnest of trafficking crack cocaine, correct?

14 A No, while it's part of the statute and certainly
15 the language in the Indictment involves the word conspire
16 you can't traffic all on his own.

17 Q However, the statute also indicates that he
18 knowingly sold, manufacturer, delivered, purchase, or
19 brought into the State or did provide assistance to aid,
20 abet or conspire to knowingly act or constructively
21 possess ten grams or more of crack cocaine, correct?

22 A Yes. The State has a wide net that they can cast
23 but you can also be a solo actor.

24 Q Now, regarding Thurman Brooker he was involved in
25 a few discussions between you Earnest Jackson, correct?

1 A We had at least two contact visit wither Earnest
2 meaning we went down to the jail and met with him.
3 Currently in York County if I would just go meet Earnest
4 on a random day it would be through a window over the
5 phone but you can request what's called a contact visit
6 which is in a small conference in a booking area where you
7 can have multiple people part of it.

8 The problem with the phone conversation is only the
9 person on the phone can hear what the other person is
10 saying and it's hard to talk to clients through the phone
11 and the glass. It's just as we figured out plexi-glass
12 can be a barrier and you add a phone and double thick
13 glass and the jail and those situations it's just always
14 in my opinion a difficult situation. And so, we arranged
15 two visits. I think one on the day of the sealed sentence
16 and because Mr. Brooker who is not from here was going to
17 be in town and then I think we arranged a separate one and
18 like I said, I think Mr. Brooker came up a third time to
19 talk to Earnest on his own without me.

20 Q And you stated that you had discussions with Mr.
21 Jackson regarding possible issues of the confidential
22 informant or any other possible defenses. Was Mr. Brooker
23 involved in any of these conversations?

24 A Yes. I mean when the contact visits were in the
25 jail we talked about there was some concern because the

1 C.I. was out on bond.' They had trouble finding him for
2 first trial and we more or less had to wait until he I
3 think got picked up on other charges in another county and
4 then became a captive audience but for a while the delay
5 in Earnest going to trial was that they couldn't put this
6 hands on the C.I. and then eventually they found the C.I.
7 again and he testified. But then my recollection is he
8 either he got into more trouble before the trial or right
9 after the trial. He was found with the same level weight
10 dope. He was registered sex offender. He had a whole hot
11 mess of issues. So certainly challenging the credibility
12 of that C.I. was always probably Earnest's best effort or
13 best argument at trying to dodge the charges.

14 Q And you had a conversations with Mr. Jackson
15 regarding his prior strikes on his record and the fact
16 that he could be facing a potential for life without
17 parole if he were sentenced to a third strike?

18 A So on on May 30th, which this isn't date, but it
19 was long before the trial. I had a meeting with Earnest
20 Jackson in which I told him exactly what he was facing a
21 total of 145 years and also told him if convicted of two
22 separate offenses he faced the possibility of life without
23 parole and at that time the offer was 20 years although it
24 went below that. At some point after this meeting I asked
25 Earnest to sign it. Earnest told me he wouldn't sign it,

1 but I did note on the form that Barton Kelly my
2 investigator was present. Witnessed Earnest not doing --
3 refusing to sign it but also witnessed to that
4 conversation wherein I outlined that and then also at the
5 time of the plea, we did a plea waiver form wherein he
6 understood the strike situation and what he was facing.

7 Q And was Thurmond Brooker involved in any of the
8 conversations regarding the three strikes?

9 A Yes, because I mean, that was what Earnest was
10 really grappling with, was do I get Mr. Brooker to do the
11 appeal. He really wanted I think or envisioned was, that
12 he would be able to appeal the trial conviction and if
13 that got overturned then they didn't have as many bites at
14 the apple and he would be in a better situation and what
15 we explained to him was that you can't force the appeal
16 process to go through before the State proceeds on the
17 next trial and given that, begin that the fact that he was
18 exposed to life without parole unfortunately that was kind
19 of predicament in which he found himself. So that was
20 very much a part the discussion with Mr. Brooker and Mr.
21 Jackson and myself.

22 Q And you were aware of a few independent
23 conversations that Thurmond Brooker had with Earnest
24 Jackson himself regarding this action, correct?

25 A Like I said, I think there was one time that I

1 facilitated getting Mr. Brooker his own meeting with Mr.
2 Jackson. And I know at times when I went down to talk to
3 Earnest on the phone he would reference having talked to
4 Mr. Brooker on the phone. I remember on day of the plea
5 making sure that Earnest was clear to go forward. That he
6 didn't need any additional time to talk to me or Mr.
7 Brooker before he made that decision.

8 Q And can you recall any of the information that
9 Earnest Jackson said was discussed during his
10 conversations with Thurmond Brooker that were then brought
11 -- or that he then discussed with you?

12 A I think it was just that -- you know, Mr. Brooker
13 had had advised him somewhat similar that he didn't have
14 the -- he couldn't force them to kind of explore the
15 appeal. We couldn't stave off the trial of the second
16 offense that he was going to get caught and he was going
17 to be the one that was going to be left holding the bag.
18 So, I remember about the nature of that. I remember
19 asking Earnest whether or not Mr. Brooker wanted to com up
20 and put anything on the record at the time of the plea
21 because I thought if this was something in terms of the
22 record being preserved that I hadn't thought of or that
23 was his strategy going forward to collaterally attack the
24 trial or the plea I wanted to give them the opportunity to
25 do that.

1 Q And in describing where the drug buys took place
2 you stated that in two of the videos they occurred in a
3 shed behind the house on Chestnut Street, correct?

4 A My recollection is that all three happened in the
5 shed. One of them may have just been out back, but they
6 always go away from the front yard. My recollection is
7 that they go back into the shed. I did not look at all
8 three videos right before today, but they always would go
9 into the shed because I think either the grandmother or
10 aunt, whoever owned the house I remember was a maternal
11 relative. They did not tolerate this. So they did not
12 want her seeing them out front, out back, outside doing
13 anything and I remember the shed just being -- you know
14 you could tell you were in a shed. It would get darker
15 when they would go in there. The circumstances would be
16 tighter. That type of thing. So my recollection was that
17 in all three occasions they went back there. One of them
18 they may have just kind of made it to the back corner, but
19 that was about it.

20 Q In the videos outlying the drug buys, was Peanut
21 or any other third party involved once they would leave
22 the front yard?

23 A No.

24 Q So, it was solely Earnest Jackson and the
25 confidential informant?

1 A Whenever the dope and money is exchanged no one
2 else is ever around.

3 Q And the drug buys themselves were communicated
4 via text message between Earnest Jackson and confidential
5 informant?

6 A Yes.

7 MR. NEUBAUER: Beg the Court's indulgence.

8 Q Now, in the York County drug enforcement report
9 it states that it Peanut facilitated the introduction
10 between Earnest Jackson and the confidential informant.
11 Is there any evidence indicating when Peanut kind of
12 connected those two individuals?

13 A No. I mean, the report starts off that it all
14 happens on Tuesday May 3rd, so it starts off like that,
15 but I don't remember there being anything in terms of
16 watching the video where you see Peanut introduce him to
17 Earnest Jackson and my recollection is that deal was
18 already set up which is somewhat substantiated where it
19 says that the C.I. arrives at -- left the meeting
20 location. Arrives at Chestnut Street. Sat around outside
21 with both Watkins and Earnest. It says Black but it
22 Earnest. They were sitting there for a short while. An
23 unknown male arrives. My recollection is he pulls up in a
24 car. You see Earnest go out. Kind of gets something from
25 the guy in the car then Earnest comes back, walks towards

1 the back of the house where the shed is and the C.I. walks
2 out back with him and then they do the dope for money.
3 They don't really show the C.I. videos until you end up on
4 the trial docket. So, for a long time that was one of
5 Earnest's issues is that he couldn't view the videos. And
6 I think at one point Mr. Hogge had provided screen shots
7 where you could clearly see Earnest's face or Earnest's
8 clothes. You could see the dope. You can see the money.

9 It's kind of a tactic that the solicitor's office
10 employs up here. We got screen shots before we actually
11 got videos and at some point the deal was pulled. The
12 videos are provided and that we able to look at them more.
13 I think Earnest had seen the videos. Knew he was on the
14 trial docket and then after that we didn't see Earnest
15 again.

16 Q And just to clarify further, Peanut introduced
17 Earnest and the confidential informant and you testified
18 that I believe that they knew each other. They just
19 wasn't incredibly familiar with each other.

20 Did you ever uncover any evidence to suggest that
21 Peanut introduced those two parties for the purpose of
22 facilitating a drug deal?

23 A As I said, the C.I. had more or less had grown up
24 either next door or a couple houses down from this
25 maternal relative. Like his grandmother lived here

1 because some times he would talk about going down to see
2 her or what was going on with people in his family. You
3 know, that kind of thing. And so these two families had
4 always known each other. I just don't know that Earnest
5 trusted the C.I. well enough. I think he knew Peanut more
6 because Peanut was always out front and if you were
7 outside in that neighborhood you talked to Peanut.

8 Q And you indicated Peanut was there regularly.
9 Would Peanut have been there on instances where a drug
10 sale did not occur?

11 A My experience is Peanut is there every day.

12 Q So there's no special coincidence that Peanut and
13 the C.I. and Earnest Jackson are all present at this
14 location for the purpose of a drug deal?

15 A To the best of my knowledge I think Peanut lived
16 there.

17 MR. NEUBAUER: Beg the Court's indulgence.

18 Q And you conveyed all possible plea negotiations
19 to Earnest Jackson leading up to his eventually plea,
20 correct?

21 A Yes.

22 Q And what was his opinion regarding taking a plea
23 throughout your discussions with him?

24 A That he was being railroaded and set up based on
25 what they believe he committed earlier in his life and

1 that it wasn't right. That seemed to be something for
2 which he was preoccupied.

3 Q And did Earnest have an opportunity to discuss
4 plea offers with family or advisors prior to accepting the
5 plea?

6 A Yes, we asked him to bring family in and I know
7 at least one occasion I spoke with his Winthrop advisor --
8 I'll call him -- trying to help them understand what
9 Earnest was facing and where he found himself. Because
10 that was always the thing is, he wasn't going to dodge
11 three bullets. They had three buys. Even if he beat one
12 buy they would try him again. Sooner or later they were
13 going to get him and really if they got him for the 28 to
14 the 100 gram level weight that plus the prox charge he
15 might not get life, but he was probably going to get such
16 a substantial sentence that there wasn't a whole lot of of
17 difference. But it was always trying to get him at a
18 number that I thought achievable somewhere between 10 and
19 15 and that's kind of where we tried to get Earnest to end
20 up.

21 Q And going back to Earnest's prior conviction
22 which happened in the months prior to his plea, that
23 conviction was for the substantive offense of trafficking
24 based on the weight of the drugs as opposed to a
25 conspiracy to traffic crack cocaine, correct?

1 A Yes, it wasn't like somebody else who also bought
2 from the C.I. had a different amount of drugs and they
3 were aggregating. You know, that they stopped the guy who
4 brought Earnest the drugs in the car and they were
5 stacking those two levels of drug. The drugs always went
6 through Earnest's hands.

7 Q And ultimately did you feel that accepting a plea
8 in this matter was in Earnest's best interest?

9 A Yes.

10 Q And what was the reasoning behind that?

11 A Because I think he had been set up and I think
12 that they had unfortunately for him they had three very
13 good or at least two out of three very good drug videos.
14 They were extraordinarily long in length where you could
15 clearly see Earnest, where you could clearly see the dope
16 and you could clearly see the money and unfortunately that
17 trifecta is most often successful at court and because of
18 the amount of time involved and because I think it would
19 have been a shame for Earnest to go to jail for life over
20 this that I think anything south of 15 was a win.

21 Q And just briefly, have you handled trafficking
22 offenses in the past before Earnest Jackson?

23 A Yes.

24 Q And have you encountered a case where someone is
25 in indicted multiple times for trafficking for separate

1 purchases all meeting the substantive weight?

2 A Yes. I mean, more often then not we get two or
3 three drug buys followed a a search warrant where when
4 they execute the search warrant you have trafficking level
5 weight, but it was very rare for the York County DEU to do
6 less than two. Sometimes even more than three deals.
7 Often times they knew because either the C.I. was fragile,
8 meaning they had their own dope problem or their own
9 charges, or you never knew what kind of video you end up.
10 Sometimes they don't show the drugs. They don't show the
11 money. Sometimes the C.I. has ghosted them by the time
12 they get to trial.

13 There preference was two or three buys. Set up a
14 search warrant because a search warrant was always cleaner
15 and then try even jettison the buy. So it is for lack of
16 a better term standard operating procedure in York County.

17 MR. NEUBAUER: Beg's the Court's indulgence.

18 Q So based on the particular set of fact from this
19 situation, was there an anything to make you perceive a
20 possible double jeopardy issue?

21 A In my opinion there wasn't enough there to
22 implicate Peanut in any way that was useful to Earnest.
23 Whether it was by way of conspiracy or by way of shifting
24 the blame on the Peanut or anything in that regard. I
25 think had there been more, had when he showed up he asked

1 Peanut for Earnest and then Earnest materialized. Had
2 there not been the text messages. Had Peanut been present
3 in the shed. Had there been buys with Peanut instead of
4 Earnest. Any of those factors might have weighed
5 differently. But in that, it seemed to be an exclusively
6 business relationship between Earnest and the C.I. and I
7 think the State would have had in fact inopposite problems
8 tying to stack these charges.

9 I believe I think we even tried to make some argument
10 at trial that they couldn't stack the dope in the car to
11 the drug buy and I lost on that regard. So even that I
12 try to jettison un successfully.

13 MR. NEUBAUER: No further questions at this
14 point we request the right to call Miss Lipinski
15 during the the State's case.

16 THE COURT: Say that again please.

17 MR. NEUBAUER: We request the right to recall
18 Miss Lipinski during the State's case if
19 necessary.

20 THE COURT: Okay, any redirect.

21 MR. BROOKER: No redirect, Your Honor.

22 THE COURT: Miss Lipinski if you don't mind
23 please don't leave yet. I'll ask the State a
24 question or for both attorneys please.

25 Looking at Applicant's exhibit one on the

1 first page. There has been this questioning as
2 to whether or not Watkins is part of the
3 conspiracy, but it looks to me where they list
4 the charges they list Watkins there as
5 potentially picking up two trafficking and
6 distribution of crack proximity to a school or
7 park. So law enforcement was in fact looking to
8 him as a conspirator. Does that not indicate
9 that on that report? Do you see what I'm talking
10 about?

11 MR. NEUBAUER: Yes, I see what it indicates
12 on the first page, however reading through there
13 is nothing in there to indicate that Watkins had
14 any direct involvement with the trafficking with
15 the sales, with the actual exchange of drugs for
16 money.

17 THE COURT: I agree with the exchange, but I
18 don't agree with you on the involvement. That
19 may be a little too broad anyway.

20 Let me ask Mr. Brooker a question if I may.

21 MR. BROOKER: Certainly.

22 THE COURT: If you were successful in your
23 application wouldn't Mr. Jackson be back in the
24 place he was in before he plead in front of Judge
25 Dickson? In other words, he would be looking at

1 over a hundred years, LWOP, if you are
2 unsuccessful on Anderson and double jeopardy
3 argument,

4 MR. BROOKER: I don't believe he would, Your
5 Honor.

6 THE COURT: How would he not?

7 MR. BROOKER: Your Honor, I think if he is
8 successful on this double jeopardy arguments.

9 THE COURT: No, if he's unsuccessful.

10 MR. BROOKER: Unsuccessful.

11 THE COURT: If he's unsuccessful in
12 subsequent Anderson and double jeopardy argument,
13 would he not at that point be looking at in
14 excess of a 100 and LWOP?

15 MR. BROOKER: Yes, Your Honor, he would.

16 THE COURT: Okay. I just want to make sure
17 he understands the consequences of a successful
18 application, that he is looking as potentially
19 back in the same boat he was before.

20 Just wanted to make sure we are clear on the
21 record.

22 Let's take about an a five minute break and
23 we'll the State --

24 MR. BROOKER: I have another witness we could
25 call.

1 THE COURT: You have another witness?

2 MR. BROOKER: Mr. Jackson.

3 THE COURT: Let's take five minutes break
4 anyway. I didn't mean to cut you off.

5 MR. BROOKER: That's fine. We will be quick
6 with Mr. Jackson.

7 (WHEREUPON, there was a brief recess.)

8 THE COURT: All right. You may call your
9 next witness.

10 MR. BROOKER: Thank you, Your Honor. We
11 would call Earnest Jackson.

12 THE COURT: Come around please sir.

13 EARNEST FLOYD JACKSON, III, called as a
14 witness, having been duly sworn by the clerk, was
15 examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. BROOKER:

18 Q Mr. Jackson, you were represented by Miss
19 Lipinski I think in connection with I think drug
20 transactions take occurred -- three drug transactions that
21 occurred between May 3rd of 2016 through June 2nd of 2016?

22 A Yes.

23 Q Okay, and in those three drug transactions that
24 occurred over that roughly 30-day period of time span is I
25 think you were in the courtroom when we talked about I

1 think Peanut?

2 A Yes.

3 Q Okay, and who is Peanut?

4 A He's my uncle.

5 Q He is your uncle?

6 A Yes.

7 Q And of course is I think also there was testimony
8 in reference to an address, [REDACTED] -- my memory is so bad.

9 Excuse me Your Honor. That's [REDACTED] Chestnut Street?

10 A Yes.

11 Q Who lived at [REDACTED] Chestnut Street?

12 A Peanut, which is Dennis Watkins, me. I live
13 there at [REDACTED] Chestnut. My grandma lived there.

14 Q Okay. Let's talk about that first transaction.
15 The one that occurred on May 3rd of 2016. Did you engage
16 in a drug transaction with a confidential informant?

17 A Peanut had called me and that's how I engaged in
18 the whole situation. The whole transaction.

19 Q Did you know the confidential informant?

20 A No, I did not know the confidential informant.

21 Q Okay. Okay. And how did you first engaged with
22 the confidential informant?

23 A My uncle, Peanut, he had called me and when he
24 called me he told me to come over with the amount.

25 MR. NEUBAUER: Objection. Hearsay.

1 THE COURT: Sustained.

2 Q Don't tell us what Peanut said.

3 A Okay.

4 Q Don't tell us what Peanut said. Let me just ask
5 you this question, was Peanut present when you engaged in
6 that drug transaction on May 3rd of 2016?

7 A Yes.

8 Q Did you talk with -- and don't tell me what
9 Peanut said. You can tell me what you said.

10 A Okay.

11 Q Did you talk with Peanut about that drug
12 transaction?

13 A Yes.

14 Q Okay.

15 MR. NEUBAUER: Your Honor, if I may briefly
16 interject, and I'm sorry to interrupt you during
17 the flow of your examination.

18 The State would request that Earnest waive on
19 the record, waive any ineffective assistance of
20 counsel that he may have against Thurmond Brooker
21 due to the sort of dual representation that he
22 received leading up to his plea.

23 THE COURT: Say that again please.

24 MR. NEUBAUER: We would request that Earnest
25 Jackson waived any potential allegations of

E Jackson - Direct by Mr. Brooker

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1 ineffective assistance of counsel.

2 THE COURT: Let's not deal with that now.

3 Remind me, we will cover that later. Okay.

4 MR. NEUBAUER: Yes, sir.

5 THE COURT: Thank you.

6 Q Did you discuss wither Earnest Jackson about the
7 drug transaction to occur with the C.I. on May 3, 2016?

8 A Yes.

9 Q Tell me what did you tell him about that drug
10 transaction when you were introduced to the confidential
11 informant

12 A What did -- can you say that again.

13 Q Can you tell me what you discussed with Peanut --
14 don't tell me what Peanut said. That will be hearsay.
15 But you can tell me what you told Peanut about that drug
16 transaction. What did you tell many Peanut about that?

17 A I told Peanut that I would come over and --

18 THE COURT: Would you speak up please sir.

19 A I told Peanut that I would come over and deliver
20 what he asked for.

21 Q Did Peanut knew -- to your knowledge did Peanut
22 knew that you were dealing drugs?

23 A Yes.

24 Q And of course what sort of drugs were to be
25 exchanged that day?

1 A Crack cocaine.

2 Q Had you ever dealt with crack cocaine in the
3 presence of Peanut before?

4 A Yes.

5 Q So on May 3rd of 2016 is it your testimony that
6 Peanut was present and Peanut was aware of the fact that
7 was a drug transaction with the C.I.?

8 A Yes.

9 MR. NEUBAUER: Objection, Your Honor there is
10 no -- it's speculating to know Peanut was aware
11 of what was happening.

12 THE COURT: Lay some foundation for that
13 please.

14 MR. BROOKER: I think, Your Honor, the
15 foundation was --

16 Q Did Peanut witness the transaction?

17 A Yes.

18 Q Did Peanut actually see the drugs?

19 A Yes.

20 Q So, and of course did Peanut see you make the
21 transaction of exchange between -- when I say see, did he
22 physically see you make a transaction of crack cocaine for
23 money?

24 A Yes.

25 Q Now, you can tell me whether or not did Peanut

1 ever receive any money for any of these drug transactions?
2 Was he part of receiving any money? Did you ever give him
3 any money? I think you said he introduced the C.I. to
4 you. Did you give him any for that.

5 A Yes, I always give him money when he do something
6 like that.

7 Q Okay, and how much money -- I don't know if you
8 specifically remember how much money you gave him during
9 that occasion? Do you remember how much money you gave
10 him during that May 3, 2016 occasion?

11 A I don't remember how much, but I would give him
12 money every time he do something like that I always give
13 him money.

14 Q Do you know what you typically would give him?

15 A I would typically five him about \$50. Something
16 around that amount.

17 Q Okay. Now, did you have a conversation with Miss
18 Lipinski? I know that you were in the courtroom when Miss
19 Lipinski testified, is that correct? Were you in the
20 courtroom when Miss Lipinski testified.

21 A At trial?

22 Q No. No, here just a minute ago?

23 A Oh, yes.

24 Q Okay. And of course is I think Miss Lipinski
25 testified that you constantly complained to her about why

1 wasn't Peanut charged, is that correct?

2 A Yes.

3 Q Okay. Okay. Did you ever tell Miss Lipinski
4 about Peanut's involvement?

5 A Yes.

6 Q And what did you tell her about Peanut's
7 involvement?

8 A I told Miss Lipinski that my uncle, Peanut, he
9 called me and I went over there.

10 Q No, don't tell me what Peanut says.

11 A No, I'm not saying what Peanut says. I'm just
12 saying that he called me and then I'd go over there.

13 Q Okay. Okay. Now, you also had another
14 transaction with the confidential informant. Was it that
15 same confident informant? I think you had another
16 transaction on May 20th of 2016, about 17 days later?

17 A Yes.

18 Q Was it with that same confidential informant?

19 A Yes.

20 Q Okay, and of course is that when you had -- had a
21 that transaction, that drug transaction on May 20, 2016
22 for that confidential inform was Peanut present?

23 A Yes.

24 Q Did Peanut witness the exchange, drugs for money?

25 A Yes.

1 Q Did you give Peanut any money for any role that
2 he may have played during that transaction?

3 A Yes.

4 Q And I think you also had another drug transaction
5 I think on June 2nd of 2016, is that correct?

6 A Yes.

7 Q Okay. Was Peanut present during that drug
8 transaction on June 2, 2016?

9 A Yes.

10 Q And of course did Peanut witness -- did Peanut
11 witness the exchange between you and the confidential
12 informant, drugs for money?

13 A Yes.

14 Q Okay. And on all three occasions -- on all three
15 of those occasions that we just discussed what sort of
16 drugs were being exchanged?

17 A Crack cocaine.

18 Q Okay. And of course on all three of those
19 occasions, it's my understanding you testified on all
20 three of those occasions that yourself, that Peanut and
21 the confidential informant was present, is that correct?

22 A Yes.

23 Q It's my understanding and you correct me if I'm
24 wrong. Is it my understanding that testified to the fact
25 that Peanut was involved in all three of those drug

1 transactions on those three days?

2 A Yes.

3 Q Okay. And it's my understanding is that you paid
4 money for his involvement?

5 A Yes.

6 Q Okay, and of course is I think you testified to
7 the fact that you discussed Peanut's involvement with Miss
8 Lipinski?

9 A Yes.

10 Q Now, was Peanut charged? Was Peanut ever
11 charged?

12 A He was taken to jail. But as in -- yeah, he was
13 charged. He was charged, but he wasn't taken to prison.

14 Q He wasn't convicted?

15 A Yes, he wasn't convicted.

16 Q Okay. Okay. Now -- now, all of these drug
17 transactions where would these drug transactions take
18 place?

19 A At [REDACTED] Chestnut.

20 Q Okay. Every last each one of those three
21 transactions?

22 A Yes.

23 Q And of course is, is when these three drug
24 transactions took place were the conduct or at least the
25 exchange similar?

1 A Yes.

2 Q Were they always be at [REDACTED] Chestnut?

3 A Yes.

4 Q Would the C.I. always comes to [REDACTED] Chestnut?

5 A Yes.

6 Q Were you and Mr. -- you and Peanut always
7 present?

8 A Yes.

9 Q And was there always an exchange drugs for money?

10 A Yes.

11 Q Did the C.I. leave immediately after each
12 transaction? Leave immediately after the transaction on
13 each occasion?

14 A Yes.

15 Q Now, I know that you said that you talked with
16 Miss Lipinski about -- about Peanut's involvement. Okay.
17 At some point in time I think you were tried in connection
18 with the drug transactions or the drug transaction that
19 took place on June 2nd of 2016, is that correct?

20 A Who I was or he was?

21 Q You was?

22 A Yes.

23 Q And you didn't show up for your trial, did you
24 not?

25 A I did not.

1 Q And you were tried in your absence?

2 A Yes.

3 Q Was some point in time were you taken into
4 custody? Were you arrested some point after that trial?

5 A Yes.

6 Q Okay. All right. And of course is that is that
7 -- and of course this was a sealed sentence I think that
8 was awaiting for that June 2, 2016 transaction after your
9 conviction?

10 A Yes.

11 Q And were you convicted for trafficking in
12 cocaine?

13 A Yes.

14 Q Crack cocaine?

15 A Yes.

16 Q All right. Now, at some in point in time after
17 you were taken into custody did Miss Lipinski talk with
18 you about the State's intentions to proceed on the
19 transaction that took place on May 3rd of 2016?

20 A Yes.

21 Q Okay. That's the trafficking charges that took
22 place on May 3, 2016. You talked to Miss Lipinski about
23 that?

24 A Yes.

25 Q Okay, and the State wanted you to plead guilty to

1 that with a concurrent sentence with the concealed
2 sentence for the conviction in your absence?

3 A Yes.

4 Q Now, did you talk with Miss Lipinski about
5 potential defenses?

6 A No, other than taking a plea.

7 Q Did you all talk about -- did you all talk about
8 the -- let me put it this way.

9 Did you all discuss the possibility that these two
10 events, that the drug trafficking event that occurred on
11 the -- on May 3rd of 2016 and the drug trafficking event
12 that occurred on June 2, 2016, did you all discuss the
13 possibility or that there was an argument to be made that
14 those two events constituted one event as opposed to two
15 separate events?

16 A No.

17 Q Okay. Did you all ever talk about the
18 possibility that those events constituted one event as
19 opposed to two separate events and there was a possibly a
20 double jeopardy defense?

21 A No.

22 Q Okay. Now, had you been presented -- had you
23 been advised of the fact that there was a defense -- that
24 that defense was available? That the defense or argument
25 that those two separate events constituted one conspiracy,

1 if you had been presented with that argument or that
2 potential defense, do you think you would have plead
3 guilty to that indictment in I think it's Indictment
4 ending 1958?

5 A No. No, I wouldn't.

6 Q If you had been told about the possibility of a
7 double jeopardy defense, do you think that you would have
8 plead guilty to the Indictment ending 1968 -- I'm sorry
9 1958, in which you accepted a plea of 17 years to run
10 concurrent with the ten years you received for the guilty
11 conviction on the first trafficking charge?

12 A No, I would not have plead.

13 Q Did you have any knowledge of those two potential
14 defenses?

15 A No.

16 MR. BROOKER: If you can indulge me for just
17 a second Judge I may be finished with my
18 questions.

19 I don't have any further questions, Your
20 Honor.

21 THE COURT: Cross examination.

22 MR. NEUBAUER: Thank you.

23 CROSS EXAMINATION

24 BY MR. NEUBAUER

25 Q Good afternoon. So, prior to your plea on April

1 2018, you were convicted of trafficking cocaine, correct
2 -- or crack cocaine?

3 A Yes.

4 Q And that trial was in your absence. You were no
5 present?

6 A Right.

7 Q And during the time that you were -- during the
8 time between the trial and you being apprehended by police
9 you had spoken with Thurmond Brooker, correct?

10 A Say that one more time.

11 Q So, following your trial in your absence, you met
12 with Thurmond Brooker at his office, correct?

13 A No, sir

14 Q How did you --

15 A You say at his office.

16 Q You met him regarding him representing you?

17 A No, I never met Thurmond Brooker.

18 Q So you did not talk with him about him
19 representing you on a plea?

20 A No, my cousin had talked to him to represent me.

21 Q You had no conversations with him prior to your
22 plea on April --

23 A I was locked up. I couldn't have no conversation
24 with him.

25 Q You were the not locked up at the time of your

1 trial, correct?

2 A No, I wasn't.

3 Q And you were not in York at that time, correct?

4 A No.

5 Q And you discussed with Thurmond or eventually
6 Thurmond Brooker was brought on to handle the appeal of
7 that trial, correct?

8 A Correct.

9 Q Did you have any discussions with Thurmond
10 Brooker after he was brought on to handle your appeal?

11 A No, he was retained by my cousin.

12 Q So you didn't talk to him at all regarding your
13 appeal? Regarding the possibility of a trial for the
14 following charges -- for the charges that you plead to?

15 A Not me personally. You're talking about as in me
16 being out while my trial was going on, right?

17 Q No, I'm saying after the trial.

18 A Okay. Okay, after the trial then I'm still on
19 the street.

20 Q You are still out on the street?

21 A No.

22 Q After the trial and you're apprehended, do you
23 have any conversations with Thurmond Brooker either on the
24 phone, in person at the courthouse, at the jail?

25 A No, I didn't. No, I didn't have conversations

1 with Thurmond Brooker until he came to see me at the
2 county once I got apprehended and they brought me back to
3 York County.

4 Q So you did speak with Thurmond Brooker. So it
5 was after you were apprehended, but you did talk to him.

6 A Yes, he came to see me. He came to see me the
7 one time Mindy had mentioned that he came to see me.

8 Q And did you have any phone calls with him ever?

9 A No.

10 Q You never talked with him outside of the meeting
11 with Mindy?

12 A No.

13 Q Now, you were present earlier today when Thurmond
14 Brooker testified, correct?

15 A Right.

16 Q And he indicated that he spoke with you over the
17 phone regarding issues with your appeal, correct?

18 A Regarding my appeal?

19 Q Yes, and the possible consequences that would
20 come if you plead guilty or if you pursued your appeal?

21 A Are you talking about -- okay. Before trial and
22 after trial. So I'm apprehended, did I talk to him.

23 Q Yes.

24 A I talked to him at the jail house where Mindy had
25 mentioned one of three times.

1 Q And you're saying that those meeting with Mindy
2 Lipinski are the only conversations that you had with
3 Thurmond Brooker prior to your plea?

4 A No, I talked to him. My cousin -- my cousing got
5 in contact with Mr. Brooker. The reason that he got in
6 contact with Mr Brooker because I gave him the number for
7 Mr. Brooker. So, therefore we had talked beforehand.
8 That was after my trial.

9 Q We're talking about leading to the plea, after
10 you are apprehended?

11 A Yes. Yes, I'm locked right.

12 Q Yes.

13 A Yes. Yes.

14 Q You spoke with Thurmond Brooker?

15 A Yes.

16 Q Did you speak with just Thurmond Brooker at any
17 point only you and him?

18 A Yes, I talked to him. I talked to him and I
19 talked to Mindy.

20 Q Now, was the conversation -- you're saying you
21 had a conversation just you and Thurmond Brooker, correct?

22 A Yes.

23 Q During those conversations do you remember what
24 you two discussed?

25 A Not off for real. I had wanted him in a nutshell

1 -- I wanted him for my appeal. So that was about it. I
2 wanted him for my appeal because I had already been
3 sentenced on a sealed sentence. So I wanted him for my
4 appeal, but -- but I didn't do an appeal.

5 Q Now did you and Thurmond Brooker discuss why you
6 wouldn't pursue an appeal?

7 A No. No. I don't think -- I say -- I can't
8 remember. I can't remember.

9 Q Did you at any point discuss with Thurmond
10 Brooker about whether you should plead guilty?

11 A No. No. All I -- all he said he couldn't tell
12 me about what was going on because he didn't have all the
13 information on my case. So he didn't give me know kind of
14 like legal information about what was going on inside of
15 my case because he didn't have all the information to tell
16 me what was going on. Basically he just was there
17 basically to see if I would take the plea or go to trial.

18 Q Did he outline -- during the conversations with
19 you Mindy Lipinski and Thurmond Brooker, did Thurmond say
20 anything during those conversations? Was he actively
21 talking with you about the issues?

22 A No, he wasn't. He wasn't. It was mostly Mindi.
23 I might turn to him and be like, like -- you know, like my
24 hands are torn like. Like there ain't really nothing I
25 can do. Do you see what I am saying. I was basically

1 just trying to -- I knew I had him for my appeal. That's
2 the only reason why I had him for my appeal.

3 MR. NEUBAUER: No further questions.

4 THE COURT: Redirect.

5 MR. BROOKER: I don't have any redirect.

6 THE COURT: Thank you. You may step down.

7 THE COURT: Any other witnesses?

8 MR. BROOKER: No, Your Honor.

9 THE COURT: All right. Applicant ready to
10 proceed with it's case.

11 MS. MCCALLISTER: Yes, Your Honor, the State
12 calls Matt Hogge.

13 THE COURT: Come around please.

14 MATTHEW HOGGE, called as a witness, having
15 been duly sworn by the clerk, was examined and
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MS. MCCALLISTER:

19 Q Thank you, Mr. Hogge. How are you involved in
20 this case?

21 A I prosecuted Earnest Jackson. I called him to
22 trial on the June 2nd trafficking case and then I
23 ultimately pled him to the May 3rd trafficking case.

24 Q Okay, and so he had more than just those two
25 charges, correct?

1 A That's correct.

2 Q And you so you handled all of Earnest Jackson's
3 drug charges, is that correct?

4 A That's correct.

5 Q Okay, and you have been present in the courtroom
6 here today?

7 A That's correct.

8 Q You heard the testimony of applicant and Miss
9 Lipinski and Mr. Brooker, correct?

10 A I didn't hear. I believe before lunch there was
11 a discussion about having him removed as a necessary
12 witness. I wasn't privy to that. But since two o'clock I
13 was in here.

14 Q So you you weren't present for the motion hearing
15 but you were you present for the evidentiary portion of
16 today's hearing?

17 A Correct.

18 Q And so you heard sort of Miss Lipinski's
19 explanation or summation of kind of the evidence and how
20 these charges came about for Mr. Jackson, correct?

21 A Correct.

22 Q And so this was a serious of drug buys with a
23 confidential informant, correct?

24 A Correct.

25 Q All taking place on different days?

1 A Correct.

2 Q But at the same location and involving the same
3 confidential informant and Mr. Jackson?

4 A Correct.

5 Q And you heard the allegation that this, you know,
6 sort of should have been defended by Miss Lipinski as a
7 conspiracy arising out of the same course of action,
8 correct?

9 A Correct.

10 Q Okay. And you actually took the two -- you
11 separated the charges and you went to trial on one charge
12 from June 2nd, correct?

13 A Correct.

14 Q And what was your theory of the case and how did
15 the State prove trafficking at that trial?

16 A So, there are a number of ways to prove
17 trafficking. The easiest way is possessing over the level
18 and in this case my entire argument was that this was
19 trafficking by weight alone.

20 I recall telling the jury in my closing that
21 trafficking is possessing a lot and that's all it is. He
22 was also charged with a conspiracy or attempt to violate
23 drug laws. I dismissed -- I called the proximity charge
24 to trial and the trafficking charge to trial. I did not
25 call that third indictment. I dismissed it immediately

1 after the trial for insufficient evidence to prove that
2 there was any conspiracy. I don't believe conspiracy was
3 what that means was defined during the judge's jury
4 instructions.

5 I was in no way alleging that this was a some grand
6 drug conspiracy. This was a distribution, that is
7 trafficking by the fact that it is over a ounce or 10 to
8 28 grams.

9 Q Okay. And so, essentially I think I just heard
10 you say there is more than one way to proving trafficking,
11 correct?

12 A Correct.

13 Q And there is more than one way to actually charge
14 conspiracy in a trafficking case, correct, it could be
15 sort of like theory of the case or there is a separate
16 conspiracy charge that you can use?

17 A Yes.

18 Q Okay. So under the statute that he was convicted
19 on the 37 -- or 374(C), conspiracy sort of like an option
20 on the menu of ways you can prove that charge but you
21 chose the possession option, correct?

22 A Yes, this was always about possessing a lot. I
23 recall telling the jury that when you think of trafficking
24 the imagine comes in your mind are people in a truck
25 crossing the border of Mexico and they got tons and tons

1 and there's this it big conspiracy, but that's not what
2 this case is. All I want you to hear is that trafficking
3 is possessing a lot. Period. And that's all it is and
4 that's all I'm trying to prove here today was by weight
5 alone.

6 I wasn't trying to make this some giant broad
7 conspiracy involving Peanut. Peanut had no role
8 whatsoever in what I tried him for. The deal was set up
9 whenever Calvin Ricky Jr., the C.I., happened to see
10 Earnest Jackson at a gas station earlier that day. He
11 testified as to that in the trial and while they were
12 there there they had set up a deal or talked about a deal.
13 He then texted Earnest Jackson later and then he met
14 Earnest Jackson where he would buy there at [REDACTED] Chestnut.
15 And again, Peanut is one of those guys who sits out on his
16 porch all day and watches who goes by and Peanut just
17 happened to be there. He then see Earnest Jackson. He
18 gives the money to Earnest Jackson. Earnest Jackson then
19 leaves. He goes to his source for drugs and they have to
20 wait a while for him to get those drug. During that time
21 Peanut is sitting there with Calvin Ricky Henson and
22 they're just talking about whatever. Talking about some
23 girl that broke somebody's heart. It's hard to understand
24 what Peanut is saying, but at some point in time Peanut
25 asked him what are you doing here today. What have you

1 got going on with Earnest because he had no idea because
2 he was not involved.

3 MR. BROOKER: I just would object to what
4 Peanut said unless they are going to introduce
5 evidence or have Peanut testify. That would be
6 hearsay.

7 THE COURT: Overruled. Go ahead.

8 A But that's what was presented at trial. So
9 again, it was not conspiracy. It was trafficking by
10 weight.

11 Q Okay. And so his conviction at trial then was
12 not a conspiracy conviction, is that correct?

13 A Correct.

14 Q It was just a trafficking conviction?

15 A Correct.

16 Q And what he plead to then in the second count
17 that was a plea to the substantive events of trafficking?

18 A Are you talking about the May 3rd plea?

19 Q Yes.

20 A Yeah, he plead to trafficking 10 to 28 grams,
21 second offense.

22 Q And if the State had had taken that case to trial
23 was the State's theory going to be the same in terms of
24 the theory of trafficking was possession by weight?

25 A Yes. Absolutely.

1 Q Okay. So neither conviction is a conspiracy
2 conviction?

3 A No.

4 Q Okay. And you actually -- I think that was the
5 way it was from the beginning. It was charged as separate
6 offenses, correct?

7 A Right. And that's typical. The DEU will go out
8 and they will make several buys and that's just because
9 one video might be better than the other and it's best to
10 go ahead and have all of that just in case. And that was
11 the case here. One video wasn't so great. We had two
12 excellent videos. And so yeah, three separate instances
13 and I tried them separately. I could not have tried them
14 all together if I wanted to. If that's something that we
15 could do then we would do it all the time and just keep
16 buying from people and stacking those amounts up until we
17 have over hundred grams. But this case isn't like the
18 State versus Emerson case. It's more like the State
19 versus Gordan case where it's trafficking crack cocaine
20 not as conspiracy but as separate distribution.

21 Q That's all the question I have for Mr. Hogge?

22 THE COURT: Cross examination.

23 MR. BROOKER: Thank you, Your Honor.

24 CROSS EXAMINATION

25 BY MR. BROOKER:

1 Q Mr. Hogge, how well do you know Peanut?

2 A Not well.

3 Q Have you ever had a conversation with him?

4 A Never.

5 Q And of course you were in courtroom when Mr.

6 Jackson testified, is that correct?

7 A Correct.

8 Q And of course -- do you know the relationship

9 between Mr. Jackson and Peanut is that Peanut is Mr.

10 Jackson's uncle?

11 A Correct.

12 Q Okay. And of course is that -- and so is it your

13 testimony and I want to make sure I understand. Is it

14 your testimony that you would have more knowledge about

15 what Peanut's role was in those transactions then Mr.

16 Jackson did? Is that your testimony is that you have more

17 knowledge about what Peanut's role in those transactions

18 were then Mr. Jackson?

19 A I suppose that's true.

20 Q Were you present when those transactions took

21 place?

22 A No.

23 Q Were you present during every conversation prior

24 to the occurrence of those transactions that -- were you

25 present during every conversation immediately proceeding

1 those transactions that Peanut and Mr. Jackson had?

2 A No, I did not have any of that evidence to
3 present to trial. I just had what the police had.

4 Q So, when Mr. Jackson testified here today that --
5 that he had talked with Mr. Peanut about the drug
6 transaction that he would have with the C.I. and also paid
7 Peanut he said typically \$50 for Peanut's assistance. Is
8 that you have no evidence that's not accurate, is that
9 correct?

10 A I mean I would have evidence in terms of I have
11 the video where I have Peanut on video clearly clueless as
12 to what's going on. I would have evidence of the text
13 messages between Earnest Jackson and Calvin Ricky Henson
14 and Peanut is no where involved and I have the evidence of
15 the May 3, 2016 distribution where they're in the shed
16 away from Peanut and Calvin Ricky Henson says give me your
17 number so that way I don't have to go through Peanut any
18 more. I can just go through straight through you.

19 Q Do you have every conversation that Jackson had
20 with Peanut?

21 A No.

22 Q So you would be limited to any discussions in
23 which that C.I. was present, is that correct? Your
24 knowledge would be limited to any discussions in which the
25 C.I. was present on May 3rd and the C.I.'s camera happened

1 to capture the conversation, is that correct?

2 A That and the gas station conversation which
3 wasn't one of those.

4 Q So any private conversations between Peanut and
5 Mr. Jackson in which the confidential informant wasn't
6 present you would be privy to those conversations, right?

7 A Right.

8 Q And of course is that the conversation -- the
9 conversation that I just expressed or the conversation
10 that Mr. Jackson described that he had with Peanut those
11 could have occurred off camera, could they not?

12 A That's correct. I would have no evidence of that
13 and I could not present that in trial in a conspiracy
14 trial.

15 Q But you did you went to a Grand Jury and present
16 evidence to a Grand Jury and got an indictment for
17 conspiracy, did you not?

18 A I did not. I did not go and present evidence but
19 that was done.

20 Q Your office did?

21 A Correct.

22 Q The solicitor's office did?

23 A Correct.

24 Q And of course is what you're telling the judge is
25 that it's the practice of the 16th Circuit Solicitor's

1 Office to go a Grand Jury and get an Indictment from the
2 Grand Jury with no evidence whatsoever for conspiracy. Is
3 that what you're telling us?

4 A No.

5 Q So at least the 16th Circuit Solicitor's Office
6 did think at some point in time that they had evidence
7 sufficient enough to go before a Grand Jury and ask the
8 Grand Jury to hand down an Indictment for conspiracy, is
9 that correct?

10 A Earnest Jackson was indicted for attempt to
11 conspire to violate drug laws and that was based off of
12 the incident report where Mr. Watson was mentioned and
13 thereafter looking at the case I did not think that I
14 could prove that beyond a reasonable doubt at trial so I
15 did not call that case to trial and then immediately after
16 the trial dismissed it for insufficient evidence to
17 convict.

18 Q So the answer to my question is yes, that the
19 16th Circuit Solicitor's Office did --

20 MS. MCCALLISTER: Your Honor, I think he's
21 answered that question.

22 THE COURT: Overruled. Go ahead.

23 Q Did the 16th Circuit Solicitor, a yes or no and
24 then you can give a explanation. The 16th Circuit
25 Solicitor's Office at some point in time thought it had

1 sufficient enough evidence to go before a Grand Jury and
2 ask the Grand Jury for an Indictment, is that correct?

3 A An indictment for what?

4 Q Conspiracy?

5 A Yes, he was in indicted for the attempt slash
6 conspire which is separate from a conspiracy trafficking
7 Indictment under 44-53-375 conspiracy. He was indicted
8 for the conspire or attempt to violate the drug law which
9 is separate statute and so, yes, we presented that.
10 Didn't name any other person in it from my recollection.
11 That he just conspired with another and then that was
12 subsequently -- and that was dismissed right after trial
13 because I didn't think I could prove that one.

14 Q And the Grand Jury did hand down an Indictment
15 for conspiracy against Mr. Jackson, is that correct?

16 A Correct.

17 Q I think you indicate in that Indictment is that
18 the conspirator -- the Indictment mentioned that the
19 conspirator was I guess unidentified conspirator, is that
20 correct?

21 A I can't recall off the top of my head. If you
22 give it to me I can tell you for sure. I might have
23 listed Thomas (sic) Watkins. I may not have.

24 Q If you could give me just a second I could look
25 and see if I can find it real quick. I think I have it

1 here.

2 Would it refresh your memory just to take a look at
3 the Indictment.

4 A Yes.

5 Q The conspiracy Indictment.

6 MR. BROOKER: May I approach, Your Honor?

7 THE COURT: Yes.

8 A Yes, so he was indicted. The language of the
9 Indictment is the defendant, Earnest Floyd Jackson II, did
10 on or about June the 2, 2016 in York County conspire,
11 traffic crack cocaine all in violation of 44-53-420 and it
12 does not name Dennis Watkins.

13 Q It doesn't name Dennis Watkins, but do you need
14 to name a co-conspirator?

15 A No.

16 Q So conspiracy without naming a co-conspirator,
17 but you would agree with me is that the law in South
18 Carolina is that in order to constitute a conspiracy you
19 have to have -- you have to have at least two or more
20 persons, is that correct?

21 A Correct.

22 Q And of course the law in South Carolina is also
23 that a -- that for purposes of calculating or counting
24 the two or more person for a conspiracy that you can not
25 count the confidential informant, is that correct? For

1 purposes of reaching two or more persons you can't count
2 the confidential informant, is that correct?

3 A I am not sure, actually.

4 Q So you think that you can count the confidential
5 informant for purposes of proving a conspiracy of two or
6 more persons?

7 A You might be able to. I really don't know.

8 Q Okay. All right. But it does take two or more
9 persons, is that correct?

10 A That's correct.

11 Q Okay. And of course is, is that if someone,
12 whoever obtained the Indictment would have to have alleged
13 to the Grand Jury that there were two or more persons?
14 That there was at least Mr. Jackson and another person
15 that conspired on June 2nd of 2016 to traffic in crack
16 cocaine, is that correct?

17 A Correct.

18 Q Now, you would agree with me that if a conspiracy
19 can exist whether the government or whether the State of
20 South Carolina chooses prosecute it or not, is that
21 correct?

22 A Correct.

23 Q So the fact that you chose not to prosecute a
24 conspiracy doesn't mean one didn't exist, is that correct?

25 A Correct.

1 Q Now, you would agree with me -- would you agree
2 with me that the control buys that Mr. Jackson was
3 prosecuted for, those three control buys all occurred
4 within a thirty-day period, is that correct?

5 A That is correct.

6 Q And you would agree with me that all of those
7 control buys took place at one location. That was at [REDACTED]
8 Chestnut Street is that correct?

9 A I believe that's correct. I believe it would
10 have been at that same address. I think two distributions
11 took place in the shack and one did not take place in the
12 shack.

13 Q Is that shack -- is that shack on the property of
14 [REDACTED] Chestnut Street?

15 A I don't know for sure. It very well could be.

16 Q Did you see the I think the case file summary
17 from the multi-jurisdictional combined drug unit?

18 A I've seen it before.

19 Q Would it refresh your memory to take a look at it
20 to see whether or not all three of those transactions took
21 place at [REDACTED] Chestnut Street?

22 A It probably would.

23 Q Okay. Would you like to have your memory
24 refreshed?

25 A Yes.

1 Q Okay. (Handed)

2 A My memory is refreshed.

3 Q Okay. Did all three of those drug buys on May 3,
4 2016, May 20, 2016 and June 2, 2016, did all of those
5 control buys take place at [REDACTED] Chestnut?

6 A It appears so.

7 Q Now, you would also agree with me at all three of
8 those control buys is that there were three person
9 present. Not talking about what their involvement is, but
10 there was at least three persons present at all three of
11 those buys and those three persons were Mr. Jackson,
12 Peanut and the C.I., is that correct?

13 A That's correct. At least three.

14 Q Okay. And of course you would also agree with me
15 is that the 16th Circuit Solicitor's Office convicted Mr.
16 Jackson for conspiring with someone else for drug
17 trafficking, is that correct?

18 A No.

19 Q The Indictment that I think you just looked at
20 before, that Indictment for conspiracy, that Indictment
21 was for conspiracy and drug trafficking, is that correct
22 for June 2, 2016?

23 A Correct.

24 Q Okay. So the solicitor's office did convict Mr.
25 Jackson for conspiring to traffic with someone on June 2,

1 2016?

2 A No, that Indictment that I read was the
3 Indictment that I dismissed.

4 Q I'm sorry, not convict. I should not have used
5 the word convicted, but indicted Mr. Jackson for
6 conspiring with someone on June 2, 2016?

7 A That is correct.

8 Q Yes, sir, thank you. I apologize. And of course
9 is is that -- and you would also agree with me is that Mr.
10 Jackson was convicted and also plead guilty for the exact
11 same statute and that would be -- that would be that
12 370(C), is that correct? Or was 44-53-370(C) is that he
13 was was found guilty and also plead guilty to the exact
14 same statute, is that correct?

15 A I think that is correct, yes.

16 MR. BROOKER: If you indulge me for just one
17 second. I don't I have any further questions.

18 No further questions, Your Honor.

19 THE COURT: Cross examination or redirect.

20 MS. MCCALLISTER: Thank you, Your Honor.

21 REDIRECT EXAMINATION

22 BY MS. MCCALLISTER:

23 Q I just want make sure that we are clear about
24 some OF your testimony. So you testified that Peanut was
25 present during these buys on these three separate days,

1 correct?

2 A Correct.

3 Q He was present at the address, correct?

4 A Correct.

5 Q Is there evidence that Peanut was present when
6 the drugs or the money were actually exchanging hands?

7 A He was not present during the May the 3rd
8 hand-to-hand. There were lots of people out there and
9 then they walk away. They go into a shed where they are
10 alone and they make the transaction and it's just the two
11 of them in there. So the actually drug deal is just the
12 two of them in this shack away from anybody else and
13 that's where they exchange phone numbers and the C.I.
14 says, I don't have to go through Peanut any more. I can
15 go straight through you.

16 Q So, okay. And so this -- the
17 conspiracy Indictment under 420 then was not related to
18 the May transaction. It was related to June 2nd
19 transaction, correct?

20 A Yes Indictment I read off earlier was for the
21 June 2nd.

22 Q Transaction. Okay.

23 A He was charged with that in light of the fact
24 that Dennis Watkins was there, but then in speaking to the
25 C.I. in preparation for trial I elected not to go forward

1 with that and then dismissed it for insufficient evidence
2 to convict. The rest of the charges I dismissed per plea
3 agreement but that one I dismissed because I just didn't
4 feel like I had the evidence.

5 Q And so is it then unusual for your office to
6 obtain an Indictment through the Grand Jury but then later
7 it's dismissed for insufficient evidence?

8 A Yes, that happens.

9 Q Okay. Is the standard for getting the Indictment
10 true billed by the Grand Jury less than the standard for
11 getting a conviction at trial?

12 A Yes.

13 Q And is the Indictment some times true billed by
14 the Grand Jury before you have fully prepared your case
15 for trial?

16 A Oh, yes.

17 Q Okay. And did that happen in this case?

18 A Yes. I got the case. Reviewed it. Looked
19 through everything. Sent the indictment off to the Grand
20 Jury. They indicted and then over a year later perhaps I
21 called the case to trial.

22 Q Okay and your ultimate determination then was
23 that there was not sufficient evidence to convict Mr.
24 Jackson beyond a reasonable doubt of a conspiracy to
25 traffic drugs?

1 A Correct. After looking at the case further and
2 speaking to the confidential informant it was clear to me
3 that Mr. Watkins just happened to be there because he's
4 always there and knew nothing about the drug deal and that
5 was evidenced by the fact that he's asking what's going
6 on. What have you got going on with Earnest and after
7 looking at the text messages that the confidential
8 informant gave me after this case was indicted and sitting
9 down with him after it was indicted and talking to him I
10 could clearly see that was texting back and forth to
11 Earnest one on one and that this wasn't some grand
12 conspiracy to have Dennis Watkins wrapped into it.

13 Q And so again, the jury for the trial on the June
14 2nd charge was not presented with evidence of a
15 conspiracy?

16 A No. From what I recall they were not given an
17 instruction as to what conspiracy means. They likely were
18 given the instruction on everything that trafficking can
19 be which included conspiracy, but again, my argument to
20 the jury is trafficking is possessing a lot and that's all
21 you are to find in this case.

22 Q In addition, I think you said that you weren't
23 the one that presented this to the Grand Jury, correct?

24 A Correct.

25 Q And so the Indictment additionally doesn't mean

1 the co-conspirator, correct?

2 A Correct.

3 Q So we don't know who I guess the previous
4 solicitor who handled this case before it was assigned to
5 you is that why?

6 A No, I had it -- I'm sorry, what is the your
7 question.

8 Q I am trying to ask why were you not the same
9 person who presented to the Grand Jury?

10 A The Indictment would have been presented by the
11 officers probably Deputy Hager who actually read it out to
12 them. So, usually the solicitor is not in there. We type
13 up the indictment and we send it off. And I'll also point
14 out again, it's not named but again there was testimony at
15 that trial that Earnest Jackson drove off and met with
16 another individual who he got the drugs from and then came
17 back around.

18 Q Thank you. That is sort of where I was going
19 with this. So there were multiple people or multiple
20 players that the conspiracy theoretically could have
21 applied to?

22 A That's correct. It could have also included the
23 person who on June 2nd Earnest Jackson leaves the
24 confidential informant and Dennis Watkins and then goes
25 off for an extended period of time and then comes back and

1 so that could have been a theory under that Indictment.

2 Q That only happened in the June 2nd transaction,
3 correct?

4 A Correct.

5 Q So for the May 3rd transaction, that was the plea
6 that that person whoever he went to there was no evidence
7 that person was involved?

8 A Correct.

9 Q Okay.

10 MS. MCCALLISTER: I beg the Court's
11 indulgence, Your Honor. I just want to make sure
12 I covered everything. I think that's all my
13 questions.

14 THE COURT: Thank you, sir. You may step
15 down much. Thank you.

16 Do you have any objection to excusing him.

17 MS. MCCALLISTER: No, thank you.

18 THE COURT: Sir, you are excused as well.

19 Anything further?

20 MS. MCCALLISTER: Your Honor, I understand
21 your previous ruling about Mr. Brooker, but there
22 has been some testimony that he participated in
23 these discussions about whether he should go to
24 trial or he should take this charge.

25 THE COURT: He's not going to be called on as

1 a witness in this case. I want you to make your
2 grounds. If I'm wrong I'm wrong.

3 MS. MCCALLISTER: Thank you, very much, Your
4 Honor. If I could just then for the record I
5 guess sort of state I guess the issues that maybe
6 weren't covered in the testimony from the motion
7 this morning and I think the biggest issue is
8 that I believe, if I'm recalling Mr. Bookers's
9 testimony correctly that he testified that he was
10 sort of kind of waiting in the wings and talking
11 to Mr. Jackson about what, you know, what to do.
12 Whether he should plead or whether he should take
13 this case to trial. And I think the issue that I
14 would like to ask Mr. Brooker about is, you know,
15 we didn't get into how could he give that advice
16 and talk to somebody about what they should do in
17 that situation if they don't at least have some
18 discussions of what the facts are and what the
19 possible defenses were. And I believe Miss
20 Lipinski's testimony from the evidentiary hearing
21 was that Mr. Brooker was present and that they
22 were talking about sort of this issue of is it
23 continuing conspiracy? Can we attack it that way
24 and that Mr. Brooker didn't bring that up as a
25 potential defense. And so I think that there is

1 -- I think there are some issues there regarding
2 that testimony from Miss Lipinski that we weren't
3 aware. We didn't Mr. Brooker testify about
4 earlier this morning and just sort of more
5 specifically, you know, what advice exactly he
6 was giving about the trial and how he does that
7 with his clients when he's trying it to help
8 someone decide to plea verses trial.

9 THE COURT: That is noted for the record.
10 Anything further to protect yourself on the
11 record?

12 MS. MCCALLISTER: Not on that issue, Your
13 Honor. I think the State would like to make some
14 argument.

15 THE COURT: I'm glad to hear argument. The
16 question remains with you right now though, do
17 you intend to call any other witnesses?

18 MS. MCCALLISTER: No, Your Honor. I don't
19 believe we intend to call any other witnesses.

20 THE COURT: Very good, and I note your
21 objection to my ruling regarding questions Mr.
22 Brooker and your grounds.

23 Now, I want to ask a question at this
24 juncture. It seems to me that in order for the
25 applicant to have have a successful application

1 that there has to be a ruling in this action that
2 this was a continuing conspiracy and so, do I
3 have jurisdiction to make that ruling in this
4 hearing? Because otherwise, it seems like you're
5 asking the Court to engage in a lot of
6 speculation as to what somebody, another Circuit
7 Court judge may or may do and that may not carry
8 the weight today.

9 So what is your position on that.

10 MR. BROOKER: Your Honor, I think -- I think
11 that Your Honor there are two things that you
12 have -- I think the discretion to do. Of course
13 the first is that we're alleging ineffective
14 assistance of counsel. We are alleging that is
15 very valid defense. We're alleging is that there
16 was elements -- there was factual elements that
17 were sufficient --

18 THE COURT: I got you. Let back you up for a
19 little clarification.

20 MR. BROOKER: Sure.

21 THE COURT: Assuming for the sake of
22 argument, that Miss Lipinski should have
23 discussed this we me for the first prong and so
24 therefore there was deficient conduct. I'm not
25 saying there is. I'm just saying for the sake of

1 this argument.

2 The next prong would have to be in my view --
3 and maybe I'm just wrong -- that there was a
4 continuing conspiracy, okay, because if you don't
5 have that then he is still out there in the same
6 situation he was in before

7 MR. BROOKER: That's correct.

8 THE COURT: So the question then is -- and I'm
9 glad for anybody to prove me wrong -- not prove
10 me wrong, but to show me where I am wrong. That
11 there would have to be a ruling here in this
12 hearing that this was in fact a criminal
13 conspiracy because without that it's mere
14 speculation as to what would have happen, right.

15 MR. BROOKER: That's correct.

16 THE COURT: Okay. So do I have jurisdiction
17 to make that call in this case?

18 Mr. Brooker: Your Honor -- Your Honor, this
19 is the first time that this issue has been
20 brought up. It was not brought up at the trial
21 level and obviously at the PCR action I think you
22 do have is the authorization to be able to make
23 that determination as to whether or not there was
24 sufficient evidence present that constitute that
25 this was a single conspiracy as opposed to two

1 separate conspiracies. Now obviously is if the
2 State disagrees with that is that the State can
3 then -- and of course is and I'm assuming either
4 party will do regardless of whatever your ruling
5 is they can file a motion -- excuse me, file an
6 appeal and of course have this reviewed by the
7 Court of Appeals. But in order for you to make a
8 determination as on whether there was ineffective
9 assistance of counsel I think it is absolutely
10 necessary for you to make a determination based
11 upon the evidence that was presented on the stand
12 as to whether or not -- whether or not from the
13 findings of the evidence because in a PCR action,
14 Your Honor, is that you are the fact finder and
15 of course is that you can make finding of facts
16 and of course is you can make conclusion based
17 upon the evidence that was testified on the
18 stand, is that this was a single conspiracy
19 versus - versus two separate independent
20 conspiracies. And of course is that issue like
21 all issues is appealable, but in this
22 jurisdiction you are a fact finder. You're not
23 just simply I think a PCR judge are just simply
24 resigned to simply reviewing a decision that's
25 previously made in this particular situation.

1 This is an issue that was never raised. And so
2 this is the first time this issue has been argued
3 and you are the fact finder in this particular
4 setting.

5 THE COURT: Thank you, sir. I'll be glad to
6 hear from the State.

7 MS. MCCALLISTER: Your Honor, the way -- so
8 the way that this is pled is that that Mr.
9 Jackson believes trial counsel was ineffective in
10 pleading him to the trafficking because the plea
11 violated double jeopardy because it was a
12 continuous conspiracy. And so they're arguing
13 that she erroneously informed him that it would
14 bet his third strike and that he would seek life
15 without parole.

16 They have two allegations listed but they're
17 obviously intertwined and the argument that I
18 think I hearing Mr. Brooker make or has made
19 today, is that essentially that Miss Lipinski
20 should have asserted this defense of the double
21 jeopardy clause as a way to either get this plea
22 dismissed. I mean, to get this charge that he
23 ultimately plead to dismissed and again, I think
24 we're sort of getting into some of the ways that
25 this case is a mesh because that's also a defense

1 that could have been raised at trial

2 THE COURT: Say that again? That is also.

3 MS. MCCALLISTER: That also something that
4 could have been raised at trial had Mr. Brooker
5 taken this to trial. So again, that's just sort
6 of one of the ways that I think this is all
7 intertwined.

8 THE COURT: So you're saying it should have
9 been a direct appeal issue as well as opposed to
10 being a collateral attack?

11 MS. MCCALLISTER: I think it could have been.
12 Certainly, it could have been raised at trial
13 certainly and it could have been attacked that
14 way on the direct appeal. I don't think that
15 it's improper for him to plead that counsel was
16 ineffective for not raising that defense. I
17 think that is a proper PCR ground and to get to
18 what your question was, you know, the standard
19 for what you have to find, the Strickland
20 standard, and I think it's Hill v Lockhart is the
21 plea -- the case that talks about guilty pleas.
22 The standard is not the outcome at trial would be
23 different assuming -- let's assume for the sake
24 of argument Miss Lipinski was wrong not to have
25 raised this defense. The issue is, would it have

1 changed Mr. Jackson's decision to go to trial and
2 so, I think it's sort of inevitable that if you
3 decide that this would have changed Mr. Jackson's
4 mind that your sort of saying that you agree that
5 this double jeopardy defense had merit and that
6 she should have raised it.

7 THE COURT: So its sound to me -- and maybe
8 I'm misinterpreting what you're saying, buy you
9 agree with Mr. Brooker then that I need to make
10 that call one way or the other in this
11 proceeding.

12 MS. MCCALLISTER: Well, I think you need to
13 make the decision whether Miss Lipinski was
14 ineffective for pursuing -- not pursuing this
15 this double jeopardy defense.

16 THE COURT: Well, the second prong.

17 MS. MCCALLISTER: Yes, and if she had advised
18 Mr. Jackson, you know, I think this is a great
19 defense and you should -- we should try this that
20 he might have changed his mind. But part of that
21 is whether or not that would have been reasonable
22 for her to do that and so I think she testified
23 that they did kind of talk about this and she did
24 have that in her mind and she looked at it.

25 THE COURT: I didn't hear her say that. I

1 heard her say that we talked all along those
2 lines, yes, but she never brought up this
3 specific double jeopardy with him at all. That's
4 the way I heard it.

5 MS. MCCALLISTER: I don't want to misstate.
6 I'm not looking at my notes. I'm just going off
7 of memory.

8 THE COURT: Okay.

9 MS. MCCALLISTER: But my understanding of her
10 testimony is, is that essentially she was aware
11 sort of this issue, that it could potentially be
12 looked at as -- you know, could we potentially
13 look at this and argue this as a single
14 conspiracy and I think she did set forth her
15 reasons for why she thought that wasn't the case
16 and why it wasn't a conspiracy at all and that
17 there was no evidence that she saw that Peanut
18 was involved and then we have the solicitor who
19 testified that these are not conspiracy
20 convictions. He was not convicted up the
21 conspiracy statute. He was convicted for the
22 substantive offense of trafficking on the theory
23 that he possessed the trafficking weight. And
24 so, in that case I think it is reasonable for
25 Miss Lipinski to not have pursued this double

1 jeopardy defense because it's not applicable and
2 so it's not credible for Mr. Jackson to say that
3 her telling me that this defense wasn't going to
4 work is going to change his mind on whether he
5 pleas guilty or not.

6 The testimony from both Mr. Brooker in the
7 motion hearing this morning and from Miss
8 Lipinski is that his concern was avoiding LWOP.
9 He did not want to take the risk that he got this
10 third strike at trial because the State was going
11 to seek life without parole. And so -- I'm not
12 sure I'm fully answering your question. I'm
13 trying to, but I think it's kind of all wrapped
14 up in Your Honor's decision about, you know, the
15 ineffectiveness. Part of that is, you know,
16 whether it's reasonable to think that he would
17 have changed his mind and to go to trial.

18 THE COURT: Thank you, very much. All right.
19 Any further from the applicant?

20 MR. BROOKER: Nothing further from the
21 applicant. The only thing I would say is very
22 briefly, Your Honor, is that this was not an
23 issue that he could have directly appeal because
24 is that you can only appeal an issue unless it's
25 preserved and of course this issue was never

1 preserved because it was never raised and so his
2 only opportunity to -- to deal with this issue is
3 on a PCR because originally, Your Honor, is that
4 we filed a Notice of Appeal and of course is that
5 -- of course is that we ended up abandoning that
6 Notice of Appeal and of course ended up filing
7 this PCR action because is it that, you know,
8 there is a thousand cases out there where the
9 courts above says if you don't preserve it you
10 can't raise it for the first time on appeal.

11 MS. MCCALLISTER: And Your Honor, if I could
12 just sort of speak on that. Mr. Brooker is
13 correct and I wasn't trying to say that he would
14 have an opportunity to raise this. What I was
15 trying to say if he had gone forward to trial it
16 could have been raised at trial and then he would
17 have had an opportunity on direct appeal.

18 THE COURT: I think it's probably one of
19 these very rare issues where you could have gone
20 directly or collaterally.

21 MS. MCCALLISTER: Yes, and there is a
22 provision for that in PCR statute. You can raise
23 purely a constitutional question in the PCR and
24 usually that it is in this circumstance where
25 there was a guilty plea and there was no -- there

1 wasn't an opportunity to have raised the issue
2 because of the guilty plea. So I do think --
3 just wanted to make sure I was clear on that,
4 Your Honor. And the other thing that I had in my
5 mind, Your Honor, at the beginning of the hearing
6 I know we put the allegations that were going
7 forward and that were being waived on the record.
8 I don't -- did you question Mr. Jackson about
9 that and about the fact that -- I know we said
10 that we were only --

11 THE COURT: I didn't question Mr. Jackson. I
12 let his lawyer talk for him.

13 MS. MCCALLISTER: Okay, and that Mr. Brooker
14 did have some involvement with the trial.
15 Obviously this PCR is only about the plea and
16 wouldn't effect the conviction from the trial.

17 THE COURT: That's correct.

18 MS. MCCALLISTER: I wanted to make that's
19 clear.

20 THE COURT: That's clear and everybody
21 stipulated that.

22 MS. MCCALLISTER: And Mr. Jackson is aware
23 that he essentially waived claims against Mr.
24 Brooker by going forward.

25 THE COURT: I don't necessarily think your

1 right on that. I think that I would have had to
2 make a finding that he was more involved in that
3 counseling of Mr. Jackson for there to be a
4 waiver of his -- I think you're asking me if I'm
5 not mistaken -- and correct me, that because Mr.
6 Brooker was involved in some forth or fashion in
7 counseling the applicant about the plea, that
8 therefore today waives any claim of ineffective
9 assistance of counsel by having the same attorney
10 represent him at this PCR hearing. Isn't that
11 what you are saying?

12 MS. MCCALLISTER: Yes, or any sort of
13 conflict created by that representation and we
14 should probably have done this at the beginning
15 of the hearing but I didn't. I'm sorry.

16 THE COURT: That's okay. Again, based on
17 what I heard, I didn't feel that the
18 representation -- that there was any
19 representation really going on. I think it was
20 very generic in his advising him as to what he
21 thought. He's representing him on appeal. I
22 don't think that he failed -- he might have been
23 called in by Miss Lipinski to sit in, but I don't
24 think he was representing him. And if I'm wrong,
25 it won't be the first time I'm wrong or the last

1 time I'm wrong.

2 MS. MCCALLISTER: Well, I understand that,
3 Your Honor. I'm just trying to make sure that
4 we're clear. This has been a little bit of
5 confusing situation today and a unique situation.

6 THE COURT: It's unique.

7 MS. MCCALLISTER: And I understand Your
8 Honor's point on that. Obviously the State's
9 issue I just want to be clear is more that Mr.
10 Brooker was a necessary witness for this
11 evidentiary hearing because he was involved even
12 if it was tangentially he was present and he
13 testified sort of he knew what some of the
14 considerations were for making these decisions
15 and so I think it' two separate things. That he
16 was a necessary witness for this hearing and
17 should have been disqualified, but also because
18 he did represent him on the appeal from the trial
19 that any claims regarding that and Mr. Brooker's
20 representation here today would also need to be
21 waived as a separate issue. And if Your Honor
22 doesn't want to do that.

23 THE COURT: Say that -- because he
24 represented him on the appeal that he would have
25 to waive. He doesn't have any claims about his

1 appeal.

2 MS. MCCALLISTER: He doesn't, but I just want
3 to be clear.

4 THE COURT: I'm not clear what you are asking
5 me. That's why I am asking.

6 MS. MCCALLISTER: I'm sorry.

7 THE COURT: I'm just not clear what you are
8 asking me it to do. He clearly represented him
9 on appeal. No question.

10 MS. MCCALLISTER: Yes.

11 THE COURT: So what are you asking me to do?

12 MS. MCCALLISTER: Just -- and I realize he's
13 not raising that in this action because this is
14 about the plea and maybe that's all that needed
15 to be stipulated is that we agree with that, but
16 potentially he could have had claims against Mr.
17 Brooker in the other action which is potentially
18 a conflict with Mr. Brooker representing him.

19 THE COURT: We don't need to address that.

20 MS. MCCALLISTER: I just wanted to make sure
21 those are two separate issues in my mind.

22 THE COURT: All right. Thank you guys.
23 Interesting case. I'll let you know my decision.
24 I'll tell you this, I'm not positive that I have
25 the right to make that call as to whether or not

1 this is a continuing conspiracy. If you have any
2 further authority I'm more than happy to look at
3 it before I make my call.

4 MS. MCALLISTER: Your Honor, if you would
5 okay with it I think perhaps it would be helpful
6 for the State and for everybody if we maybe
7 submit memos sort of on the --

8 THE COURT: That will be great.

9 MS. MCCALLISTER: -- arguments on all of
10 these issues that we had here today.

11 THE COURT: Sure. If you want to brief the
12 other issues about him testifying and all that
13 and waivers, go ahead. I'm not going to change
14 my mind on it. I'LL tell you right now I won't.

15 MS. MCCALLISTER: I was thinking more about
16 the merits of the issues.

17 THE COURT: Yes, ma'am. Absolutely. That
18 will be great. How long do you need to get
19 memorandum in?

20 MS. MCCALLISTER: I would say 45 days.

21 THE COURT: No.

22 MS. MCCALLISTER: Thirty days.

23 THE COURT: No. Look, I'm old. I have gray
24 hair and if I can get of out here I will forget
25 about. I forget my name sometimes. I don't want

1 have to go back and reread all this stuff again.

2 I'll give you thirty dates.

3 MS. MCCALLISTER: Thirty days. Thank you.

4 THE COURT: If it's past 30 days I will not
5 look at it. Same to you.

6 MR. BROOKER: That is perfectly fine. Thank
7 you so much.

8 END OF TRANSCRIPT

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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 30th day of June, 2021.

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

March 13, 2024

Aileen Butler

**YORK COUNTY MULTIJURISDICTIONAL
DRUG ENFORCEMENT UNIT**

GENERAL SESSION CASE FILE SUMMARY

Incident Report #: 201600015470 / 201600017781 / 201600019721 /
201600019744

Case Agent: J. Spencer

Suspect(s): Ernest Floyd Jackson II
Dennis James Watkins

Charge(s): **Jackson**
Trafficking Crack
Trafficking Crack
Trafficking Crack
Distribution of Crack
PWID Crack Proximity to a Park or School
PWID Crack Proximity to a Park or School
Distribution of Crack Proximity to a Park or School
Distribution of Crack Proximity to a Park or School
Conspiracy

Watkins
Trafficking Crack
Trafficking Crack
Distribution of Crack Proximity to a Park or School

Witness/Officer(s): J. Spencer, M. Brown, M. Doherty (FBI), D. Ford (ATF), H. Clevenger, D. Burkhardt, R. King, R. Jenkins, L. Harrelson, A. Philson, B. Glynn

Tape(s): 4318-E / 4337-E / 4354-E / 4355-E

Summary By: J. Spencer

201600015470 ✓

On Tuesday May 3rd, 2016 at approximately 2:00pm officers with the York County Multijurisdictional Drug Enforcement Unit (YCMDEU) met with a confidential informant (CI) who stated that they could buy narcotics from a black male that he knew as "Black". The CI told officers that he knows black to live



Page 2

near [REDACTED] Chestnut St, Rock Hill, York County, South Carolina. The CI stated to officers that they have not purchased crack from "Black" before but knew a male at [REDACTED] Chestnut St whose nickname was "P-nut" and that "P-nut" could help the CI set up a deal with "Black". Officers have dealt with "P-nut" before and know his real name to be Dennis Watkins. The CI told officers that he could order a half ounce of crack from "Black" for \$600.00 in US Currency.

The CI met with officers at a predetermined location and was searched with no contraband found. The CI's vehicle was searched with no contraband found. The CI was issued \$600 in identifiable government funds by Special Agent Doherty (FBI). The CI was given audio and video recording devices so the transaction could be recorded and monitored by YCMDEU agents. The CI and YCMDEU agents left the meeting location and left for [REDACTED] Chestnut St. The CI arrived at the residence and sat outside with Watkins and "Black". After sitting for a short while an unknown male arrived and handed "Black" approximately 15 grams of crack. "Black" and the CI then walked over to a shed in the backyard where the CI gave "Black" the \$600.00 in US Currency from Agent Doherty and "Black" gave the CI approximately 15.0 grams of crack. This transaction was recorded both visually and audibly (tape 4318-E).

The CI and "Black" talked again for a short while and then the CI left the residence. When the CI left the residence, he was followed by officers to a predetermined meeting location. Once at that location, Inv. Spencer recovered the crack from the CI's hand. The CI and the CI's vehicle were searched by officers and no contraband was found. The CI then gave a sworn statement to Investigator Spencer about the events of the drug transaction. The suspect was positively identified by the CI from a previous booking photo and the video as Ernest Floyd Jackson II. Warrants for Trafficking Crack and PWID Crack Proximity to a Park or School were obtained. This incident did occur within one half mile of Workman Street Park.

201600017781

On Friday May 20, 2016 at approximately 4:45pm officers of the York County Multijurisdictional Drug Enforcement Unit (YCMDEU) met with a confidential informant (CI) who stated that they could buy crack from Ernest Jackson II again. The CI stated that they had spoken to Jackson and was willing to sell an 8 ball (3.5 grams) of crack.

The CI met with officers at a predetermined location and was searched with no contraband found. The CI's vehicle was searched with no contraband found. The CI was issued \$180.00 in identifiable government funds by Investigator Spencer. The CI was given audio and video recording devices so the transaction could be recorded and monitored by YCMDEU agents. The CI and YCMDEU agents left the meeting location and drove towards [REDACTED] Chestnut St. The CI arrived at the residence and stood outside with Watkins. After standing around with Watkins for a few minutes, Jackson drove up to the residence in a

Page 3

black Nissan. Jackson exited the vehicle and walked to the side of the house where the CI and Watkins were standing. "Black" gave the CI approximately 3.5 grams of crack and the CI gave Jackson the \$180.00 in identifiable government funds from Investigator Spencer. This transaction was recorded both visually and audibly (tape 4337-E).

Once the deal was completed, the CI and Jackson each left in separate vehicles. The CI met Inv. Spencer at a predetermined meeting location where Inv. Spencer recovered the 3.5 grams of crack. The CI and their vehicle was searched again by officers and no contraband was located. The CI gave Inv. Spencer a sworn statement as to the events that took place. The crack was placed into evidence by Inv. Spencer. Warrants for Distribution of Crack and Distribution of Crack Proximity to a Park or School were obtained for Jackson. This incident did occur within one half mile of Workman Street Park.

201600019721

On Wednesday June 2nd, 2016 at approximately 5:30pm Investigator Spencer with the YCMDEU was contacted by a confidential informant (CI) who stated that they had spoken to Ernest Jackson earlier in the day and Jackson stated that he could sell the CI an ounce of crack. The CI has purchased crack from Jackson two times prior under the watch of officers from the YCMDEU.

The CI met with officers at a predetermined location and was searched with no contraband being found. The CI's vehicle was searched with no contraband found. The CI was issued \$1100.00 in identifiable government funds by Special Agent Doherty (FBI). The CI was given audio and video recording devices so the transaction could be recorded and monitored by YCMDEU agents. The CI and YCMDEU agents left the meeting location and drove towards [REDACTED] Chestnut St. The CI arrived at the residence and stood outside with Watkins. A few minutes later Jackson arrived in a silver Hyundai. Jackson exited the vehicle and began to talk to Watkins and the CI. The CI handed Jackson the \$1100.00 in identifiable government funds that was provided by Agent Doherty. Jackson then told the CI that he needed to leave [REDACTED] Chestnut St and go get the crack. After leaving for approximately 25 minutes, Jackson returned with approximately 28 grams of crack. Jackson weighed the crack to show the CI that the crack weighed approximately 28 grams. Jackson then gave the CI the crack. This transaction was audibly and visually recorded on tapes 4354-E and 4355-E.

When the transaction was completed the CI and Jackson left the residence in separate vehicles. The CI was followed by Inv. Jenkins to a predetermined location where Inv. Jenkins recovered crack from the CI. The CI and their vehicle was searched with no contraband being found.

Officers of the YCMDEU, Federal Bureau of Investigation, and Rock Hill Police Violent Crimes Unit (VCU) who were placed in the neighborhood around [REDACTED] Chestnut St, followed Jackson as he left the residence. Jackson's vehicle made a left on Keels Avenue from Chestnut Street and continued towards East Black St. Once at the stop sign officers pulled in front of and behind Jackson's

Page 4

vehicle and took him into custody without incident. The driver of the vehicle, Chontai Hill was also placed under arrest. During Jackson's arrest, he was asked to exit the vehicle. When Jackson exited the vehicle, he threw a plastic bag containing approximately 12.0 grams of crack back onto the driver's side floorboard of the vehicle that he was in. The crack was recovered by Inv. Harrelson. Jackson was transported to the DEU East Office by officers. Inside of Jackson's pants pocket was one of the \$20.00 bills that was previously copied by Agent Doherty just prior to the crack deal. Jackson was booked and served with his warrants. Through the course of officer's investigation, officers learned that Hill was not truly involved in the crack deal. Hill was released with no charges. Officers who had active arrest warrants for Watkins for aiding in the sale of the crack was located at [REDACTED] Chestnut Street and taken into custody without incident. Total weight recovered of crack from Jackson was approximately 39.9 grams.

20160019744

Hill advised officers during questioning that there was a small quantity of marijuana in her house located at 411 N. Confederate Ave Apt B, Rock Hill, York County, South Carolina. Officers received verbal and written consent to search her residence. Officers located inside a males Nike sneaker, a clear plastic bag containing approximately 14.0 grams of crack. Officers did locate a small amount of marijuana inside a small metal grinder. The marijuana was seized but no charges for filed for the marijuana. Officers seized the crack that was found and placed it into evidence.

Statement: Hill: Rights by C. Rowe

Rights again by Agent Doherty

Hill stated that she was Jackson's girlfriend of two years. Hill told officers that Jackson stated part-time with her. Hill stated that she did not have anything to do with Jackson's business. Hill did give officers consent to search her cell phone but officers were met with negative results. Hill stated that there was a small quantity of marijuana at her residence. Hill did give officers consent to search her apartment.

Statement: Jackson: Rights by D. Burkhart

Rights again by Agent Doherty

Jackson admitted to throwing crack at the time he was stopped by officers. Jackson knew the weight of the crack that was thrown inside the vehicle. Jackson knew the weight and location of the crack found inside of Hill's apartment. Jackson knew this information without officers telling him. Jackson did admit to selling crack in general. Jackson gave consent for officers to search his cell phone. There were minimal text messages saved and no messages relating to sale or purchase of drugs.

See full FBI interview.

WITNESSES

DEU

Witnessing Officer: T. Hager

ARREST WARRANT NUMBER

2016A4610200997

ACTION OF GRAND JURY
TRUE BILL

GA
Foreperson of Grand Jury
Date: 5-11-17

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2017-GS-46- 01958

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

MAY 11, TERM 2017

THE STATE

VS.

ERNEST FLOYD JACKSON II

INDICTMENT FOR
TRAFFICKING CRACK COCAINE

SC Code: § 44-53-375(C)
CDR Code: 0450

After 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 to

Defendant

Witness:

C.C.C. PLS. AND G.S.

EXHIBIT

A-2 AB
6-30-21

STATE OF SOUTH CAROLINA
COUNTY OF YORK

INDICTMENT

At a Court of General Sessions, convened on May 11, 2017, the Grand Jurors of York County present upon their oath:

TRAFFICKING CRACK COCAINE

The defendant, Ernest Floyd Jackson II, did on or about May 3, 2016, in York County, South Carolina, 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 ten grams or more of crack cocaine as defined and otherwise limited in Sections 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of Section 44-53-375(C), 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.



T. MATTHEW HOGGE
ASSISTANT SOLICITOR

WITNESSES

DEU

Witnessing Officer: T. Hager

ARREST WARRANT NUMBER

2016A4610201207

**ACTION OF GRAND JURY
TRUE BILL**

[Signature]
Foreperson of Grand Jury
Date: 5-11-17

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2017-GS-46-01962

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

MAY 11, TERM 2017

THE STATE

VS.

ERNEST FLOYD JACKSON II

INDICTMENT FOR

TRAFFICKING CRACK COCAINE

SC Code: § 44-53-375(C)
CDR Code: 0392

After 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 to

Defendant

Witness:

C.C.C. PLS. AND G.S.

EXHIBIT

A-3 AB
6-30-21

STATE OF SOUTH CAROLINA
COUNTY OF YORK

INDICTMENT

At a Court of General Sessions, convened on May 11, 2017, the Grand Jurors of York County present upon their oath:

TRAFFICKING CRACK COCAINE

The defendant, Ernest Floyd Jackson II, did on or about June 2, 2016, in York County, South Carolina, 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 twenty-eight grams or more of crack cocaine as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of Section 44-53-375(C), 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.



T. MATTHEW HOGGE
ASSISTANT SOLICITOR

argue Double Jeopardy prevented Applicant from being prosecuted on these charges.¹ At the close of all evidence and after hearing arguments from both sides, the Court directed the parties to submit memoranda of law in support of their respective positions, specifically on the following question:

Applicant claims his guilty plea violated double jeopardy inasmuch as the crack cocaine drug transactions of May 3, May 20, and June 2, 2016 constituted a “single continuous conspiracy” arising out of the same facts and circumstances of his conviction for trafficking crack cocaine on June 2, 2016. Also that trial counsel erroneously informed applicant that a conviction under 2017-GS-46-1958 constituted a third serious or most serious conviction. Applicant urges error based upon a “single continuing conspiracy” referenced above.

Applicant asserts that the five-part multi prong test provided in *State v. Amerson*, 311 SC 316, 428 S.E.2d 821 (1992), for determining whether one or more conspiracies exist should be used to find a continuing conspiracy.

In this case, Applicant was charged with three counts of trafficking in crack cocaine and only one count of conspiracy. Since there is only one count of conspiracy and since the substantive charges of trafficking crack cocaine are not the same offense as conspiracy for double jeopardy purposes, how is the *Amerson* test relevant to the facts of this case?

Additionally, this Court had before it a copy of the York County Clerk of Court’s records regarding the subject conviction, Applicant’s records from the South Carolina Department of Corrections, the application and amendment, Respondent’s return, the plea transcript, and Applicant’s appellate records. After a review of the record and all evidence presented, for the reasons set forth below, this Court finds Applicant has failed to meet his requisite burden of proof and denies relief.

¹ In November 2017, Applicant was convicted of trafficking cocaine base – ten grams or more but less than twenty-eight grams, first offense (2017-GS-46-001962), for which he was sentenced to imprisonment for a period of ten years. He alleges this is the conviction which would have triggered double jeopardy with respect to the trafficking charge that is the subject of this action.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its August 2016 term, the York County Grand Jury indicted Applicant for trafficking in crack cocaine – ten grams or more but less than twenty-eight grams (2016-GS-46-02575), and possession of intent to distribute crack cocaine within proximity of a park (2016-GS-46-02576). Additionally, during its May 2017 term, the York County Grand Jury indicted Applicant for possession of crack cocaine with intent to distribute within proximity to a park or school (2017-GS-46-01957), trafficking crack cocaine – ten grams or more but less than twenty-eight grams (2017-GS-46-01958), trafficking crack cocaine – ten grams or more but less than twenty-eight grams (2017-GS-46-01962), distribution of crack cocaine within proximity of a park (2017-GS-46-01964), and conspiracy (2017-GS-46-01963). Applicant was represented by Mindy Lipinski, Esquire. Assistant Solicitor Thomas Matthew Hogge of the Sixteenth Circuit Solicitor's Office prosecuted the case.

In November 2017, Applicant was tried in his absence and convicted of trafficking cocaine base – ten grams or more but less than twenty-eight grams, first offense (2017-GS-46-001962). His sentence was sealed following his conviction. On March 30, 2018, Applicant's sentence was unsealed, and Applicant was sentenced to imprisonment for a period of ten years.² Applicant filed a timely notice of appeal and retained Thurmond Brooker as appellate counsel. On August 28, 2018, the South Carolina Court of Appeals dismissed Applicant's appeal due to appellate counsel's failure to timely order the transcript as required by South Carolina Appellate Court Rule 207. The remittitur issued on September 25, 2018.

² Applicant is not challenging this conviction or sentence in this PCR action. His application lists only his convictions from his guilty plea, the allegations raised pertain only to the entry of that plea, and Counsel for Applicant expressly waived any allegations regarding the trial.

Meanwhile, on April 11, 2018, Applicant appeared before the Honorable Edgar W. Dickson and pleaded guilty to trafficking crack cocaine – ten grams or more but less than twenty-eight grams, second offense (2017-GS-46-01958), pursuant to a negotiated plea agreement, which included the dismissal of all other charges. Judge Dickson accepted Applicant's guilty plea and sentenced him to the negotiated sentence of seventeen years, which was to run concurrent to the ten-year sentence Applicant was already serving. Applicant received credit for time served for 202 days. Applicant did not appeal his convictions or sentences from his guilty plea.

FACTUAL BASIS SUPPORTING GUILTY PLEA

On May 3, 2016, a confidential informant told Drug Enforcement Unit officers that he could purchase a half of an ounce of crack for six-hundred dollars. GP Tr. 5. The informant set up a buy with Applicant on Chestnut Street in Rock Hill. GP Tr. 5. The informant, Applicant, and Applicant's uncle were present at the residence when Applicant took the informant to the shed and gave him fifteen grams of crack cocaine in exchange for six-hundred dollars. GP Tr. 5-6. The informant later made additional buys from Applicant.³ GP Tr. 6.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. "Trial counsel was ineffective in allowing Defendant to plea to charges with trial court lacked jurisdiction to hear."
2. Prosecutorial Misconduct
 - a. "The State violated applicant's right of due process, where it failed to provide

³ Testimony at the evidentiary hearing established the informant made additional buys from Applicant on May 20, 2016, and June 2, 2016. The June 2 transaction was the subject of the November 2017 trial. The charges arising from the May 20 sale were dismissed as part of Applicant's plea bargain.

applicant with all discovery under Rule 5, Brady and Giglio.”

3. Involuntary Guilty Plea

- a. “Applicant plea was not [voluntarily] and [intelligently] given.”

In his amended application, Applicant alleges:

1. Applicant believes that trial counsel was ineffective in pleading defendant to trafficking in methamphetamine because the indictment was for trafficking in crack cocaine. Methamphetamine is a chemically distinctive drug from crack cocaine, no evidence of the existence of methamphetamine and no proof of methamphetamine existed.

2. Trial court lack jurisdiction to sentence defendant to trafficking in methamphetamine because Applicant was never indicted for trafficking in methamphetamine.

3. Appellant (sic) believes that trial counsel was ineffective in pleading Applicant to trafficking in methamphetamine because such plea violated the Double Jeopardy clauses of the constitutions of South Carolina and the United States of America. Specifically, Application’s (sic) guilty plea to trafficking in methamphetamine (indictment allege crack cocaine) on May 3, 2016 was a single continuous conspiracy arising out of the same facts and circumstance of his conviction for Tracking in Cocaine on June 2, 2016.

4. Appellant (sic) believes that his guilty pleas was not knowingly and intelligently give because trial counsel erroneously informed Applicant that a conviction under indictment 2017-gs-46-1958 constituted a third serious or most serious conviction, and that the State would seek life imprisonment if he was convicted at trial. However, Applicant’s conviction under indictment 2017-gs-46-1958 and 2017-gs-46-1962 constituted a single continuance conspiracy and would only have been a second serious or most serious conviction, and would not have subject Application (sic) to a life sentence. But for trial counsel’s erroneous advise/statement of the law, Applicant would not have plead guilty.

Applicant withdrew amended allegations #1 and #2, as well as the Brady claim listed in his original application at the beginning of the evidentiary hearing. Those allegations are therefore dismissed with prejudice.

SUMMARY OF TESTIMONY

Applicant testified he believed it would be a hardship to him if Brooker were not allowed to represent him, and he wanted Brooker to continue as his counsel. He stated he made his decision to plead guilty based on advice from Counsel, not Brooker.

Brooker testified as to his involvement with Applicant during the criminal proceeding. Brooker testified he first became involved when Applicant was trying to decide if he wanted to go to trial or plead guilty in the second case, which is the subject of this action. Brooker testified he was involved in case Applicant decided to proceed to trial. Brooker explained if Applicant had not decided to plead guilty, he would have taken over the representation and asked for a continuance to prepare for trial.

Brooker stated he was present for at least one, possibly two, conversations between Applicant and Counsel as Counsel discussed the pros and cons of pleading guilty. Brooker also testified he spoke to Applicant about what his options were and reemphasized what Counsel said, but he did not give Applicant an independent assessment because he did not have access to discovery. Brooker testified anything he told Applicant about the facts of the case would have been reemphasizing what Counsel said as he had heard what Counsel explained to Applicant during at least one meeting. Brooker further testified, although Applicant asked Brooker for advice regarding the decision to plead guilty or pursue a trial, Brooker stated he did not advise Applicant because he told Applicant he could not perform an independent evaluation of case. Brooker further testified he could not recall if he told Counsel about any conversations between himself and Applicant outside of Counsel's presence.

Brooker testified he believed he told Applicant that if the information provided to him by Counsel was accurate regarding a third strike, the law says Applicant would be subject to potential life imprisonment. Brooker stated he would have instructed Applicant as to what the law was but that he could not tell Applicant how it applied to Applicant's situation. Brooker testified he did not recall if he and Applicant had any discussions regarding the applicability of double jeopardy to Applicant's case. Brooker acknowledged he was aware Applicant was

concerned with avoiding a potential life sentence and stated he believed it was one of the biggest motivating factors in Applicant's decision whether to plead guilty.

Counsel testified she was involved in Applicant's case from the very beginning and stayed involved for quite some time. She testified she visited with Applicant almost immediately after receiving the case. Counsel testified the State initially extended a plea offer before the trial on the first charge. She explained that she drew up a document outlining all of Applicant's charge and potential penalties, which she asked him to sign, but he refused. Counsel explained the first charge eventually went forward as a trial in Applicant's absence, and she had at least one conversation with Applicant while he was on the run, in which she explained he had been convicted on some charges but acquitted on others, his sentenced had been sealed, and he needed to turn himself in.

Counsel acknowledged Applicant informed her he was looking to retain counsel, and she asked him to have whoever he retained call her. Counsel testified she spoke to Brooker and tried to give him a clear picture of the chain of events. Counsel further testified once Applicant had been apprehended, she reached out to Brooker so he could be present for sentencing to allow him to preserve issues for appeal. Counsel recalled the three of them first had a group meeting and discussed what to do from there, but since they did not know Applicant's sentence at that time, the discussion was primarily prospective and theoretical. Counsel testified she had an idea of what the State's new offer would be on the second set of charges, and they also spoke about whether to accept the new plea agreement.

Counsel testified that throughout the time leading up the plea, Applicant would reference conversations he had with Brooker. Counsel explained she felt that Brooker's advice was not necessarily conflicting with hers, but that she and Brooker used different terms, so she arranged a

second meeting where everyone could be together and Brooker could give Applicant advice. Counsel testified Brooker met with Applicant independently after the second group meeting, and Brooker reached out to her to set up the solo meeting between Brooker and her client. She stated she was aware Applicant and Brooker were continuing to talk by phone because Applicant would reference what Brooker said to him.

Counsel testified the issues Brooker was working on were embedded within the issue of whether Applicant should plead guilty to the second charge. Counsel explained, from Applicant's perspective, he had been convicted at trial, and he wanted Brooker to handle the appeal and try to undermine the trial, but Applicant was also concerned about forfeiting any additional rights by pleading guilty. Counsel testified Applicant also wanted to understand what would happen if he did not plead guilty, so the issues were interconnected in Applicant's mind. Counsel stated this case had a unique procedural history, and the solicitors were not letting the second set of charges go because they wanted Applicant to receive additional time, so that was a complicating factor in deciding how to handle the case.

Counsel further testified she has always been a trial attorney and has not handled many appeals or PCRs, so she deferred to Brooker to give Applicant advice on those collateral attacks. Counsel also explained that because Brooker was paid and she is a public defender, she felt what Brooker said carried more weight with Applicant, and she felt they both needed to be in the room to give Applicant dual advice. Counsel testified she believed if Brooker had told Applicant the plea would affect the appellate outcome regarding the trial, Applicant would have chosen to go to trial. She testified Applicant only agreed to plead guilty because he had a first strike from 2008 plus the trial strike, and both attorneys were concerned with the possibility he would receive a life sentence. Counsel testified Applicant relied heavily on both her and Brooker, and

she believed that if Brooker had told Applicant he should go to trial, Applicant would have. Counsel also testified she asked Applicant if he needed more time to talk to Brooker before they went forward with the plea hearing.

Next, Counsel testified the charge at issue in this case was trafficking in crack cocaine in violation of section 44-53-375(C) of the South Carolina Code. Counsel testified she received documents in discovery from the York County Drug Enforcement Unit, including a report⁴ which outlines three drug distributions on May 3, 2016, May 20, 2016, and June 2, 2016. Counsel explained the June 2 sale was the subject of the trial; the May 3 sale was the subject of the plea; and the State dismissed the charges related to the May 20 event.

Counsel reviewed the report, and stated she did not remember another man, Dennis Watkins, known as Peanut, participating in any of the transactions, other than being present at the house where they took place. Counsel stated the confidential informant had grown up with the Jackson family and had seen Applicant around. Counsel further explained the informant knew Peanut could make an introduction between him and Applicant, who was known as Black, because Applicant would not sell to him without an introduction. Counsel explained the full background is not apparent from the videotapes of the sales, but text messages indicated a relationship eventually developed to the point that the informant and Applicant were talking by themselves. Counsel explained when you watch the videos, you could see other people in front of the house where the transactions took place, including Peanut, just hanging out and talking to the informant, and Applicant would sometimes arrive later, but Peanut never participated in the sales themselves. Counsel testified even if Peanut made the introduction for the first transaction, it is not on the video, although she agreed it is mentioned in the report.

⁴ Applicant's Exhibit 1.

Counsel further agreed the discovery suggested Peanut might have known what was going on, and she and Applicant talked about why he was not charged and whether he could be implicated. Counsel explained his exact role was not clear, but on the videotapes, the drugs and money never passed through Peanut, and she did not think a defense involving Peanut was going to succeed in getting Applicant acquitted. Counsel explained she believed in order for Peanut to be charged as a conspirator, he would have to know he was making the introduction for the purpose of engaging in a drug conspiracy, although she agreed the transactions did not necessarily have to pass through him in order for him to be implicated. Counsel stated Peanut had a history with the police, but he essentially just sat outside all day and was occasionally a source of information for officers. Counsel acknowledged Peanut was at the house during the first transaction, but she testified he did not participate other than being present, and she did not have any knowledge of when he made the introduction between Applicant and the informant.

Counsel testified Applicant was concerned about why Peanut was not charged and thought maybe Peanut had set him up. Counsel explained she told Applicant that even if Peanut had been charged, it would not exonerate Applicant because of the text messages setting up and discussing the buys. Counsel testified Applicant always believed the entire operation was a set up because of a previous unsuccessful murder prosecution, and he believed the police were out to get him. Counsel testified Applicant wanted her to flesh out whether Peanut might have been involved, but she was never able to do so. Counsel further testified she explained to Applicant that Peanut was not going to come into court and say he was the one in the shed instead.

Counsel further testified the defense team talked to Peanut, and he did not want anything to do with them. Counsel stated for each sale there were text messages between Applicant and the informant discussing how much the informant wanted to buy and how much Applicant had

available, and those messages did not go through Peanut in any way. Counsel also explained when the informant got the house, he did not, for example, have Peanut make a call and then Applicant would show up. Counsel testified Peanut was just outside hanging around because that is what he did every day. She testified she thought the informant and Applicant knew of each other, and Peanut may have vouched for the informant, but that was the extent of his involvement.

Counsel testified the second transaction on Friday, May 20, was initiated after the informant met with officers and was searched and provided with funds. Counsel stated Peanut was also present in the yard of the house during this transaction, but the video clearly showed he was not in the shed when the actual sale took place, and the sale did not take place in front of him. Counsel further explained the way the second sale played out, stating the video showed the informant arriving at the house and standing outside with Peanut when Applicant drove up. Counsel explained that while the wording of the report suggests Peanut was present for the second transaction, her recollection was that the actual sales always happened in the shed behind the house, and Peanut was never on videotape anywhere other than in the front yard. Counsel explained there were also sometimes other people in the yard as well, including children and other men who walked up to speak to the people in the yard. Counsel testified, however, the only people in the shed on the tapes are Applicant and the informant, and the text messages did not involve Peanut, only, again, Applicant and the informant.

Counsel testified the third transaction took place on June 2, 2016, and again the informant met with officers, was searched and received money, then left and drove to the house. Peanut was there when the informant arrived, then Applicant showed up. Counsel explained, again, while Peanut was present in the yard with Applicant and the informant, she did not recall him

being present when the money or drug exchange occurred, and it did not happen there in the yard. Counsel explained this was a big sale, and law enforcement had gotten a significant amount of money cleared for this purchase. Counsel testified her recollection was that the informant gave Applicant the money, then Applicant left to go get the drugs from somewhere else and was gone a very long time, leaving the informant and Peanut in the yard talking. Counsel explained when Applicant came back, he and the informant either went into the shed or behind the house for the actual exchange of drugs.

Then, Counsel explained, after the big sale on June 2, officers conducted a traffic stop and found another ten-to-fourteen grams in Applicant's car. They then interviewed Applicant and his girlfriend, who was also in the car, and searched Applicant's apartment where more drugs were found tucked inside a man's shoe. Counsel explained, at the trial, the State dropped the charges related to the drugs found at the apartment, but proceeded on the drugs found during the traffic stop. Counsel testified the jury "split the baby" on the charges at trial.

Counsel explained Applicant pleaded guilty to charges arising from the events of May 3, the first sale. She testified the video from that date was better than the video from the May 20 transaction, where you could not see Applicant's face as much or as often. She recalled the State believed two of the three sales were very clear as to who was involved. She testified the State dropped the charges from May 20, and Applicant pleaded guilty to the others.

Counsel agreed all three transactions took place within about thirty days, and all happened at the same place. Counsel further agreed Applicant, the informant, and Peanut, along with other people, were present at some point during all three transactions. Counsel also agreed all three sales occurred in a similar format or sequence. Counsel testified Applicant was convicted of trafficking at trial for the June 2 transaction and was also charged with trafficking

related to the May 3 sale. Counsel testified she believed the charges from the May 20 sale were only distribution charges because it did not meet the requisite weight, but she agreed all of the charges arose under the same statute.

Counsel testified she was not specifically aware of the Amerson case, but she was familiar with the five-pronged test to determine whether the State can charge separate incidents or if they must be charged together. Counsel testified, however, the allegation in this case was not that there was a conspiracy, particularly not with Peanut. Counsel acknowledged Applicant was originally charged with conspiracy, but she explained the conspirator would have been whoever Applicant obtained the drugs from when he left the scene during the June 2 buy.

Counsel explained Applicant was convicted at a trial in his absence for the charges arising from June 2, and the plea was related to a transaction that took place thirty days prior to the June sale. Counsel agreed both indictments⁵ charged a violation of section 44-53-375(C). Counsel reemphasized Peanut was not involved in the transactions and stated it was routine to have separate trials for separate transactions. She testified she understood Applicant's argument, but she feared it might also allow the State to stack the weights of different transactions, resulting in a situation in which Applicant or other defendants might win a battle but ultimately lose the war. Counsel testified she never seriously considered making the argument, although she and Applicant discussed why the State was allowed to pursue each transaction separately and his perceived unfairness of that situation. Counsel testified they also talked about trying to identify Applicant's sources, but he was either not willing to give them up or could not give sufficient information.

⁵ Applicant's Exhibit 2.

Counsel also testified she and Applicant discussed double jeopardy because Applicant thought the situation was so unfair. Counsel testified she had seen the State pursue separate convictions like this before and noted Brooker never brought up the double jeopardy issue when the three of them discussed what Applicant should do. Counsel testified she discussed with Applicant the fact that the jury obviously had issues with the State's case in the first trial, and there was a chance a second jury would also, but the overwhelming concern was that if the defense did not prevail, Applicant was facing a life sentence.

Counsel testified it was a complicated situation, which is why she brought Brooker into meet with them, to discuss what issues Applicant might waive if he pleaded guilty. Counsel testified she felt it was somewhat unfair how the State had "cornered" Applicant, but she explained the State also originally offered him a largely global deal and opined he might have have had an argument for less time before the case ended up on the trial docket. Counsel testified her recollection was the best offer Applicant received was either a range of ten-to-fifteen years or a cap of seventeen years, but Applicant refused it.

On cross-examination, Counsel clarified the charges stemmed from three separate sales. Applicant pleaded guilty to one, was convicted at trial of one, and the State dismissed the other. Counsel testified the charges from May 3 included trafficking – 10 to 28 grams and distribution; the May 20 charges included distribution and distribution with proximity; and the June 2 charges included another proximity count, two counts of trafficking, one count of distribution, and one count of conspiracy. Counsel explained the single charge from May 3 was sufficient to meet the weight for trafficking. For the June 2 transaction, Counsel stated the two counts arose from the sale of fourteen grams to the informant and the additional fourteen grams law enforcement found in Applicant's car. Counsel testified the total combined weight of the drugs involved on June 2

was well over twenty-eight grams. Counsel further stated the weight each count was based on was sufficient to meet the minimum for trafficking, and the conspiracy charge, along with one count of trafficking, was dropped prior to the start of the trial.

Assistant Solicitor Thomas Matthew Hogge testified he prosecuted all three of the cases against Applicant. Hogge testified law enforcement determined the initial charges, and he dropped the conspiracy charge due to lack of evidence once he received and reviewed the file. Hogge testified the State's theory for both the plea and the trial was based on the weight of the transactions, not a conspiracy, and the jury was not charged on conspiracy during the trial. Hogge testified he specifically remembered arguing to the jury regarding the significant amount of drugs.

Hogge further testified to his recollection of the videotapes of the buys. Hogge stated Peanut was always present at the house, but he was never involved in the actual transactions, which never occurred in the front yard. Hogge testified the videos only showed Applicant and the informant. Hogge also testified, during the June 2 video, specifically, it was clear Peanut was unaware of the exact nature of the transaction until he and the informant were talking while the informant was waiting for Applicant to return.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has heard the testimony and evidence presented at the evidentiary hearing, observed the witnesses and evaluated their credibility, considered the arguments of counsel, and weighed these factors accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject conviction, the appellate records, and Applicant's original and amended applications, as well as the plea transcript. This Court finds the combined record from the criminal case and the testimony and evidence presented the evidentiary hearing

establishes Applicant received effective assistance of counsel, and relief should be denied and this application dismissed with prejudiced. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws:

Standard of Review

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 466 U.S. at 688 (1984)). 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.” Id. at 117-18, 386 S.E.2d at 625. An applicant who pleads guilty with the advice of counsel may collaterally attack the plea only by showing (1)

counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994); Hill v. Lockhart, 474 U.S. 52 (1985)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56.

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

This Court finds Applicant has failed to prove his plea counsel's performance was deficient in any way, nor was Applicant prejudiced by her performance. Counsel met with Applicant and reviewed with him the evidence and discovery in the case, as well as Applicant's version of the facts and possible defenses. This Court finds Applicant ultimately chose to plead guilty freely and voluntarily and with the advice of competent counsel in order to accept a favorable bargain from the State and avoid the possibility of a sentence of life without parole.

Allegations of Ineffective Assistance of Counsel for Failing to Raise Double Jeopardy as a Defense Leading to Applicant's Involuntary Guilty Plea

Applicant argues his plea counsel was constitutionally ineffective for failing to advise Applicant the plea violated the Double Jeopardy Clause because the various drug sales for which he was indicted constituted a single continuing conspiracy for trafficking in cocaine, and thus his

guilty plea under indictment 2017-GS-1958 was involuntary. In support of this argument, Applicant cites the five-part test for determining whether a defendant engaged in a single conspiracy or multiple conspiracies as set forth in Amerson shows the three drug buys were part of a single conspiracy. State v. Amerson, 311 S.C. 316, 319-20, 428 S.E.2d 871, 873 (1993) (“The factors considered are (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.”). Thus, Applicant argues the guilty plea entered for the May 3 sale after Applicant had been convicted at trial for the June 2 sale violated the Double Jeopardy clause. However, Applicant was convicted of two counts of the substantive offense of trafficking, not conspiracy, and in any event, the sole count of conspiracy charged against Applicant was dismissed. Thus, this Court finds Amerson is wholly inapplicable, Applicant’s convictions do not violate the Double Jeopardy clause, and relief should be denied because Applicant plead guilty freely and voluntarily.

Amerson is Inapplicable to Applicant’s Case and Double Jeopardy is not a Defense

This Court finds Amerson is inapplicable to Applicant’s case, and therefore, Applicant’s convictions do not violate the Double Jeopardy Clause. Accordingly, the Court also finds Counsel was not constitutionally ineffective in failing to advise Applicant of double jeopardy as a defense.

It is axiomatic that “a conspiracy to commit a crime is a separate offense from the crime itself.” United States v. Felix, 503 U.S. 378, 391 (1992). Thus, the State can prosecute the same

defendant for the conspiracy and other separate, overt acts the defendant undertakes in furtherance of that conspiracy without running afoul of double jeopardy. In South Carolina, the State can prosecute conspiracy in several ways – the Code contains a general drug conspiracy offense (44-53-420), and proof of a conspiracy can also be used to prove the substantive offense of trafficking crack cocaine (44-53-375). Thus, under section 44-53-375, conspiracy to traffic crack cocaine *is* trafficking. As the Supreme Court stated in State v. Raffaldt,

trafficking may be accomplished by a variety of criminal acts, to wit:

- knowingly selling, manufacturing, cultivating, delivering, purchasing, or bringing ten grams or more of cocaine (or any mixtures containing cocaine) into this State; or
- providing financial assistance or otherwise aiding, abetting, attempting; or
- conspiring to sell, manufacture, cultivate, deliver, purchase, or bring ten grams or more of cocaine (or any mixtures containing cocaine) into this State; or
- knowingly having actual or constructive possession or knowingly attempting to become in actual or constructive possession of ten grams or more of cocaine (or any mixtures containing cocaine).

It is the amount of cocaine, rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession.

318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995).

The State can also, of course, prosecute a defendant for multiple, discrete substantive trafficking offenses without the need to allege or prove a conspiracy. That is what ultimately happened in Applicant's case. Although Applicant was initially charged with both conspiracy under section 44-53-420, in addition to three distinct, substantive trafficking offenses under 44-53-375, the State declined to prosecute the conspiracy and dismissed that charge specifically because, as the solicitor credibly testified, he could not prove an agreement between Applicant and any other person. See State v. Dasher, 278 S.C. 454, 455, 298 S.E.2d 215, 216 (1982) ("The gravamen of the offense of conspiracy is the agreement or combination.").

Instead, the solicitor credibly testified the State's theory of proof for trafficking in both cases was based on the weight of the drugs Applicant sold to the informant in each controlled transaction, and the jury in Applicant's trial on the June 2 sale was not instructed on the law of conspiracy. Moreover, both indictments are labeled "Trafficking Crack Cocaine," and the corresponding arrest warrant for the May 3 indictment -- the subject of the guilty plea actually at issue here -- describes the offense as the distribution of fifteen grams of crack cocaine to another person during a controlled buy. Further, the only mention of conspiracy in the text of either the May 3 or June 2 indictment is the alternative phrasing of the trafficking statute, which states a person commits the offense of "trafficking in crack cocaine" if the person:

knowingly sells, manufactures, delivers, purchases, or brings into this State, *or* who provides financial assistance *or* otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, *or* who is knowingly in actual or constructive possession *or* who knowingly attempts to become in actual or constructive possession of ten grams or more... cocaine base. . . .

S.C. Code § 44-53-375(C) (emphasis added). As discussed below, the Court finds this statutory language alone does not transmute the charge from a substantive offense into a conspiracy offense.

Thus, the Court finds Applicant's case is more analogous to State v. Gordon, as argued by Respondent, rather than Amerson. In Amerson, the defendant was charged with two counts of conspiracy to traffic marijuana as part of a four-year enterprise importing marijuana from Texas to South Carolina. 311 S.C. at 320, 428 S.E.2d at 473-74. While Amerson was charged with two counts of conspiracy -- one for pre-1990 conduct, and one for post-1990 conduct -- the evidence the State sought to introduce to prove each charge was the same proof of the ongoing conspiracy. Id. at 317-18, 428 S.E.2d at 872. The trial court applied a five-part, "totality of the circumstances" test to determine if the conduct charged in the indictments constituted a single

conspiracy or multiple conspiracies, ultimately dismissing the second indictment on the basis of a double jeopardy violation. Id. at 319-20, 428 S.E.2d at 873. In a similar case, decided the same day, declining to find a double jeopardy violation, then-Justice Toal explained:

Under South Carolina law, the crime of conspiracy is complete when the agreement is reached. No overt act in furtherance of the conspiracy need be proven. . . . It is a completely separate offense from the substantive offenses which are the objects of the conspiracy. . . . *Thus, the conduct to be proven is the agreement.* Accordingly... “in conspiracy cases the plea of former jeopardy will prevail where it can be shown that the subsequent prosecution *rests solely upon the same agreement* that was involved in the former prosecution. . . .”

State v. Wilson, 311 S.C. 382, 390-91, 429 S.E.2d 453, 458 (1993) (Toal, J., concurring), abrogated by on other grounds by State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) (internal citations omitted) (emphasis added).

On the other hand, in Gordon, the defendant was first tried and convicted in 1997 for trafficking crack cocaine on September 21-23, 1996, under section 44-53-375(C). 356 S.C. 143, 146-47, 588 S.E.2d 105, 107 (2003). He was then later indicted in 2000 and tried in 2001, for trafficking crack cocaine on September 27, 1996, also under section 44-53-375(C). Id. Gordon argued double jeopardy prevented the 2001 prosecution under the theory that the events giving rise to the 1997 trafficking conviction were “part of a continuing course of conduct” and a conspiracy that continued through the events alleged in the 2001 prosecution. Id.

However, the South Carolina Supreme Court affirmed the trial judge’s refusal to quash the second indictment on the ground of double jeopardy, finding the 1997 conviction was “clearly a prosecution for the substantive offense of trafficking.” Id. at 150, 588 S.E.2d at 108.

Among other things, the Court pointed to the proof offered at the 1997 trial:

[O]n September 23, 1996, police were investigating Tommy Rhinehart, a suspected drug dealer. Rhinehart left his home and went down an alley toward Gordon’s home, which was 50–75 yards away. When Rhinehart returned, police executed a search warrant on his home and discovered two bags of crack cocaine,

and a pill bottle also containing crack. Rhinehart decided to cooperate with police and told them he had gotten the crack from Gordon. Rhinehart testified Gordon had given him two bags of crack, on Sat. Sept. 21, 1996, in the alley between their homes. Rhinehart sold that crack between Saturday and Monday, and paid Gordon \$500.00 to pay for it on Monday (Sep. 23rd), at which time Gordon gave him two more bags.

Id. at 150, 588 S.E.2d at 108-09.

Gordon's indictment, unlike Applicant's, omitted the "or conspires" phrase included in section 44-53-375(C). Id. at 149-50, 588 S.E.2d at 108. However, the trial judge included the "conspires" language in the jury instructions given at trial, which Gordon argued was proof he was tried for conspiracy. Id. at 150, 588 S.E.2d at 108. The Supreme Court addressed this issue, writing:

Gordon's basic contention is that, because the word "conspires" was included in the judge's charge covering the trafficking statute, § 44-53-375(C), his 1997 trial was essentially rendered a "conspiracy" trial. We disagree. As noted previously, Gordon was not indicted for conspiracy, and the jury was **not** charged on the law of conspiracy at the 1997 trial. Simply because the trial court instructed the jury the language of the trafficking statute did not thereby transform his trafficking trial into one for conspiracy.

Id. at 151, 588 S.E.2d at 109 (emphasis in original).

Similarly, in this case, Applicant was never tried on the conspiracy charge specifically because the State did not have any evidence of an agreement or cooperation between Applicant and another person.⁶ Although the language of section 44-53-375(C) allows proof of the

⁶ Applicant argues the investigator's reports supports Applicant's contention that this was a conspiracy charge, essentially asserting Applicant's uncle, who goes by the nickname Peanut, was an unindicted co-conspirator as all of the transactions took place at his house, and he introduced the informant to Applicant. However, as both the solicitor and Counsel repeatedly and credibly testified, all three controlled buys were video recorded, and Peanut was never present for the actual exchange of drugs for money. Moreover, both testified text messages between Applicant and the informant show Peanut was not included in arranging about the buys.

substantive offense by presenting evidence of a conspiracy, that was not done in Applicant's case; the State's theory in the May 3 charge to which Applicant pleaded guilty was based entirely on the weight of the drugs sold to the informant.⁷ Moreover, this Court finds the evidence in both of Applicant's cases as described by both Counsel and Hogge – namely, recordings of two separate controlled drug buys – is, as in Gordon, proof of separate and distinct acts which each constituted the substantive offense of trafficking.

Because Applicant was not charged with nor tried for two conspiracy offenses, but rather with substantive trafficking offenses, this Court finds Amerson does not apply to his case. For this exact reason, the Supreme Court in Gordon explicitly distinguished Amerson from the facts of Gordon's case, calling Gordon's reliance on Amerson "misplaced." Id. at 151 n.7, 588 S.E.2d at 109 n.7. Under Applicant's reasoning, so long as Applicant agreed with Peanut or any other person to deal drugs, and Applicant continued to make sales without a substantial break, only the first sale could be prosecuted because the remaining sales would simply be part of the ongoing conspiracy. The Court agrees with Respondent that this is clearly not the intent of Amerson. Rather, it is meant to be applied in the narrow circumstance where the State seeks to prove an agreement as the completed crime of conspiracy. In that instance, if the State pursues multiple

Mere association with another who committed a crime does not make that person an accomplice or a co-conspirator to the guilty perpetrator, nor does mere presence at the scene of the crime make a person an accomplice or a co-conspirator. State v. Kelsey, 331 S.C. 50, 76, 502 S.E.2d 63, 77 (1998). While the State might have initially investigated Applicant and Peanut for a conspiracy, ultimately the State was unable to prove such a conspiracy existed, dismissed that charge, and instead prosecuted Applicant for two counts of the substantive offense of trafficking by weight.

⁷ Similarly, the Court finds the solicitor credibly testified his theory on the June 2 count, which went to trial, was also based solely on weight, and he argued to the jury they should convict Applicant of trafficking because he possessed "a lot of drugs." The solicitor also testified the judge in that case did not charge the jury on the law of conspiracy in that case. Regardless, because Applicant's conviction on the May 3 indictment at issue here was clearly for the substantive offense, Amerson still would not apply, no matter the basis for the June 2 conviction obtained at trial.

counts, the State must prove separate and distinct agreements, as it did in Wilson, discussed above, wherein the defendants were convicted of two separate conspiracy offenses – one for trafficking cocaine and one for trafficking marijuana. 311 S.C. at 385, 429 S.E.2d at 455 (finding the State did not “seek to prove the same conduct in both cases since a different controlled substance was the subject of the prosecution in each case”).

In any event, the Court finds the factual basis of the plea at issue here was based solely on the weight of the drugs Applicant sold in the May 3 transaction. GP Tr. p. 5. There was no evidence of a conspiracy or agreement between Applicant and any other person in connection with the May 3 sale resulting in Applicant’s guilty plea; thus, it is not a conspiracy conviction. Because Applicant was never charged with nor convicted of even a single conspiracy offense, let alone more than one, this Court finds Amerson is wholly inapplicable to this case. Accordingly, the Court further finds double jeopardy does not apply to these facts because Applicant’s convictions are for separate violations of the substantive offense of trafficking in crack cocaine.

Therefore, Applicant’s constitutional rights were not violated by the plea to the May 3 count, nor was plea counsel ineffective for failing to raise double jeopardy as a defense. This Court therefore denies relief as to this allegation and dismisses it with prejudice.

Applicant’s Guilty Plea Was Freely and Voluntarily Entered

Applicant argues his guilty plea was not freely and voluntarily entered because Counsel “erroneously informed Applicant that a conviction under indictment 2017-gs-46-1958 constituted a third serious or most serious conviction, and that the State would seek life imprisonment if he was convicted at trial,” on the basis that the conviction would count only as a single strike if it arose from a single continuing conspiracy. As discussed above, this Court finds Applicant’s conviction at issue here was a conviction for the substantive offense of trafficking,

not conspiracy, and therefore, the Court also finds Counsel's advice regarding the number of strikes and Applicant's potential sentencing liability was not deficient. Since Counsel's advice was not deficient, that cannot be a basis for finding Applicant's guilty plea was involuntarily entered. Because Counsel gave the correct advice, and in conjunction with this Court's review of the plea hearing record, this Court finds Applicant's guilty plea was freely and voluntarily entered, and this allegation shall be dismissed with prejudice.

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 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Dalton, 376 S.C. at 138, 654 S.E.2d at 874 (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)).

"In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)). Respondent submits the transcript reflects that the guilty plea was knowingly and voluntarily

entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). 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. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975), overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. Id. at 755. However, "[i]t is also well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). Many factors other than the facts may legitimately influence a decision to plead guilty, such as reduction of stress on a defendant and his or her family, the removal of uncertain consequences, and reduction of actual sentencing exposure. See McMann v. Richardson, 397 U.S. 759, 768–69 (1970) (acknowledging the validity of guilty pleas in "cases where the defendant has his own reasons for pleading guilty wholly aside from the strength of the case against him"); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992) ("[A]lthough petitioner pled guilty to avoid a possible death sentence, the plea was entered with knowledge of the sentences attendant to the guilty plea and so was knowing and voluntary."); Cf. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (pointing out that the imposition of the difficult choice between going

to trial and pleading guilty is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas).

This Court finds Applicant has presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing. Counsel explained to the plea court that she had reviewed all of the evidence and discovery with Applicant, including the videos of the controlled sales. She also informed the plea court she had discussed with Applicant the applicability of the strike system and the fact that this is considered a violent and serious offense. Counsel relayed to the plea court her discussions with Applicant concerning the solicitor's expressed intent to seek life without parole had Applicant elected to pursue a trial on this charge. Counsel stated the potential for life without parole was a significant factor in her discussions with Applicant about how to resolve this case, and she informed the plea court of her belief Applicant understood their discussions and the seriousness of the charges. GP Tr. pp. 7-8.

Applicant agreed he and Counsel had discussed these issues, and he told the plea court he understood their discussions. He also stated Counsel had answered all of his questions, and he was satisfied with her representation. GP Tr. pp. 10-11. More importantly, Applicant told the plea court he was pleading guilty freely and voluntarily, without any promises, threats, or coercion, because he believed doing so was in his best interest. GP Tr. p. 12.

Accordingly, this Court finds Applicant's guilty plea was freely and voluntarily entered after appropriate consultation with Counsel, who gave Applicant the correct advice regarding available defenses, the strike system as applied to Applicant, and Applicant's sentencing exposure at trial. Relief is therefore denied, and this allegation is dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by her representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.


 R. LAWTON MCINTOSH
 Presiding Judge
 Sixteenth Judicial Circuit

9-22, 2021

FORM 5

STATE OF SOUTH CAROLINA)
 IN THE COURT OF COMMON PLEAS)
 County of YORK)

IN THE COURT OF COMMON PLEAS

2022CP4601806

Ernest E. Jackson 340086)
 Full name and prison number (if any) of Applicant)

v.)

APPLICATION FOR)

State of South Carolina)
RELIEF)

APPLICATION FOR

POST-CONVICTION RELIEF

FILED-RECEIVED

2022 JUN 16 AM 10:02

INSTRUCTIONS B 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 Broad River Correction Institution
2. Name and location of Court which imposed sentence York County
York, South Carolina
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) 2017 - GS - 46 - 1958

CERTIFIED TRUE COPY

2022 JUN 16 AM 10:19

5. Check whether a finding of guilty was made
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence?
No
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of PCR Counsel
- (b) _____
- (c) _____
10. State concisely and in the same order the facts which support each of the grounds set out in (9):
- (a) PCR Counsel failed to appeal denial of PCR order of dismissal
- (b) _____
- (c) _____

11. Prior to this application have you filed with respect to this conviction yes,

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof: Application for post-conviction relief.

- i. _____
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. York County Court of common pleas
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. order of dismissal
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. September 22, 2021
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

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

(a) your arraignment and plea? ✓

(b) your trial, if any? _____

(c) your sentencing? ✓

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

(a) the name and address of each attorney who represented you

i. Thurmond Brooker, Esq. (PCR Counsel)

ii. _____

iii. _____

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

i. Post-Conviction relief proceeding

ii. _____

iii. _____

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

Request Austin v. State hearing

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

No

STATE OF SOUTH CAROLINA

County of YORK

VERIFICATION

I, Ernest F. Jackson, 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.

Ernest F. Jackson II

SWORN to and subscribed before me this 13
day of June, 2020

[Signature] (L.S.)
Notary Public

My Commission Expires: 8/30/2024

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

I, Ernest F. Jackson, 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 therefor.

Ernest F. Jackson II
Applicant

SWORN or affirmed to and subscribed before me this

13 day of June, 2022

[Signature]
Notary Public

My Commission Expires 8/30/2024

STATE OF SOUTH CAROLINA

COUNTY OF YORK

COURT OF COMMON PLEAS

ERNEST F. FLOYD, #340086,

Applicant,

2019-CP-4600632

Vs.

MOTION TO AMEND

APPLICATION FOR POST-

State of South Carolina

CONVICTION RELIEF

Respondent.

FILED-RECEIVED
MS
2022 JUL 11 AM 11:54
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

The above Applicant moves to amend his application for Post-Conviction Relief to include the following grounds for Ineffective Assistance of counsel.

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

(a) Trial Counsel was ineffective;

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

(a) For failing to raise the Defense of entrapment.

If the Court would take judicial notice of the events in this matter it will find that the C.I. in the case stated in his own words, that he never brought drugs from the applicant and did not know the applicant. Therefore, the C.I. stated that he had to befriend a friend

which was the applicant's uncle (P-nut) Dennis Watkins. The C.I. used the applicant's own nephew to entrap the applicant.

Moreover, the C.I. signed an agreement with the I.C.M.E.U. agents, to stay out of trouble, and not catch a charge, yet still, the? C.I. caught another charge after signing the agreement, this drug charge should had destroyed any credibility he had as a C.I. The C.I. used his friend (P-nut) to set up a drug buy with his nephew, and without the friend knowing is trickery, and an element of entrapment. See Crisp Alligood v. United States, 262 F.2d 68 (1958), 26 U.S.C.A. (I.R.C.1954) 4705 (a).

Thus, the affidavit of the search warrant was insufficient for probable cause, moreover the state in this matter can be charged with wire tapping as the state failed to provide an order for electronic surveillance, which supports an element of entrapment, because not only did York County police not know MR. Jackson, but the applicant never came into focus as a drug suspect, he only came into after the police paid the C.I. to get them somebody to arrest for drugs, and at that point, where did the C.I. go to? Right to the applicant's nephew to entrap the applicant into the scheme of an unwarranted investigation of the unknown applicant.

Please take notice that at the beginning of this investigation of Mr. Jackson, there was no probable cause for a search warrant, no probable cause to apply for an application for electronic surveillance, and nobody involved knew who MR. Jackson was, until told by the C.I., and from what's going on with the police, and the electronic equipment is wiretapping, and an unlawful invasion of privacy, and whatever is seized from this act is unlawful, and tainted evidence. U.S. v. Fox, Supra, also United States v. Giordano et al, 94 S.ct. 1820, District Court of Maryland granted defendant's Motion to Suppress wiretap evidence, 340 F. Supp 1033. The Fourth Circuit Court of Appeals affirmed 469 F.2d 522. Certiorari was granted. The Supreme Court, Mr. Justice White, held that executive assistant to attorney general was not empowered by statute to authorize applications for wiretap orders; primary or derivative evidence secured by wiretaps pursuant to court order issued in response to application which was not in fact authorized by attorney general or assistant attorney general specially designated by him

must be suppressed upon proper motion. Wiretap orders 18 U.S.C.A. 2516(1). See, U.S. v. Giordano, 416 U.S.505 (May13, 1974).

Federal Courts Criminal Law Key

170B	Federal Courts
170BXVI	Supreme Court
170BXC1(B)	Decisions Reviewable
170BK3144	Particular Cases, Contexts,
170BK3145	and Questions
	In General
	(Formerly 170BK457, 106K383(4))

See also, Berger v. State of New York, 87 S.ct. 1873 (1967); Conversation is within Fourth Amendment protections and use of electronic devices to capture it is a "search" within meaning of Amendment U.S.C.A. Const. Amen. 4

Fourth Amendment's Right of privacy is enforceable against states through Due Process Clause of Fourteenth Amendment. U.S.C.A. Const. Amends. 4,14.

Wong Sun v. United States, 371 U.S. 47, 479 (1963) (Physical evidence or verbal statements resulting from unlawful seizure inadmissible had trial counsel conducted a meaningful investigation of the facts, Defense Counsel would have requested a timely Motion to Suppress.

Petitioner contends that he was denied the right to a fair trial by trial counsel's gross incompetence in failing to raise meritorious Fourth Amendment claim. Kimmelman v. Morrison, 477 U.S. 365 (1986)

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

(a) Plea was involuntary and unknowingly,

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

(a) Because counsel mistakingly informed me that the total exposure to my charge was life imprisonment. I told counsel that I wanted to go to trial, and that I did not want to take a plea. My plea counsel incorrectly advised me into taking a plea for 17-years. By telling me that maximum possible exposure to my charge was a term of life imprisonment, and that would be the only sentence that would by going to trial. I accepted the advice of my attorney, because that was what my counsel got paid for, and it was that in which I trusted my attorney, and being an expert in the representation of her client. I would not had pleaded guilty if I was properly advised.

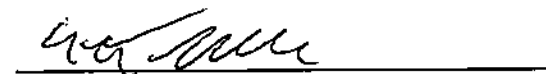
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel,

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

(a) Counsel failed to object to the applicant being denied his Sixth Amendment Right to confront his accuser, the C.I. in regards to the C.I.'s testimony:

DATE: 7/6/2022



ERNEST F. FLOYD, #340086

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	FOR THE SIXTEENTH JUDICIAL CIRCUIT
Ernest Floyd Jackson, II,	)	
S.C.D.C. No. 340086,	)	
Applicant,	)	
v.	)	Case No.: 2022-CP-46-01806
State of South Carolina,	)	
Respondent.	)	
	)	

FILED-RECEIVED
 2022 SEP -7 AM 10:04
 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC

In response to the application for post-conviction relief filed by Applicant Ernest Floyd Jackson, II, on June 16, 2022, Respondent the State of South Carolina makes the present Return and would show this Court:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its August 2016 term, the York County Grand Jury indicted Applicant for trafficking in crack cocaine, ten grams or more but less than twenty-eight grams (2016-GS-46-02575); and possession of intent to distribute crack cocaine within proximity of a park (2016-GS-46-02576). Additionally, during its May 2017 term, the York County Grand Jury indicted Applicant for possession of crack cocaine with intent to distribute within proximity to a park or school (2017-GS-46-01957); trafficking crack cocaine, ten grams or more but less than twenty-eight grams (2017-GS-46-01958); trafficking crack cocaine, ten grams or more but less than twenty-eight grams (2017-GS-46-01962); distribution of crack cocaine within proximity of a park (2017-GS-46-01964); and conspiracy (2017-GS-46-01963). Applicant was represented by Mindy Lipinski,

Esquire. Assistant Solicitor Thomas Matthew Hogge, of the Sixteenth Circuit Solicitor's Office, prosecuted the case.

In November 2017, Applicant was tried in his absence and convicted of trafficking cocaine base, ten grams or more but less than twenty-eight grams, first offense (2017-GS-46-01962). His sentence was sealed following his conviction. On March 30, 2018, Applicant's sentence was unsealed, and Applicant was sentenced to imprisonment for a period of ten years.¹ Applicant filed a timely notice of appeal and retained Thurmond Brooker as appellate counsel. On August 28, 2018, the South Carolina Court of Appeals dismissed Applicant's appeal due to appellate counsel's failure to timely order the transcript as required by Rule 207, SCACR. The remittitur was issued on September 25, 2018.

Meanwhile, on April 11, 2018, Applicant appeared before the Honorable Edgar W. Dickson and pleaded guilty to trafficking crack cocaine, ten grams or more but less than twenty-eight grams, second offense (2017-GS-46-01958), pursuant to a negotiated plea agreement, which included the dismissal of all other charges. Judge Dickson accepted Applicant's guilty plea and sentenced him to the negotiated sentence of seventeen years, which was to run concurrent to the ten-year sentence Applicant was already serving. Applicant received credit for time served for 202 days. Applicant did not appeal his conviction or sentence from his guilty plea.

Applicant filed his first application for post-conviction relief on February 21, 2019, challenging his imprisonment on the following grounds:

1. Trial Counsel was ineffective in allowing Defendant to plea to charges with trial court lacked jurisdiction to hear.

¹ Applicant did not challenge this conviction or sentence either in his current application for post-conviction relief or in his initial application; both actions refer only to the conviction and sentence resulting from his guilty plea on indictment 2017-GS-46-01958.

2. The State violated applicant's right of due process, where it failed to provide applicant with all discovery under Rule 5, Brady and Giglio.

3. Applicant plea was not voluntarily and intelligently given

[errors in original]. On June 28, 2021, Applicant, through counsel, filed an amended application raising the following issues:

1. Applicant believes that trial counsel was ineffective in pleading defendant to trafficking in methamphetamine because the indictment was for trafficking in crack cocaine. Methamphetamine is a chemically distinctive drug from crack cocaine, no evidence of the existence of methamphetamine and no proof of methamphetamine existed.
2. Trial court lack jurisdiction to sentence defendant to trafficking in methamphetamine because Applicant was never indicted for trafficking in methamphetamine.
3. Appellant believes that trial counsel was ineffective in pleading Applicant to trafficking in methamphetamine because such plea violated the Double Jeopardy clauses of the constitutions of South Carolina and the United States of America. Specifically, Application's guilty plea to trafficking in methamphetamine (indictment allege crack cocaine) on May 3, 2016 was a single continuous conspiracy arising out of the same facts and circumstance of his conviction for Trafficking in Cocaine on June 2, 2016.
4. Appellant believes that his guilty pleas was not knowingly and intelligently given because trial counsel erroneously informed Applicant that a conviction under indictment 2017-gs-46-1958 constituted a third serious or most serious conviction, and that the State would seek life imprisonment if he was convicted at trial. However, Applicant's conviction under indictment 2017-gs-46-1958 and 2017-gs-46-1962 constituted a single continuance conspiracy and would only have been a second serious or most serious conviction, and would not have subjected Applicant to a life sentence. But for trial counsel's erroneous advice/statement of the law, Applicant would not have pleaded guilty.

[errors in original].

An evidentiary hearing was held before R. Lawton McIntosh on June 30, 2021.

Thurmond Brooker, Esquire, represented Applicant. Assistant Attorney General Michael J.

Neubauer and Senior Assistant Deputy Attorney General Megan Jameson, of the South Carolina

Attorney General's Office, represented Respondent. On October 22, 2021, Judge McIntosh

denied the application and dismissed it with prejudice. Applicant did not appeal from the order of dismissal.

II. STATEMENT OF THE FACTS

On May 3, 2016, a confidential informant told officers of the Drug Enforcement Unit that he knew an individual who would sell half an ounce of crack cocaine for six hundred dollars. Officers agreed to set up a controlled buy, and the informant met Applicant with six hundred dollars in identifiable funds provided by the FBI. Applicant accompanied the informant to a shed where he exchanged fifteen grams of crack cocaine for the six hundred dollars. (Plea Tr. pp.5–6).

III. CURRENT APPLICATION

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

1. Ineffective assistance of PCR counsel
 - a. PCR counsel failed to appeal denial of PCR order of dismissal [*sic*].

Applicant requests relief as follows:

Request Austin v. State hearing.

Attached to and incorporated herein are the records of the York County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

IV. RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. Where the application

alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel’s performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Second, counsel's deficient performance must have prejudiced 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. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

Where, as here, an applicant alleges ineffective assistance of post-conviction relief counsel for failing to appeal the denial of his initial post-conviction relief application, the Court applies the procedure set forth in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). First, the Court must hold an evidentiary hearing on the issue of whether or not the applicant requested, and was denied, an opportunity to seek appellate review. *Id.* at 454, 409 S.E.2d at 396. Second, the Court must review whether the applicant was prejudiced by the failure to obtain review of a meritorious issue. *Id.* This question is to be decided according to the *Strickland* standard. *Id.* at 455, 409 S.E.2d at 396.

Respondent submits that Applicant neither requested appellate review of the denial of his initial application nor had any meritorious issues for review. However, *Austin* held that an allegation of this kind is sufficient to state a claim of ineffective assistance requiring an evidentiary hearing. *Id.* at 454, 409 S.E.2d at 396. Therefore, Respondent respectfully requests a hearing be held to fully resolve this issue.

VI. ASSERTION OF RIGHTS TO NOTICE OF AMENDMENTS, EXPERTS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. Rule 11(a), SCRCP. *Pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (holding *pro se* filing a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”).

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent, or in the alternative continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (“In most PCR cases, . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases.”); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) (“When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record.”); *see also* Rules 15(a)–(b), SCRCP (explaining how to amend a pleading).

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

VII. GENERAL DENIAL

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

VIII. CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court convene an evidentiary hearing on Applicant's *Austin v. State* claim.

Respectfully submitted,

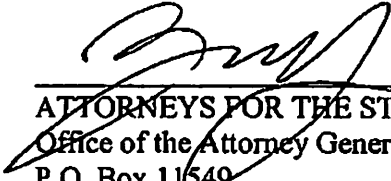
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
Assistant Attorney General

By:



ATTORNEYS FOR THE STATE
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

August 22, 2022

STATE OF SOUTH CAROLINA
COUNTY OF YORK

ERNEST FLOYD JACKSON, II, #340086

Applicant,

vs

STATE OF SOUTH CAROLINA,
Respondent,

IN THE COURT OF COMMON PLEAS

2022-CP-46-1806

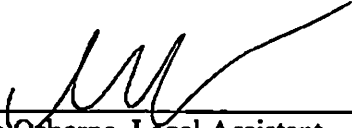
CERTIFICATE OF SERVICE BY MAIL

FILED-RECEIVED
2022 SEP -7 AM 10:04
DAVID HAMILTON
C.C.P. & GS
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 to the Application for Post-Conviction Relief in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Michael H. Lifsey, Esquire
Post Office Box 548
Chester, South Carolina 29706

DATED this 22nd day of August, 2022.



Joshua Osborne, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF YORK CASE NO. 2022-CP-46-01806

ERNEST F. JACKSON, II,)
)
 Plaintiff,)
)
 -vs-) TRANSCRIPT OF RECORD
)
STATE OF SOUTH CAROLINA,)
)
 Defendant.)
_____)

December 5, 2023
York, South Carolina

B E F O R E:

Honorable Grace Gilchrist Knie, Judge.

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

Mr. Michael Lifsey
Attorney at Law
Attorney for the Applicant
Winnsboro, South Carolina

Mr. Zachary Jones
Assistant Attorney General
Attorney for the State of South Carolina
Columbia, South Carolina

Shannon E. McGilberry, CVR-M
Court Reporter

1			<u>I N D E X</u>	
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u> <u>RECROSS</u>
3	ERNEST F. JACKSON, II,			
4	Mr. Lifsey	8		
5	THURMOND BROOKER			
6	Mr. Lifsey	11		
7	Mr. Jones		13	
8	Certificate	21		
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1 THE COURT: All right. Good morning. This is a term
2 of Common Pleas Non-Jury. Today is Tuesday, December the
3 5th, 2023. I am Judge Knie, K-n-i-e. I am from the seventh
4 circuit, which is Spartanburg and Cherokee Counties. It is
5 my pleasure to be with you-all today and if I can first --
6 well, let me call the case and then I'll have counsel
7 identify themselves for the record. Okay.

8 This is the matter of Ernest F. Jackson, II. This is
9 civil action number 22-CP-46-1806. This matter is before
10 the Court with Mr. Jackson being the applicant in a post-
11 conviction relief action.

12 I will note that Mr. Jackson is present. Good morning.

13 MR. JACKSON: Good morning.

14 THE COURT: And I will ask counsel to identify
15 themselves for the record.

16 Counsel, if you will.

17 MR. LIFSEY: Your Honor, my name is Mike Lifsey. I
18 represent he applicant on this matter.

19 THE COURT: Okay.

20 MR. JONES: Your Honor, Zachary Jones for the State of
21 South Carolina. Thank you.

22 MR. MITCHELL: Your Honor, I am Cruise Mitchell, also
23 with the State of South Carolina.

24 THE COURT: Okay. Thank you. All right. And so what
25 I generally do and I will just give y'all an outline, I

1 usually ask the respondent's counsel to give just a brief
2 procedural history and then I will let counsel for the
3 applicant begin. I welcome opening statements if you wish
4 to give that; you're not required to. And then after your
5 presentation, both of you, I will allow you to give a
6 summation, which helps me also pull it back together. Okay?
7 And is this going to be an evidentiary hearing?

8 MR. LIFSEY: Yes. I expect testimony on the record.

9 THE COURT: Okay.

10 MR. JONES: Yes, Your Honor.

11 THE COURT: Okay. And so with that, then, I don't know
12 -- I am showing one witness as being listed. I don't know
13 if y'all want to sequester witnesses. Okay. If you do, I
14 would like to know now since I don't really know who these
15 people are and people will be coming in and out.

16 MR. LIFSEY: The issue's very limited in this case, not
17 to jump ahead, so I'm fine with everybody being in here for
18 the hearing, Judge.

19 MR. JONES: Same. No objection from the State, Your
20 Honor.

21 THE COURT: Okay; all right. And so -- and, again, I'm
22 -- because there's no jury here, I am less formal than I
23 would be with a jury. If y'all need to approach or if you
24 forget to ask a question, I'm going to let you-all go back
25 and do redirect, recross, re-redirect, re-recross, if you

1 think you need to. Okay.

2 All right. And so let me, then, first hear from Mr.
3 Jones regarding just a very brief procedural history.

4 MR. JONES: Thank you, Your Honor. Mr. Jackson was
5 indicted during the May 2017 term for possession of crack
6 cocaine with intent to distribute within proximity to a park
7 or school. That indictment number was 17-GS-46-1957; two
8 counts of trafficking crack cocaine, ten grams or more, but
9 less than 28 grams. Those indictment numbers are 2017-GS-
10 46-1958 and 1962; one count of distribution of crack cocaine
11 within proximity of a park, 2017-GS-46-1964 and one
12 count of conspiracy, 2017-GS-46-1963. Mr. Jackson was
13 represented by Mindy Lipinski and the case was prosecuted by
14 Assistant Solicitor, Thomas Matthew Hogge of the Sixteenth
15 Circuit Solicitor's Office.

16 On April the 11th, 2018, Mr. Jackson appeared before
17 the Honorable Edgar W. Dickson and pleaded guilty to
18 trafficking crack cocaine, ten grams or more, but less than
19 28 grams, second offense. That indictment was 2017-GS-46-
20 1958.

21 Pursuant to a negotiated plea agreement, which included
22 the dismissal of all other charges, Judge Dickson accepted
23 Mr. Jackson's guilty plea and sentenced him to a negotiated
24 sentence of 17 years, which was to run concurrent to a ten-
25 year sentence Mr. Jackson was already serving on some prior

1 charges. Mr. Jackson received credit for 202 days time
2 served and did not appeal his conviction or sentence from
3 the guilty plea.

4 Mr. Jackson then filed his first application for post-
5 conviction relief on February 21st, 2019. Through counsel,
6 Mr. Jackson amended his application on June 28th, 2021 and
7 an evidentiary hearing was held before R. Walton McIntosh on
8 June 30th, 2021. Mr. Jackson was represented by Thurmond
9 Brooker and the State was represented by Assistant Attorney
10 General, Michael J. Neubauer and Senior Assistant Deputy
11 Attorney General, Megan Jameson, of the South Carolina
12 Attorney General's office.

13 On October 22nd, 2021, Judge McIntosh denied and
14 dismissed the application and Mr. Jackson did not appeal the
15 order of dismissal. His present application was filed on
16 June 16th, 2022 and Mr. Jackson raised an *Austin v. State*
17 claim of ineffective assistance of PCR counsel for failure
18 to appeal from the denial of his previous PCR.

19 With that, I'll turn it over to Mr. Lifsey.

20 THE COURT: Okay. Thank you. Yes, sir.

21 MR. LIFSEY: Thank you. Your Honor, I agree and I
22 believe this is a very narrow issue. It is a hearing
23 pursuant to *Austin v. State*, 40 -- excuse me -- 305 South
24 Carolina 453, 409 S.E. 2nd 395. I have a copy of that
25 opinion for the Court if you wish me to hand one up.

1 (Whereupon, the referenced document was handed up to
2 the Court.)

3 MR. LIFSEY: The issue as I see it, Your Honor,
4 pursuant to that opinion, is whether or not the petitioner
5 requested and was denied an opportunity to seek appellate
6 review, so I think that's the limited factor before us
7 today.

8 THE COURT: Okay. Thank you. I'm happy to hear from
9 you--

10 MR. LIFSEY: Thank you.

11 THE COURT: ---or any witnesses.

12 MR. LIFSEY: Thank you, Your Honor. I'd call my client
13 to the stand, please. Mr. Jackson, if you'd walk --

14 (Ernest E. Jackson, II, being first duly sworn, was
15 examined and testified as follows):

16 THE COURT: Okay. Sir, just make yourself comfortable.
17 Okay? And if you would state your full name, spelling your
18 last.

19 THE WITNESS: Okay. First name Ernest J-a-c-k-s-o-n.

20 THE COURT: Okay. And it may be that we can adjust
21 that mic a little bit and then you can relax a little bit in
22 that chair and, actually, you can maybe turn a little bit
23 towards me. Okay.

24 (Discussion off the record)

25 THE COURT: Okay. Sir, just make yourself comfortable.

1 Okay? But I think since the court reporter is the one
2 that's making the record, if she can't hear you well, she'll
3 let us know.

4 THE WITNESS: Okay.

5 THE COURT: All right. This is direct examination.
6 All right.

7 MR. LIFSEY: May it please the Court, Your Honor?

8 THE COURT: Yes.

9 DIRECT EXAMINATION

10 ERNEST JACKSON BY MR. LIFSEY:

11 Q. All right. Mr. Jackson, speak up now so I can hear
12 you. Okay?

13 A. Yes, sir.

14 Q. All right. Mr. Jackson, where are you serving time
15 right now?

16 A. At Broad River Correctional Institution.

17 Q. All right. And were you -- who was your lawyer
18 originally way back when?

19 A. Mindy Lipinski.

20 Q. All right. So Ms. Lipinski represented you. Is that
21 right?

22 A. Yes, sir.

23 Q. And after you were convicted, ultimately, you filed a
24 PCR action. Is that correct?

25 A. Yes, sir.

- 1 Q. Who was your PCR lawyer?
- 2 A. My PCR lawyer was Thurmond Brooker.
- 3 Q. All right. Did you hire Mr. -- you or your family hire
- 4 Mr. Brooker?
- 5 A. Yes, sir.
- 6 Q. All right. Did you meet with Mr. Brooker prior to your
- 7 PCR hearing?
- 8 A. Prior to the PCR hearing.
- 9 Q. Did y'all talk about your case some?
- 10 A. Yes, sir.
- 11 Q. All right. During the course of that, did you discuss
- 12 what would happen if you did not win your PCR hearing?
- 13 A. Yes, sir.
- 14 Q. Did you discuss the prospect of an appeal with Mr.
- 15 Brooker from the PCR hearing?
- 16 A. Yes, sir.
- 17 Q. Tell the Court what y'all discussed and what the plan
- 18 was if you were unsuccessful at the PCR hearing.
- 19 A. Just that, basically, if we were denied the PCR, that
- 20 we'll go file the appeal.
- 21 Q. Okay. Now, you had your PCR hearing with Mr. Brooker.
- 22 Is that right?
- 23 A. Yes, sir.
- 24 Q. All right. And did the judge ultimately rule against
- 25 you in the PCR hearing?

1 A. Yes, sir.

2 Q. All right. Did you and Mr. Brooker have any
3 discussions about appealing that?

4 A. Yeah. We just was to go appeal the PCR once it was
5 -- once it -- if it had got denied, we'll go appeal it.

6 Q. Okay. Now, to the best of your knowledge, was an
7 appeal filed?

8 A. No, sir.

9 Q. Did you at any point ever waive your right to an appeal
10 or tell Mr. Brooker you didn't want to file an appeal?

11 A. No, sir.

12 Q. Okay. And was it your impression that an appeal had
13 been filed?

14 A. Yes, sir.

15 Q. When did you find out it had not been filed?

16 A. I found out about six, seven months later when I didn't
17 have my transcript from the PCR.

18 Q. Okay. And, ultimately, you found out an appeal had
19 never been filed?

20 A. Yes, sir.

21 Q. And that's why you filed this current action?

22 A. Yes, sir.

23 Q. Okay; all right.

24 MR. LIFSEY: I don't believe I have any further
25 questions, Judge.

1 THE COURT: Okay. Cross-examination. Okay?

2 MR. JONES: Nothing from the State, Your Honor. Thank
3 you.

4 THE COURT: Okay. No cross-examination. Anything else
5 of this witness?

6 MR. LIFSEY: Not of this witness, Judge.

7 THE COURT: Okay. Sir, please watch your step. Okay?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: Okay. Next witness.

10 MR. LIFSEY: I think I'll just go ahead and call Mr.
11 Brooker to the stand just to make things move along a little
12 faster, Judge. Thank you.

13 THE COURT: Thank you.

14 (Thurmond Brooker, being first duly sworn, was examined
15 and testified as follows):

16 THE COURT: Okay. If you will make yourself
17 comfortable, sir, and if you will state your full name and
18 spell your last.

19 THE WITNESS: Thurmond Brooker, B-r-o-o-k-e-r.

20 THE COURT: Thank you. Direct examination.

21 DIRECT EXAMINATION

22 THURMOND BROOKER BY MR. LIFSEY:

23 Q. Mr. Brooker, did you represent my client in this
24 matter?

25 A. I did.

1 Q. All right. Did you handle his PCR action?

2 A. Yes.

3 Q. All right. And, ultimately, what was the result of the
4 PCR hearing?

5 A. The judge denied his application.

6 Q. Okay. Was an appeal ever filed in that case?

7 A. No.

8 Q. Is it generally your practice to file appeals?

9 A. It is and I don't mind saying is is that of course I
10 was in the courtroom and I think I heard Mr. Jackson
11 testify. I don't recollect that conversation, but I will
12 say is that I think it's my responsibility whether he had
13 requested me or not to -- to appeal and, generally, if I
14 don't have a conversation with a client and don't know
15 whether or not they want to appeal, I normally file an
16 application or file an appeal just to protect them just in
17 case when I do talk with them they tell me yes, they do, but
18 I did not do this in this circumstances.

19 Q. And you never had any discussion where he waived the
20 right to appeal anything; right?

21 A. No. I don't recollect him ever telling me, no, Mr.
22 Brooker, I don't want to file an appeal. That's correct.

23 Q. All right.

24 MR. LIFSEY: I don't believe I have any further
25 questions, Judge.

1 THE COURT: Cross-examination.

2 MR. JONES: Just very briefly, Mr. Brooker. Thank you.

3 THE WITNESS: Sure.

4 CROSS-EXAMINATION

5 THURMOND BROOKER BY MR. JONES:

6 Q. Did you see any meritorious issues for appeal from the
7 prior PCR order?

8 A. I would say no. I don't know whether or not you want
9 me to elaborate or --

10 Q. If you wouldn't mind.

11 A. Yeah. In the PCR action there were two primary issues
12 in which we argued and one was a double jeopardy issue.
13 This was a situation where, I think, Mr. Jackson had, I
14 think, three controlled buys in less than a month. I think
15 one controlled buy was May, I think on May 3rd, a second
16 controlled buy was on May 20th and then a third controlled
17 buy was June 2nd, so it was all within a month. And, of
18 course, the prosecution, I think, tried him on the June
19 20th, I think, distribution or trafficking and he was found
20 guilty in his absence and the judge held the sentence in
21 abeyance until he could be retained -- excuse me -- held the
22 sentence -- sealed the sentence until he could be detained
23 and brought before the Court so that the sentence could be
24 read to him.

25 When he finally was arrested, I think at the same time

1 the prosecutor told him of their intention to go ahead and
2 try him on the first controlled buy, which was on May 3rd
3 and, of course, I think at that particular period of time he
4 had a decision to decide whether or not he would plead to
5 that controlled buy or either whether or not it would go to
6 trial and, of course, at that particular period of time the
7 -- he made a determination to plead guilty.

8 What we filed our appeal on is is that we alleged,
9 because all of these controlled buys occurred within less
10 than a month, that they all involved the same person, they
11 all occurred at the same place and that this was a situation
12 that was covered under *State versus Amerson* and that these
13 was all collectively one act and that he should have been
14 prosecuted for a single act as opposed to two separate acts
15 and we argued that, I think, during his PCR is is that
16 because the attorney who was representing him at the trial
17 level allowed him to plead to that second charge, not
18 understanding that these were all one continuous act
19 underneath *Amerson*, *State versus Amerson*, that the trial
20 counsel was ineffective in that way. And then, of course,
21 --

22 MR. LIFSEY: Your Honor, I don't want to -- and I don't
23 in any way --

24 THE WITNESS: Sure.

25 MR. LIFSEY: I know we're less formal and I don't want

1 to restrict what the Attorney General wants to argue, but I
2 don't believe any of this is relevant.

3 MR. JONES: Your Honor, I just wanted to establish the
4 -- for the purposes of creating a record for any potential
5 appeal of this what the grounds were for not -- or what the
6 grounds would have been for a meritorious appeal or in this
7 case what they would not have been. If --

8 THE COURT: I'll allow it.

9 MR. JONES: All right. Thank you, Your Honor.

10 THE COURT: I'll allow it. Thank you.

11 THE WITNESS: Okay.

12 THE COURT: You can continue.

13 THE WITNESS: Sure.

14 A. And so -- and so our argument was primarily based upon
15 *State versus Amers (sic)*, but unfortunately, I think, when
16 we were at the PCR hearing, there was a discussion arose by
17 *U.S. versus Felix* and of course, I think, *State versus*
18 *Gordon* and in those two cases the Courts established the
19 fact that even if a conspiracy exists is that a person --
20 that the conspiracy is a complete separate offense, that the
21 person can be prosecuted for the conspiracy and also can be
22 prosecuted separately and charged separately for the
23 underlying conduct that resulted in the conspiracy. So in
24 this particular situation the Court, I think, in *Felix* and
25 in *Gordon*, the Court says that you can be charged -- he

1 could be charged with the conspiracy that he engaged in or
2 alleged to have engaged in and then, of course, the two
3 trafficking conducts in which -- one in which he was tried
4 and the other in which he pled guilty to, that those would
5 be the conduct that constituted the underlying conduct of
6 the conspiracy and, of course, according to those two cases
7 he can be tried -- he can be tried and prosecuted from those
8 separately. So it really, at least in my opinion, dealt a
9 significant blow to the argument that we were making under
10 *State versus Amerson* and the second argument that we were
11 making was based upon the first and that was is is that the
12 charge in which he pled guilty to, I think he was told that
13 that was a third, but of course, if all of this conduct was
14 a single event underneath *Amerson*, then it would have
15 constituted a second, so we argued if our first argument is
16 successful, then, of course, this would have been a second
17 and when the trial counsel informed him that it was a third,
18 that that would have been misinformation and he would have
19 made -- he would have made the decision to plead guilty
20 based upon that misinformation.

21 Q. And that was -- also ran into trouble on the same basis
22 as your first allegation. Correct?

23 A. Yeah. The second argument as to whether or not this
24 was a second as opposed to first -- as opposed to a third
25 was predicated on the success of our argument that the

1 conduct should have constituted -- a single course of
2 conduct was one single event. The second argument was
3 predicated upon success of the first argument.

4 Q. All right.

5 MR. JONES: Thank you, Mr. Brooker. I think that's all
6 the questions I have for you.

7 MR. LIFSEY: I don't have any redirect.

8 THE COURT: Okay. Thank you. Any objection to this
9 witness being excused?

10 MR. JONES: None, your Honor.

11 MR. LIFSEY: No, ma'am.

12 THE COURT: Thank you, sir. Watch your step.

13 THE WITNESS: Thank you, Your Honor.

14 MR. LIFSEY: Your Honor, I don't have any further
15 witnesses.

16 THE COURT: Okay.

17 MR. JONES: Nothing from the State, Your Honor.

18 THE COURT: Okay. Well, let me hear y'all's
19 summations. Okay.

20 MR. LIFSEY: Your Honor, I think -- and I don't mind
21 going first. I hope that's okay. I think the sole issue is
22 his right to file the appeal. I think the merits of it are
23 something to be hashed out by the appellate courts and by
24 the appellate lawyers and Anders applies and all that stuff.
25 So the sole issue is whether he was denied his right to

1 appeal.

2 He indicates that they discussed it and he testified
3 that they discussed it and he requested it and it was not
4 done.

5 The lawyer, if I understood his testimony, he was very
6 forthright, I believe he said he didn't remember having that
7 conversation, but he admits -- admitted on the stand that it
8 is generally his practice to file appeals from all his PCRs
9 and he didn't do it. So all we are seeking is his belated
10 appeal of his PCR.

11 MR. JONES: Judge, in view of the testimony we've heard
12 here today, I think I'm in agreement with Mr. Lifsey on this
13 and we'd just ask that you make that finding so that the
14 process under *King v. State*, I believe is the case that sets
15 forth the *Austin v. State* appeal process and go forward.

16 THE COURT: Okay.

17 MR. JONES: Thank you, Your Honor.

18 THE COURT: Okay. So I agree that there has to be an
19 opportunity for the appeal. It's not up to this Court to
20 determine the merits of that and so the protection of the
21 right is what is before me and I -- certainly, I was a
22 practicing attorney for 27 years, sir, so I do understand
23 how busy attorneys can get, especially when sometimes a case
24 is supposed to be finalized and it's extended to an
25 indefinite period of time for matters that are beyond the

1 control of really anyone involved in the case and sometimes
2 your deadlines just don't get calendered. Okay? And so I
3 do find for the applicant on this issue and I would ask that
4 counsel for the applicant, Mr. Lifsey, if you will please
5 draft an order to that effect.

6 MR. LIFSEY: Thank you, Judge.

7 THE COURT: If you'll run that by opposing counsel. I
8 know it's a busy time of year. Is ten days enough time?

9 MR. LIFSEY: I believe so. I had a similar case, I
10 think, and -- yeah, I had a similar one of these in Richland
11 County a few months ago, so I have a draft order to go by,
12 but, I mean, I'll just particularize it to the individual
13 case.

14 THE COURT: Yes, sir; yes, sir.

15 MR. LIFSEY: That one --

16 THE COURT: You don't have to reinvent the wheel.

17 MR. LIFSEY: That one took me a while, but this one I
18 think should not take me that long, so I'll try to have
19 something to you within ten days.

20 THE COURT: Okay. And normally -- Mr. Jackson, I just
21 want you to understand that normally I would review
22 everything again before I issue very detailed instructions,
23 but it appears that counsel have agreed and so I will issue
24 that order orally today. Thank you all very much. Good
25 luck to you, sir.

1 MR. JONES: Thank you, Your Honor.

2 (END OF REQUESTED TRANSCRIPT)

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STATE OF SOUTH CAROLINA)
) C E R T I F I C A T E
COUNTY OF YORK)

I, the undersigned Shannon E. McGilberry, official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Common Pleas Court for York County, South Carolina, on the 7th day of December, 2023.

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

In witness whereof, I have hereunto subscribed my name, this 5th day of February, 2024.

Shannon E. McGilberry, CVR-M

My Commission Expires:

April 26, 2027

FILED-RECEIVED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) 2023 DEC -8 PM 10:54) SIXTEENTH JUDICIAL CIRCUIT

Ernest Floyd Jackson, II,)
ANGIE M. BRYANT)
C.C.C.P. & GS)
YORK COUNTY, SC)

Case No.: 2022-CP-46-01806

Applicant,)
) **ORDER GRANTING BELATED**
) **APPEAL PURSUANT TO AUSTIN v. STATE**
) **v.**
) State of South Carolina,)
) Respondent.)

This matter came before the court for a hearing on December 5, 2023. The Applicant, Ernest Floyd Jackson, II, was represented by Counsel Michael H. Lifsey. The Respondent, State of South Carolina, was represented by Assistant Attorney General Zachary W. Jones.

PROCEDURAL HISTORY

In November of 2017, Applicant was tried in his absence and convicted of trafficking cocaine base, ten grams or more but less than twenty-eight grams, first offense (2017-GS-46-01962). His sentence was sealed following the conviction. On March 30, 2018, Applicant's sentence was unsealed and Applicant was sentenced to imprisonment for ten years.

On April 11, 2018, Applicant pled guilty to trafficking crack cocaine, ten grams or more but less than twenty-eight grams, second offense (2017-GS-46-01958) for which he received a sentence of seventeen years imprisonment, which was to run concurrent to the ten year sentence he was then currently serving.

Applicant filed his first application for post-conviction relief on February 21, 2019 (2019-CP-46-00632). An evidentiary hearing was held on that application on June 30, 2021. Applicant was represented at that hearing by Counsel Thurmond Brooker. On October 22, 2021,

an order was signed denying the application and dismissing it with prejudice. No appeal was taken from that order of dismissal.

This application for post-conviction relief was filed on June 16, 2022. In this application, Applicant alleges ineffective assistance of counsel by prior PCR counsel in not filing an appeal of the denial of his application for post-conviction relief and requests a hearing pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

FINDINGS OF FACT

Applicant testified on his own behalf. His recitation of the procedural history of the case was generally consistent with the history outlined above. Applicant testified that he requested that an appeal be filed by Mr. Brooker on his behalf if his application was denied at the Circuit Court level. He further testified that he never waived or gave up his right to appeal. Applicant testified that he did not find out that his application for post-conviction relief had been denied until approximately six months after the order had been issued denying the application and that that his purpose in filing this second application was to seek appellate review of the order denying his prior application. This Court finds the testimony of the Applicant credible in these matters.

Attorney and prior counsel for Applicant Thurmond Brooker testified. Mr. Brooker testified that he did not recall the specific conversation concerning an appeal testified to by Applicant but that it was his usual practice to file an appeal of any PCR application that was denied but that he failed to do so in this case. Mr. Brooker further testified that Applicant never indicated to him that he did not want to file an appeal and that he never discussed waiving that right with Applicant. This Court finds the testimony of Mr. Brooker credible in these matters.

At the conclusion of the evidentiary hearing, the State conceded that Applicant had met his burden showing he was entitled to appellate review pursuant to *Austin*.

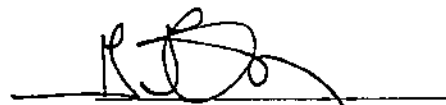
Based on the testimony of both Applicant and Mr. Brooker, and the concession of the State, this court finds that Applicant requested that the denial of his prior post-conviction relief action be appealed, Applicant did not knowingly and intelligently waive his right to appeal, and that no appeal was ever filed.

CONCLUSIONS OF LAW

PCR applicants have a right to seek appellate review. Section 17-27-100, S.C. Code of Laws, as amended, and *Austin v. State*, 305 S.C. 453, 409 S.E. 2d 395 (1991). A PCR Applicant is entitled to a belated *Austin* appeal if the PCR judge find either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Odom v. State*, 337 S.C. 256, 523 S.E. 2d 753 (1999).

THEREFORE, IT IS ORDERED that Applicant is entitled to appellate review of the dismissal of his prior PCR application, 2019-CP-46-00632.

AND IT IS SO ORDERED this 6 day of December, 2023.



GRACE GILCHRIST KNIE
Circuit Court Judge

York, South Carolina

WITNESSES

DEU

Witnessing Officer: T. Hager

ARREST WARRANT NUMBER

2016A4610200997

**ACTION OF GRAND JURY
TRUE BILL**

[Signature]
Foreperson of Grand Jury

Date: 5-11-17

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2017-GS-46- O 1958

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

MAY 11, TERM 2017

THE STATE

VS.

ERNEST FLOYD JACKSON II

INDICTMENT FOR

TRAFFICKING CRACK COCAINE

SC Code: § 44-53-375(C)

CDR Code: 0450

After 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 to

[Signature]
Defendant

Witness:

[Signature]
C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

CERTIFIED TRUE COPY
2019 FEB 21 PM 12:49

INDICTMENT

DAVID HAMILTON
CLERK OF COURT

At a Court of General Sessions, convened on May 11, 2017, the Grand Jurors of York County present upon their oath:

TRAFFICKING CRACK COCAINE

The defendant, Ernest Floyd Jackson II, did on or about May 3, 2016, in York County, South Carolina, 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 ten grams or more of crack cocaine as defined and otherwise limited in Sections 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of Section 44-53-375(C), 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.


T. MATTHEW HOGGE
ASSISTANT SOLICITOR

JAIL

ERNEST FLOYD JACKSON, II

INDICTMENT/CASE#: 2017GS4601958
A/W: 2016A4610200997
Date of Offense: 05/03/2016
S.C. Code §: 44-53-375(C)
CDR Code #: 0451

KA: _____
Race: Black Sex: M Age: 30
DOB: _____ SS#: _____
Address: _____ Chestnut Street
City, State, Zip: Rock Hill, SC 29730-5255
DL# _____ SID# SC01780301

2019 FEB 21 PM 12:49
ORIGINAL

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO: Trafficking Crack Cocaine 10g or more 2nd Offense
In violation of § 44-53-375(C) of the S.C. Code of Laws, bearing CDR Code # 0451

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)
The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____
T. Matthew Hogge, Assistant Solicitor 100126 SC Bar # _____ Defendant _____ Attorney for Defendant _____ SC Bar # _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,
for a determinate term of 17 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 Service standard conditions of probation, which
are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2017-GS-46-01962
☒ 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. 202 days
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____
Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment
Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS _____

Recipient: _____	
*Fine: _____	\$ _____
§ 14-1-206 (Assessments 107.5%)	\$ _____
§ 14-1-211 (A)(1)(Conv. Surcharge)	\$100 \$ <u>100</u>
§ 14-1-211 (A)(2)(DUI Surcharge)	\$100 \$ _____
§ 56-5-2995 (DUI Assessment)	\$12 \$ _____
§ 56-1-286 (DUI Breath Test)	\$25 \$ _____
Proviso 61.6 (Public Def/Prob)	\$500 \$ _____
§ 14-1-212 (Law Enforce. Funding)	\$25 \$ <u>25</u>
§ 14-1-213 (Drug Court Surcharge)	\$150 \$ <u>150</u>
§ 50-21-114 (BUI Breath Test Fee)	\$50 \$ _____
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea \$ _____
3% to County (if paid in installments)	\$ _____
TOTAL	\$ <u>275</u>

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,
Proviso §61.6 requires \$500 be paid to Clerk
during probation and shall be collected before
any other fees

Clerk of Court/Deputy Clerk: David Hamilton
Court Reporter: Wanda Nelson
SCCA/217 (07/2016)

Presiding Judge: _____
Judge Bar ID: _____ Judge Code: 2153
Sentence Date: 4-11-18