

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable J. Derham Cole, Circuit Court Judge

DEMOND DERRICK BURGESS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000148

APPENDIX

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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Attorney General

MELODY J. BROWN
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA	) COURT OF GENERAL SESSIONS
	) 2019-GS-23-01412 (Arnold)
COUNTY OF GREENVILLE	) 2019-GS-23-00699 (Littlejohn)
	) 2019-GS-23-07201 (Burgess)
	) 2019-GS-23-07306 (Burgess)
	) 2019-GS-23-03704 (Dodd)
	) 2019-GS-23-07197 (Dodd)
	) 2019-GS-23-07200 (Dodd)
STATE OF SOUTH CAROLINA,	)
PLAINTIFF,	)
	)
vs.	) TRANSCRIPT OF RECORD
	)
DAVID CHASE ARNOLD, RAYSHAWN	)
MARKEITH LITTLEJOHN,	)
DEMOND DERRICK BURGESS AND	)
JOVANTE DOMINIQUE DODD,	)
DEFENDANTS.	)
_____	)

December 5, 2019
Greenville, South Carolina

B E F O R E:

THE HONORABLE LETITIA H. VERDIN, JUDGE

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

HUNTER CHRISTOPHER BLOUIN, ESQ.
Attorney for the Plaintiff

CHRISTOPHER JONES, ESQ.
Attorney for Defendant Arnold

CHARLES "CHAD" SIMS PROPST, JR., ESQ.
Attorney for Defendant Littlejohn

WILLIAM G. YARBOROUGH, III, ESQ.
Attorney for Defendants Burgess and Dodd

CHERYL A. SMITH
Circuit Court Reporter

INDEX

(SW) - Denotes State's Witness

(DW) - Denotes Defense Witness

(IC) - Denotes In Camera

PAGE

There were no witnesses called.

EXHIBITSNODESCRIPTIONIDEVD

There were no exhibits introduced.

P R O C E E D I N G S

(WHEREUPON, proceedings commenced at 11:24 a.m.)

THE CLERK: Your Honor, this is 2019-GS-23-1412, the
State vs. David Chase Arnold.

2019-GS-23-0699, State vs. Rayshawn Markeith
Littlejohn.

State vs. Demond Derrick Burgess, 2019-GS-23-7201,
7306.

State vs. Jovante Dominique Dodd, indicted in
2019-GS-23-3704, 7197, 7200.

Everyone, please raise your right hand.

(WHEREUPON, DAVID CHASE ARNOLD, RAYSHAWN MARKEITH
LITTLEJOHN, DEMOND DERRICK BURGESS AND JOVANTE DOMINIQUE
DODD are duly sworn.)

THE COURT: Mr. Arnold, you're here today to plead to
possession of marijuana, first offense. That carries up to
30 days. Is that your understanding?

DEFENDANT ARNOLD: Yes, ma'am.

THE COURT: Okay. Mr. Littlejohn, you're here today to
plead to distribution of crack cocaine, first offense.
Carries up to 15 years. Is that your understanding?

DEFENDANT LITTLEJOHN: Yes, ma'am.

THE COURT: Okay. Mr. Burgess, you're here today to
plead to trafficking in heroin, 4 to 14 grams, first
offense. That is a violent and serious offense. Carries

1 seven years up to 25 years. No part of that is suspendable.
2 And trafficking in cocaine 10 to 28 grams, second offense.
3 That carries 5 to 30 years. Is that your understanding?

4 DEFENDANT BURGESS: Yes, ma'am.

5 THE COURT: Mr. Dodd, you're here today to plead to
6 distribution of crack cocaine, carries up to 15 years,
7 manufacturing crack cocaine, carries up to 15 -- I don't
8 know how that's printed out -- and possession of a
9 controlled substance. That carries up to six months. Is
10 that your understanding?

11 DEFENDANT DODD: Yes, ma'am.

12 THE COURT: Okay. Have you discussed these charges
13 with your lawyer, Mr. Arnold?

14 DEFENDANT ARNOLD: Yes, ma'am.

15 THE COURT: Mr. Littlejohn?

16 DEFENDANT LITTLEJOHN: Yes, ma'am.

17 THE COURT: Mr. Burgess?

18 DEFENDANT BURGESS: Yes, ma'am.

19 THE COURT: Mr. Dodd?

20 DEFENDANT DODD: Yes, ma'am.

21 THE COURT: Are you happy with what your lawyer's done
22 for you, Mr. Arnold?

23 DEFENDANT ARNOLD: Yes, ma'am.

24 THE COURT: Mr. Littlejohn?

25 DEFENDANT LITTLEJOHN: Yes, ma'am.

1 THE COURT: Mr. Burgess?

2 DEFENDANT BURGESS: Yes, ma'am.

3 THE COURT: Mr. Dodd?

4 DEFENDANT DODD: Yes, ma'am.

5 THE COURT: Are you under the influence of drugs or
6 alcohol here today, Mr. Arnold?

7 DEFENDANT ARNOLD: No, ma'am.

8 THE COURT: Mr. Littlejohn?

9 DEFENDANT LITTLEJOHN: No, ma'am.

10 THE COURT: Mr. Burgess?

11 DEFENDANT BURGESS: No, ma'am.

12 THE COURT: Mr. Dodd?

13 DEFENDANT DODD: No, ma'am.

14 THE COURT: Has anyone forced you to plead guilty or
15 promised you anything to get you to plead guilty,
16 Mr. Arnold?

17 DEFENDANT ARNOLD: No, ma'am.

18 THE COURT: Mr. Littlejohn?

19 DEFENDANT LITTLEJOHN: No, ma'am.

20 THE COURT: Mr. Burgess?

21 DEFENDANT BURGESS: No, ma'am.

22 THE COURT: Mr. Dodd?

23 DEFENDANT DODD: No, ma'am.

24 THE COURT: When you plead guilty, you give up certain
25 constitutional rights. One is your right to remain silent

1 about these charges. Do you know that, Mr. Arnold?

2 DEFENDANT ARNOLD: Yes, ma'am.

3 THE COURT: Mr. Littlejohn?

4 DEFENDANT LITTLEJOHN: Yes, ma'am.

5 THE COURT: Mr. Burgess?

6 DEFENDANT BURGESS: Yes, ma'am.

7 THE COURT: And Mr. Dodd?

8 DEFENDANT DODD: Yes, ma'am.

9 THE COURT: You also give up your right to a jury
10 trial. At that trial your attorney could call witnesses for
11 you, cross-examine witnesses against you, and the State
12 would have to prove your guilt beyond a reasonable doubt.
13 But when you plead guilty, you give up your right to a jury
14 trial. Do you know that, Mr. Arnold?

15 DEFENDANT ARNOLD: Yes, ma'am.

16 THE COURT: Mr. Littlejohn?

17 DEFENDANT LITTLEJOHN: Yes, ma'am.

18 THE COURT: Mr. Burgess?

19 DEFENDANT BURGESS: Yes, ma'am.

20 THE COURT: And Mr. Dodd?

21 DEFENDANT DODD: Yes, ma'am.

22 THE COURT: Everyone except for Mr. Burgess, you're
23 pleading to charges that have not yet been indicted by the
24 grand jury. Do you want to give up that right and plead
25 guilty today anyway, Mr. Arnold?

1 DEFENDANT ARNOLD: Yes, ma'am.

2 THE COURT: Mr. Littlejohn?

3 DEFENDANT LITTLEJOHN: Yes, ma'am.

4 THE COURT: Mr. Dodd?

5 DEFENDANT DODD: Yes, ma'am.

6 THE COURT: How do you plead, guilty or not guilty,
7 Mr. Arnold?

8 DEFENDANT ARNOLD: Guilty.

9 THE COURT: Mr. Littlejohn?

10 DEFENDANT LITTLEJOHN: Guilty.

11 THE COURT: Mr. Burgess?

12 DEFENDANT BURGESS: Guilty.

13 THE COURT: And Mr. Dodd?

14 DEFENDANT DODD: Guilty.

15 THE COURT: Each of you has ten days from today's date
16 to appeal this plea if you so choose, but you must do so in
17 writing to this court.

18 MR. BLOUIN: Thank you, Your Honor. Hunter Blouin for
19 the State.

20 As to Mr. Arnold, the State's recommendation is a \$200
21 fine and court costs. He has one day in jail. And on
22 August 2, 2018, Greenville County, the defendant was found
23 to be in possession of 16.97 grams of marijuana.

24 THE COURT: How long does he need to pay that fine?

25 DEFENDANT ARNOLD: Yes, ma'am. I can pay it today.

1 THE COURT: And I know you told him that it's going to
2 more than double.

3 MR. JONES: I think it's like 440.

4 THE COURT: 440. You've got that money? Okay. Well,
5 that's fantastic. That's the best way to do it, otherwise,
6 you'll spend it between now and then.

7 Okay. 30 days or a fine of \$200, credit for the day
8 you served. Good luck to you.

9 MR. JONES: Thank you so much.

10 THE COURT: Thank you.

11 MR. BLOUIN: Your Honor, as to Mr. Littlejohn, the
12 State's recommendation is probation and house arrest.

13 The facts are that on or about October 2, 2018, in
14 Greenville county, the defendant did distribute .15 grams of
15 cocaine base to an undercover operative working for the
16 Greenville County Sheriff's Office vice and narcotics unit.

17 He has a prior record of a 2004 resisting arrest; 2006,
18 breach of trust, failure to stop, ABHAN, possession of a
19 stolen vehicle. Those were in 2008. In 2010 a CDV; 2011,
20 AVWIC [phonetic]; 2011, simple possession of marijuana; 2017
21 A&B second and failure to stop.

22 THE COURT: All right. I certainly will go along with
23 that, but I'll hear from you too.

24 MR. PROPST: Well, Mr. McMaster noted in his plea
25 summary that we are free to argue against the house arrest.

1 If you're willing to just put him on probation, that's all
2 we'd ask. He works for himself, so that would give him a
3 little more freedom to make some money and do what he can to
4 support his family.

5 THE COURT: Six years suspended with probation for
6 30 months, random drug testing while on probation. Good
7 luck to you.

8 MR. PROPST: Thanks, Judge.

9 THE COURT: Thank you.

10 MR. BLOUIN: Your Honor, as to Mr. Burgess, he has
11 189 days of jail credit. And the State, this is a
12 negotiated 15-year sentence.

13 The facts are, for the first incident, on or about
14 June 1, 2019, in Greenville County, law enforcement observed
15 this defendant driving a vehicle and had prior knowledge of
16 him having a suspended license. Law enforcement performed a
17 lawful traffic stop, and he was found to be in possession of
18 a handgun in his waistband. He did not have his CWP. Also,
19 after a search the defendant was found to be in possession
20 of 17.23 grams of cocaine which were packaged into 24
21 separate baggies. He was also in possession of \$464 in
22 cash, primarily \$20 bills wrapped in a rubber band.
23 Post-Miranda the defendant admitted he knew the substance
24 was cocaine and that he had a lot.

25 Then the second incident happened the next day, Your

1 Honor, on June 2, 2019, in Greenville County. Law
2 enforcement was listening to the defendant's jail calls from
3 the detention center. On these calls the defendant was
4 talking about narcotics at his father's residence in
5 Greenville County. Law enforcement obtained a search
6 warrant and located 10.76 grams of a heroin-fentanyl mixture
7 that was located exactly where the defendant described.

8 He has a prior record: 2001, possession with intent to
9 distribute cocaine base, possession of a controlled
10 substance, UCAP, forgery, resisting arrest; 2002, FTC fraud.

11 THE COURT: This is a negotiated.

12 MR. BLOUIN: Yeah.

13 THE COURT: I think we're good. I appreciate it.

14 Mr. Burgess, you heard the facts as stated by the
15 solicitor. How do you plead, guilty or not guilty?

16 DEFENDANT BURGESS: Guilty.

17 THE COURT: Okay.

18 MR. YARBOROUGH: He wanted me to tell you some stuff
19 just about him.

20 THE COURT: That's fine.

21 MR. YARBOROUGH: And I'll tell you this. His father is
22 here. He's supportive. They both told me that this man's
23 had a drug problem for a really long time. He wants you to
24 know that although it certainly does appear and on the proof
25 the State would have was he was distributing, but I think it

1 all really goes to the fact that he was doing whatever he
2 could to kind of maintain that ability to be able to do
3 stuff. He feels bad. He's sat in jail. He's done -- he's
4 done everything he can to try to help. I just would -- any
5 way you that you construct the sentence would be great to
6 minimize the damage to him. It's going to be bad for him
7 anyway. He realizes that. We just -- you know, we're here.
8 It's awful.

9 THE COURT: I was looking at it to see if there was one
10 -- the 15 could go on as opposed to the other. I think it's
11 six one way, half a dozen of the other.

12 MR. YARBOROUGH: I agree. And he realizes that. We've
13 gone over the time and everything that he's involved. He
14 just wants you to know, Judge, it's really important for him
15 to let you know that he really is a -- he feels like he's --
16 he is a good guy. I'll tell you what. He's always worked
17 with me hard. And we looked at this case. This case was on
18 the trial docket. And we talked about it. He is not --
19 he's always maintained he's an addict, and he wants you to
20 know that. And his father tells me that too. His father
21 says he really needs some help in the long run. This is
22 going to give him a chance to get cleaned up. He's going to
23 have to do some time, and we just urge the Court to be as
24 lenient on him as you can under the circumstances.

25 THE COURT: Well, you know, of course, Mr. Burgess, and

1 I know your lawyer's told you this on this situation where
2 I've either got to accept or reject the negotiations. And
3 your attorney has worked you out, in light of the
4 circumstances, a good deal.

5 15 years, credit for 189 days, concurrent. Good luck
6 to you.

7 MR. YARBOROUGH: Thank you.

8 THE COURT: Thank you.

9 MR. BLOUIN: Your Honor, as to Mr. Dodd, he has ten
10 days of jail credit here. He's currently serving a
11 three-year sentence in the Department of Corrections that
12 began on October 17th of 2019. And the recommendation is a
13 sentence suspended on two years to run concurrent with the
14 sentence he's now serving followed by probation.

15 MR. YARBOROUGH: Yeah. I think the intention, Your
16 Honor, would be for him not to do any more time than the
17 three years he's already doing.

18 THE COURT: Sure.

19 MR. YARBOROUGH: I think that was how it was listed.
20 But I just ask the Court to maybe just give him a flat three
21 concurrent. Dating it back to October, I think, would ---

22 THE COURT: What's his jail credit?

23 MR. BLOUIN: He's got ten days here.

24 THE COURT: Ten days. I'm sorry. Then it's backdated.

25 MR. BLOUIN: Backdated to 10/17/19.

1 THE COURT: Okay. Yes, sir. Tell me about it.

2 MR. BLOUIN: Your Honor, on June 26, 2018, a
3 confidential informant working for the Greer PD purchased a
4 quantity of crack cocaine from the defendant at his
5 residence on Oakland Avenue in Greer. When the defendant
6 was arrested on June 28th of 2018 at his apartment, he had
7 about .4 grams of crack in his pocket along with \$529 cash.
8 Officers found instruments and ingredients for making crack
9 cocaine in his bedroom.

10 And then on March 23, 2019, a traffic stop by Greer PD
11 led to this defendant being found in possession of ecstasy.

12 His only record is the 2019 obstruction of justice
13 which he is currently serving the three-year sentence for.

14 MR. YARBOROUGH: Your Honor, if you could go along with
15 that recommendation, we'd ask you to. Thank you.

16 THE COURT: Will do it. Three years, three years and
17 six months, all concurrent with each other and concurrent
18 with your SCDC sentence, credit for ten days, and a sentence
19 start date of 10/17/19.

20 Good luck to you.

21 MR. BLOUIN: Thank you, Your Honor.

22 (WHEREUPON, proceedings concluded at 11:36 a.m.)
23
24
25

1
2
3 CERTIFICATE OF REPORTER

4 STATE OF SOUTH CAROLINA)

5 COUNTY OF GREENVILLE)
6

7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South Carolina,
9 do hereby certify that the foregoing is a true, accurate and
10 complete Transcript of Record of the proceedings had and
11 evidence introduced in the trial of the captioned case,
12 relative to appeal, in the Court of General Sessions for
13 Greenville County, South Carolina, on the 5th day of
14 December, 2019.

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

17
18 December 2, 2020
19
20

21 *Cheryl A. Smith*

22 Cheryl A. Smith, CVR-M

23 Court Reporter
24
25

WITNESSES

David J Gault

Greenville Police Department

6/1/2019

D.B. OWENS

DB #1846

ARREST WARRANT NUMBERS

2019A2320601972 AND 2019A2320601975

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2019-GS-23-
EWM

007201

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

September

TERM 2019

THE STATE

vs.

DEMOND DERRICK BURGESS

Yarbrough
Indictment for

0147/0549

TRAFFICKING COCAINE

AND

**POSS OF A WEAPON DURING THE
COMMISSION OF A VIOLENT CRIME**

VIOLATION § 44-53-0370 AND §16-23-0490

**ENTERED
ACCT** *for*

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

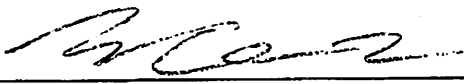
INDICTMENT FOR
 TRAFFICKING COCAINE
 AND
 POSS OF A WEAPON DURING THE COMMISSION OF A
 VIOLENT CRIME

At a Court of General Sessions, convened on **SEP 24 2019** the Grand Jurors of Greenville
 County present upon their oath:

That DEMOND DERRICK BURGESS did in Greenville County, on or about the 1st day of June, 2019, knowingly sell, manufacture, deliver or bring into the State of South Carolina, or did knowingly provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver or bring into the State or was knowingly in actual or constructive possession of more than 10 grams but less than 28 grams of Cocaine. This is in violation of §44-53-0370 of the South Carolina Code of Laws (1976) as amended.

That DEMOND DERRICK BURGESS did in Greenville County, on or about the 1st day of June, 2019, possess or visibly display a Smith and Wesson .40 Caliber Pistol during the commission or attempted commission of a violent crime, to wit: Trafficking Cocaine and Burglary 2nd Degree. This is in violation of §16-23-0490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



 SOLICITOR

BAR # 101312

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.Demond Derrick Burgess

AKA:

Race: BLACK Sex: M Age: 42DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED] CourtCity, State, Zip: Greenville, SC 29611DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Trafficking Cocaine 10-28 grams 2nd Offense

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2019GS2307201A/W#: 2019A2320601972Date of Offense: 6/1/2019S.C. Code § : 44-53-0370(E)(2)(X)CDR Code #: 0147

SENTENCE SHEET

5-30 years & \$50,000 Non-Suspendable Sentence

☐ CONVICTED OF or ☐ PLEADSin violation of § 44-53-0370 of the S.C. Code of Laws, bearing CDR Code # 0387☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature] 101312 [Signature] 10271

Miller, Walker

SC Bar#

Defendant

YARBOROUGH III, WILLIAM G

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: ☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SCDOP.☐ The Defendant is to be placed on the 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 EmploymentPayment Terms: ☐ Set by SCDPPPS Obtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender FundOther: Recipient:

*Fine:

\$14-1-206 (Assessments 107.5 %)	\$	
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100
\$14-1-211(A)(2) (DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$56-1-286 (DUI Breath Test)	\$25	\$
Proviso (Public Def/Probation)	\$500	\$
\$14-1-212 (Law Enforce. Funding)	\$25	\$ 25
\$14-1-213 (Drug Court Surcharge)	\$150	\$ 150
\$50-21-114(BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ 8.25

TOTAL

\$ 283.25

Clerk of Court/ Deputy Clerk

Court Reporter: [Signature]

SCCA/217 (04/2018)

Presiding Judge

Judge Code: 2162Sentence Date: DEC 05 2019

WITNESSES

Darren C Vaughn

BP

Greenville County Sheriffs Office

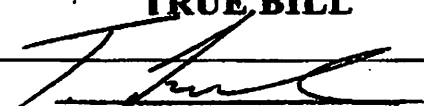
6/5/2019

ARREST WARRANT NUMBER

2019A2330204976

ACTION OF GRAND JURY

TRUE BILL



FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2019-GS-23-

EWM

007306

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

September TERM 2019

THE STATE

vs.

DEMOND DERRICK BURGESS

Indictment for

0156

TRAFFICKING HEROIN

VIOLATION § 44-53-0370

**ENTERED
ACCT** *gcl*

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

INDICTMENT FOR
 TRAFFICKING HEROIN

At a Court of General Sessions, convened on

SEP 24 2019

the Grand Jurors of Greenville

County present upon their oath:

That DEMOND DERRICK BURGESS did in Greenville County, on or about the 2nd day of June, 2019, knowingly sell, manufacture, deliver or bring into the State of South Carolina, or did knowingly provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver or bring into the State or was knowingly in actual or constructive possession of more than 4 grams but less than 14 grams of Heroin. This is in violation of §44-53-0370 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 SOLICITOR

BAR # 101312

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Greenville

VS.

Demond Derrick Burgess

AKA:

Race: BLACK Sex: M Age: 42

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED] Court

City, State, Zip: Greenville, SC 29611

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Trafficking in Heroin 4-14 grams 1st Offense

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2019GS2307306

A/W#: 2019A2330204976

Date of Offense: 6/2/2019

S.C. Code § : 44-53-0370(E)(3)

CDR Code #: 0156

SENTENCE SHEET

7-25 years & \$50,000 Non-Suspendable Sentence

☐ CONVICTED OF or ☐ PLEADS

in violation of § 44-53-0370 of the S.C. Code of Laws, bearing CDR Code # 2361

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature] 101312 Defendant [Signature] 10271
Miller, Walker SC Bar# YARBOROUGH III, WILLIAM G SC Bar#
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SCDoc.☐ The Defendant is to be placed on the 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: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: _____ \$

§14-1-206 (Assessments 107.5 %) _____ \$

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100

§14-1-211(A)(2) (DUI Surcharge) \$100 \$

§56-5-2995 (DUI Assessment) \$12 \$

§56-1-286 (DUI Breath Test) \$25 \$

Proviso (Public Def/Probation) \$500 \$

§14-1-212 (Law Enforce. Funding) \$25 \$ 25

§14-1-213 (Drug Court Surcharge) \$150 \$ 150

§50-21-114(BUI Breath Test Fee) \$50 \$

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$

3% to County (if paid in installments) \$ 8.25

TOTAL \$ 283.25

Clerk of Court/ Deputy Clerk [Signature]

Court Reporter: [Signature]

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge [Signature]

Judge Code: 2162

Sentence Date: DEC 05 2019

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

DEMOND D. BURGESS #304353)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2020-CP-23- 05112

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Allendale Correctional Institution, P.O. Box 1151, Fairfax, SC 29827
2. Name and location of Court which imposed sentence Greenville County Court of General Sessions, 305 E North St Ste 101, Greenville, SC 29601
3. Name(s) of co-defendant(s) (if any) LaQuincy Cleveland
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 19-GS-23-07306 - Trafficking in Illegal Drugs
 - (b) 19-GS-23-07201 - Trafficking in Cocaine
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) December 5, 2019 - Fifteen (15) years

- (b) December 5, 2019 - Fifteen (15) years concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
- (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) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
 - (b) Involuntary Guilty Plea
 - (c) _____
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) _____

(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? _____

- (c) your sentencing? Yes
- (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? _____
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. William G. Yarborough, III, Esq., 522 N Church St, Greenville, SC 29601
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Plea and sentencing
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
- New Trial
20. Are you now under sentence from any other court that you have not challenged?
- No

STATE OF SOUTH CAROLINA)

County of ALLENDALE)

VERIFICATION

I, Demond D. Burgess, 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.

Demond D. Burgess

SWORN to and subscribed before me this 21st
day of October, 2020

Debbie Phillips (L.S.)
Notary Public

My Commission Expires: 7-10-24

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

I, Demond D. Burgess, 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.

Demond D. Burgess
Applicant

SWORN or affirmed to and subscribed before me this
21st day of October, 2020.

Debbie Phillips
Notary Public

My Commission Expires: 7-10-24

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	IN THE THIRTEENTH JUDICIAL CIRCUIT
	)	
	)	
Demond D. Burgess, #304353,	)	Case No.: 2020-CP-23-05112
Applicant,	)	
	)	
v.	)	RETURN TO APPLICATION AND
	)	MOTION FOR A MORE DEFINITE
State of South Carolina,	)	STATEMENT
Respondent.	)	
	)	

The State (“Respondent”), making its return to the application for post-conviction relief filed by Demond D. Burgess (“Applicant”), through counsel, on November 9, 2020, would respectfully show this Court:

I. Procedural History

Applicant is presently incarcerated in the South Carolina Department of Corrections. During its February of 2019 term, the Greenville County Grand Jury indicted Applicant for possession of a weapon during the commission of a violent crime (2019-GS-23-001238), possession of a stolen firearm (2019-GS-23-007199), trafficking in cocaine (2019-GS-23-001242), three counts of possession of a controlled substance with intent to distribute (2019-GS-23-001240; -001241; -001243), and possession of methamphetamine (2019-GS-23-001239). During its September of 2019 term, the Grand Jury indicted Applicant for trafficking in cocaine (2019-GS-23-007201), unlawful carrying of a handgun (2019-GS-23-007202), driving under suspension (2019-GS-23-007200), trafficking in heroin (2019-GS-23-007304), and possession of a weapon during the commission of a violent crime (2019-GS-23-007201). Applicant was represented by William G. Yarborough, III (“plea counsel”), Esquire, and Assistant Solicitor Hunter Christopher Blouin of the Thirteenth Circuit Solicitor’s Office prosecuted the case. On December 5, 2019, Applicant appeared before the Honorable Letitia H. Verdin and pleaded guilty

to trafficking in cocaine, 12-28 grams, second offense (2019-GS-23-007201) and trafficking in heroin, 4-14 grams, first offense (2019-GS-23-07306). During Applicant's guilty plea hearing, the assistant solicitor provided the following recitation of facts:

[F]or the first incident, on or about June 1, 2019, in Greenville County, law enforcement observed [Applicant] driving a vehicle and had prior knowledge of him having a suspended license. Law enforcement performed a lawful traffic stop, and he was found to be in possession of a handgun in his waistband. He did not have his CWP. Also, after a search [Applicant] was found to be in possession of 17.23 grams of cocaine which were packaged into 24 separate baggies. He was also in possession of \$464 in cash, primarily \$20 bills wrapped in a rubber band. Post-Miranda [Applicant] admitted he knew the substance was cocaine and that he had a lot.

Then the second incident happened the next day . . . on June 2, 2019, in Greenville County. Law enforcement was listening to [Applicant's] jail calls from the detention center. On these calls [Applicant] was talking about narcotics at his father's residence in Greenville County. Law enforcement obtained a search warrant and located 10.76 grams of a heroin-fentanyl mixture that was located exactly where [Applicant] described.

Plea Tran. 9-10. In accordance with the fifteen-year negotiated sentence, Judge Verdin sentenced Applicant to imprisonment for fifteen years for each offense, with both sentences running concurrently, and with credit for time served. In keeping with the plea deal, the State dismissed the charges for two counts of possession of a weapon during the commission of a violent crime (2019-GS-23-007201; -001238), possession of methamphetamine (2019-GS-23-001239), three counts of possession of a controlled substance with intent to distribute (2019-GS-23-001240; -001241; -001243), trafficking in cocaine (2019-GS-23-001242), possession of a stolen firearm (2019-GS-23-007199), driving under suspension (2019-GS-23-007200), and unlawful carrying of a handgun (2019-GS-23-007202).

Plea counsel filed a timely notice of appeal. The South Carolina Court of Appeals found that plea counsel failed to file a sufficient explanation of how the issues raised in the notice of appeal were raised before Judge Verdin and Judge Verdin's ruling thereupon, and dismissed the

appeal.¹ State v. Burgess, S.C. Ct. App. Order dated January 14, 2020. The remittitur was issued on January 30, 2020.

II. Current Application

In his application for post-conviction relief, filed by counsel on November 9, 2020, Applicant alleges that he is entitled to relief based upon his claims that (1) plea counsel was constitutionally ineffective and (2) Applicant's guilty pleas were involuntarily entered. Applicant prays that the Court would award him a new trial.

Attached to and incorporated in this return are the records from the Greenville County Clerk of Court regarding the offenses to which Applicant pleaded guilty, the records from the Greenville County Clerk of Court regarding the offenses dismissed in accordance with Applicant's plea agreement with the State, the records from Applicant's direct appeal, the transcript from Applicant's guilty plea hearing, and Applicant's records from the South Carolina Department of Corrections.

III. Motion for a More Definite Statement

Respondent moves for a more definite statement as to Applicant's claims. Applicant claims that plea counsel was constitutionally ineffective but fails to provide any explanation of the alleged deficiency in plea counsel's performance and of the way in which the alleged deficiency allegedly caused Applicant to plead guilty rather than proceeding to trial. Applicant also claims that his guilty pleas were entered involuntarily but fails to provide any explanation as to how the guilty pleas were rendered involuntary. As it stands, Respondent is unable to provide substantive argument as to Applicant's two claims. The Uniform Post-Conviction Procedure Act requires that

¹ Plea counsel included argument and citations to authority in the notice of appeal, but did not file any response to the Court of Appeals' letter requesting further explanation in accordance with Rule 203(d)(1)(B)(iv), SCACR.

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 an 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). The Supreme Court of South Carolina has provided that:

[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of counsel is insufficient.

Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974). Furthermore, Rule 8(a), SCRPC, requires all civil pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.”

Respondent moves pursuant to Rule 12(e), SCRPC, to require Applicant to provide a more definite statement of his claims. Respondent moves to require Applicant to file an amended application well in advance of any evidentiary 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.

IV. Denial of All Other Allegations

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

V. Future Amendments and the Discovery Process

Applicant must specify any claims he intends to raise at the post-conviction relief evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent pursuant to Love v. State, 428 S.C. 231, 238-39,

834 S.E.2d 196, 199-200 (2019), or, alternatively, Respondent will move for a continuance in the matter. See Love, at 245, 834 S.E.2d at 203 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

VI. Conclusion

WHEREFORE, Respondent requests that this Court require Applicant to provide a more definite statement of the claims raised.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General

By: s/Taylor Zane Smith
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Telephone: (803) 734-3737

March 24, 2021

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNT OF GREENVILLE	)	CASE NO.: 2020-CP-23-05112
DESMOND D. BURGESS #304353,	)	
	)	
Applicant,	)	AMENDMENT TO POST CONVICTION
	)	RELIEF APPLICATION
Vs.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

23 JUL 20 AM 9:13
Erice Garrett CDE GVL SC

The Applicant above named in the aforementioned matter, through his Attorney, Tommy A. Thomas, respectfully re-alleges those allegations as contained in the original Application for Post Conviction Relief and moves to amend his original Post Conviction Relief Application.

That counsel trial counsel was ineffective for the following reasons:

1. Failure to properly investigate the case.
2. That Applicant plead to trafficking heroin. The drug tested positive for fentanyl. The Applicant is informed and believes that there was no appropriate statute to address the illegality of fentanyl at the time.
3. That the driving under suspension charge was the basis for the search of his vehicle. That the applicant was not driving the vehicle, nor was he in possession of the keys to the vehicle. Based upon this fact, the Applicant is informed and believes that the seizure of any evidence from his car should have been suppressed. That this action was an unreasonable search and seizure.
4. That Applicant plead guilty to a fifteen (15) year negotiated sentence. That the Applicant did not understand the negotiated plea. He found out the night

before that he was going to Court, by one of the officers in the detention center. He thought that the plea was for twelve years, and it turned out to be fifteen years.

5. The Applicant is informed and believes that his plea was not freely and voluntarily, nor knowingly or intelligently given.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tommy A. Thomas', is written over a horizontal line.

Tommy A. Thomas, Esq.
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063

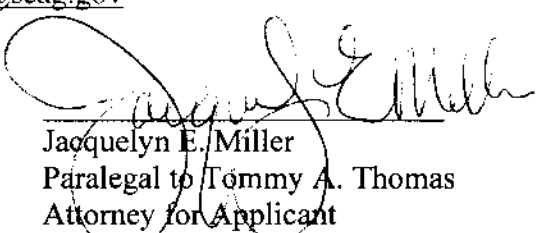
July 17, 2023

23 JUL 20 PM 9:16
Brice Garrett COD BUL SC

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNT OF GREENVILLE	)	CASE NO.: 2020-CP-23-05112
DESMOND D. BURGESS #304353,	)	
	)	
Applicant,	)	CERTIFICATE OF SERVICE
	)	
Vs.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

I, Jacquelyn E. Miller, paralegal to Tommy A. Thomas, Attorney for the Applicant
hereby certify that I emailed, a copy of an Amendment to Post Conviction Relief Application to
Melody Brown, Esq. of the Attorney General's Office, at:

Melody Brown, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549
MBrown@scag.gov


Jacquelyn E. Miller
Paralegal to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
July 17, 2023

STATE OF SOUTH CAROLINA)
COUNT OF GREENVILLE)
DESMOND D. BURGESS #304353,))
Applicant,)
Vs.)
State of South Carolina,)
Respondent.)

THE COURT OF COMMON PLEAS

CASE NO.: 2020-CP-23-05112

SECOND
AMENDMENT TO POST CONVICTION
RELIEF APPLICATION

ENTERED COMPUTER

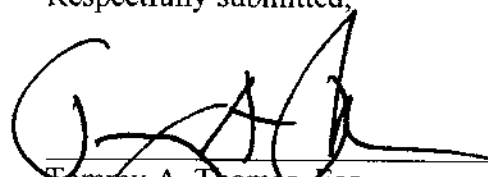
23 JUL 25 AM 9:15
Brice Garrett DDC GIL SC

The Applicant above named in the aforementioned matter, through his Attorney, Tommy A. Thomas, respectfully re-alleges those allegations as contained in the original Application for Post Conviction Relief and moves to amend his original Post Conviction Relief Application.

That counsel trial counsel was ineffective for the following reasons:

1. That Applicant plead guilty to a fifteen (15) year negotiated sentence. That the Applicant did not understand the negotiated plea. He found out the night before that he was going to Court, by one of the officers in the detention center. He thought that the plea was for the minimum on each charge (5 years and 7 years) to run concurrent for a total of 7 years. It turned out to be fifteen years.
2. Any and all other issues as they may arise from the PCR Trial.

Respectfully submitted,


Tommy A. Thomas, Esq.
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063

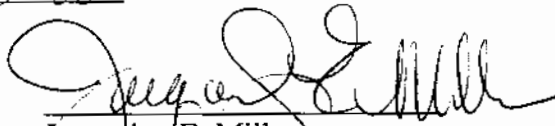
July 18, 2023

23 JUL 25 AM 9:16
Brice Barrett COC GILL SC

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNT OF GREENVILLE	)	CASE NO.: 2020-CP-23-05112
DESMOND D. BURGESS #304353,	)	
	)	
Applicant,	)	CERTIFICATE OF SERVICE
	)	
Vs.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

I, Jacquelyn E. Miller, paralegal to Tommy A. Thomas, Attorney for the Applicant
hereby certify that I emailed, a copy of a Second Amendment to Post Conviction Relief
Application to Melody Brown, Esq. of the Attorney General's Office, at:

Melody Brown, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549
MBrown@scag.gov


Jacquelyn E. Miller
Paralegal to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
July 18, 2023

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

DEMOND BURGESS, #304353

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2020-CP-23-05112

CERTIFICATE OF SERVICE BY MAIL

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:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

DATED this 24th day of March.

Hannah M. Bradham, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	2020-CP-23-05112
COUNTY OF GREENVILLE	)	
	)	
	)	
	)	
DEMOND D. BURGESS,	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	
_____	)	

July 25, 2023
Greenville, South Carolina

B E F O R E:

THE HONORABLE J. DERHAM COLE, JUDGE

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

TOMMY THOMAS, ESQ.
Attorney for the Applicant

MELODY J. BROWN, ESQ.
Attorney for the Respondent

CHERYL A. SMITH
Circuit Court Reporter

INDEX

(AW) - Denotes Applicant's Witness
(RW) - Denotes Respondent's Witness

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(AW) WILLIAM YARBOROUGH, III:

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Cross-Examination by Ms. Brown	70
Redirect Examination by Mr. Thomas	73

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-------------------------	----

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
	(Applicant's Exhibit)		
1	Drug Analysis Report	65	75

P R O C E E D I N G S

(WHEREUPON, proceedings commenced at 2:09 PM.)

MS. BROWN: Your Honor, the first case this afternoon is going to be Burgess vs. State. It is the Civil Action Number 2020-CP-23-5112.

Your Honor, I do have a judge's packet that I can hand up to you. And, Your Honor, Mr. Burgess is in the courtroom.

The judge's packet contains the PCR application filed November 9, 2020, the return and motion for a more definite statement filed by the State on March 30, 2021.

Your Honor, I do bring to your attention that there are two amendments: one amendment, one second amendment to the application filed on or about July 20, 2023. We've also included some appellate court records, the transcript from the guilty plea of December 5, 2019, and some clerk's records including the sentencing sheet, indictments, warrants, and General Sessions tracking sheets.

Mr. Burgess is represented today by Mr. Tommy Thomas.

Let's see. Your Honor, we're going a little bit out of order today to move along. If you'll excuse me just a minute.

Your Honor, because we have amendments in this case, I would ask that Mr. Thomas place on the record the exact issues that will be presented today so we can be more

1 focused in the litigation.

2 THE COURT: Okay. It looks like he's ready to do
3 that.

4 MR. THOMAS: Yes, sir. Your Honor, if it please the
5 Court. I don't know if you want me to just read them all,
6 but they are -- we're going to go exactly as the amended
7 -- the first amendment of the postconviction relief
8 application.

9 Your Honor, the second amendment actually just
10 clarifies Item 4 in that he was sentenced to 15 years. He
11 thought rather than -- I apologize. He thought, Your
12 Honor, that he was going to get the minimum on the two
13 crimes that he plead to and that that was five and seven,
14 and that those were going to run concurrent. So he
15 thought that he was going to get seven years, and, Your
16 Honor, he ended up receiving 15 on the plea, which, of
17 course, would go to the involuntariness of the plea.

18 THE COURT: All right. So what about the first
19 amendment application?

20 MR. THOMAS: Your Honor, the first amendment alleges
21 that -- one is an issue regarding ---

22 THE COURT: Are you going forward on each of those?

23 MR. THOMAS: Yes, Your Honor.

24 THE COURT: That's 1 through 5.

25 MR. THOMAS: Yes, Your Honor.

1 THE COURT: All right. 1 through 5, and then you've
2 got the second amendment.

3 MR. THOMAS: Yes, sir. The second one just clarifies
4 for Your Honor in that he felt that he was going to
5 receive the minimum of five and seven to run concurrent on
6 the two charges for a total of seven years, and he
7 received 15 from the Court.

8 THE COURT: All right. So the issues that are
9 expressed in the first amendment to the application are
10 the issues that you're proceeding on and no others.

11 MR. THOMAS: That's correct, Your Honor.

12 THE COURT: Okay.

13 MR. THOMAS: Yes, sir.

14 Your Honor, if it please the Court, we would call
15 Mr. Demond Burgess to the stand.

16 THE COURT: All right.

17 THE CLERK: Mr. Burgess, please place your left hand
18 on the Bible and raise your right hand.

19 WHEREUPON,

20 DEMOND BURGESS

21 After having been duly sworn, testified as follows:

22 THE CLERK: Please state your full name for the
23 record.

24 THE WITNESS: Demond Derrick Burgess.

25 THE CLERK: Thank you. You may have a seat.

1 MR. THOMAS: Your Honor, if it please the Court.

2 THE COURT: Yes, sir.

3 DIRECT EXAMINATION

4 BY MR. THOMAS:

5 Q Mr. Burgess ---

6 A Yes, sir.

7 Q --- you're currently in the South Carolina Department
8 of Corrections.

9 A Yes, sir.

10 Q And you're located in what institution?

11 A Allendale Correctional Institution.

12 Q You're in the programs?

13 A Yes, sir.

14 Q Okay. Are you taking programs therê?

15 A Yes, sir. I was -- they have a YOA program there. I
16 was a mentor over the YOAs which is a very extensive -- I
17 really don't know how to put it, but it's they don't just
18 take anybody to be mentors over the YOAs. So you have to
19 go through Columbia to -- to be chosen.

20 I also went for my GED, and I took a tester class. I
21 think -- I believe it's like a class that teaches taking
22 college to be able to teach -- teach. Things of that
23 nature, yes, sir.

24 Q Okay. Now, Mr. Burgess, you're serving time for
25 what?

1 A Excuse me?

2 Q You're serving time for what?

3 A Trafficking heroin and trafficking cocaine.

4 Q All right, sir. And you were arrested roughly back
5 when?

6 A June -- June 1, 2019.

7 Q Okay. And you had multiple charges?

8 A Yes, sir.

9 Q And you entered into a plea; is that correct?

10 A Yes, sir.

11 Q And those other charges were dismissed.

12 A Yes, sir.

13 Q Now, you had filed an application for postconviction
14 relief?

15 A Yes, sir.

16 Q You and I talked about that. Do you understand that
17 what you're asking for today is that your conviction be
18 set aside?

19 A Yes, sir.

20 Q In that if the Court was to grant that and your
21 conviction was set aside, then all of those other charges
22 could be reinstated?

23 A I understand that.

24 Q You understand that you could -- even though this was
25 a plea, that you could go to trial on those charges.

1 A Yes, sir.

2 Q And you and I have talked about this, about exposure.

3 A Yes, sir.

4 Q You could actually go back, go to trial and end up
5 with more time than what you've got today.

6 A Yes, sir.

7 Q All right. You understand that.

8 A Yes, sir.

9 Q And you want to go forward on your postconviction?

10 A Yes, sir.

11 Q Okay. Now, you were arrested. And did you make
12 bond?

13 A I did not.

14 Q Were you in the detention center for the whole amount
15 of time?

16 A Yes, sir.

17 Q And how long were you in the detention center?

18 A Roughly about six months, I think.

19 Q Okay. Prior to coming up for this plea?

20 A Oh, prior to coming up for this plea?

21 Q Yes, sir.

22 A Oh, no. I'm actually -- I'm in like my fifth year of
23 being incarcerated.

24 Q No, no. How long were you in the detention center?

25 A Oh, about six months.

1 Q Okay. And just in reading the transcript, I was a
2 little bit confused about the timing of all this. So
3 could you very briefly summarize to the Court what the
4 State alleged that you did?

5 A They alleged that -- obviously, that I was selling
6 drugs downtown Greenville. From -- from my understanding,
7 I've been under investigation for like a whole year from
8 some of the charges from previous -- previous before.

9 Q Yes, sir.

10 A And I don't sell drugs. And just like I told them, I
11 partied a lot. I was a -- I was a drug addict.

12 MS. BROWN: Objection, Your Honor. I think
13 describing the charge is one thing. Going into specifics
14 that have never been determined would be irrelevant.

15 MR. THOMAS: I'll rephrase it, Your Honor.

16 THE COURT: Okay.

17 BY MR. THOMAS:

18 Q Mr. Burgess, just tell us what the State had said
19 that you did, why they brought these charges against you.
20 What I'm specifically interested in is this timeframe.
21 Did you have charges from different times?

22 A I had charges from 2018 and almost a year to the day
23 later, 2019.

24 Q All right. Let me ask you this and this will help
25 me. You have the trafficking in heroin. Did that happen

1 in 2019?

2 A Yes. I was incarcerated when they found some
3 fentanyl at my father's house ---

4 Q Okay.

5 A --- in my room. This was after I -- after I was
6 incarcerated.

7 Q All right. How about the trafficking in the cocaine?

8 A I -- I had that on me. I won't deny that. Like I
9 said, I was out partying. I had cocaine on me. I don't
10 know how I got trafficking, though. But...

11 Q Okay. And this was in -- so both of these were in
12 2019.

13 A Yes, sir.

14 Q And that's what we're before the Court today on.

15 A Yes, sir.

16 Q Okay. All right. Thank you.

17 Now, did you hire an attorney or was an attorney
18 appointed to represent you?

19 A I hired an attorney.

20 Q And who did you hire?

21 A William Yarborough.

22 Q Okay. And when -- so you didn't make bond so you
23 were in the detention center.

24 A Yes, sir.

25 Q Did Mr. Yarborough come see you in the detention

1 center?

2 A Yes, sir.

3 Q And how often did he come see you?

4 A I maybe seen him a handful of times, maybe five
5 times, then right now might make six today.

6 Q Okay. So you had some fairly significant charges.

7 A Yes, sir.

8 Q And when you would meet with Mr. Yarborough, what did
9 y'all talk about?

10 A Mainly he just tried to get me to work with the
11 police, tried to get me to work with them and help them
12 get whoever it was that I was buying my drugs from.

13 Q Okay. And that's what you mean by working with
14 police?

15 A Yes, sir.

16 Q Did you and he discuss what would happen if you
17 didn't work for the police?

18 A That I'd be going to trial and I'd be facing life
19 without parole.

20 Q What happened if you were going to work for the
21 police?

22 A Then they'll ---

23 THE COURT: Let me mention, don't get so close to
24 that microphone. You're distorting.

25 THE WITNESS: Sorry.

1 Then they'll try to work with me with the life --
2 with the life without parole issue.

3 BY MR. THOMAS:

4 Q Some sort of deal.

5 A Yes, sir.

6 Q Okay. Now, what else did y'all talk about? Did you
7 talk about how he was going to defend you or defenses? Or
8 let's talk about that.

9 A No, no. I mean, just -- just have one defense. That
10 was to file a motion for suppressing evidence. I don't
11 even know whatever happened from that. We never -- we
12 never went through with that, I guess.

13 Q All right. Let's come back to that.

14 Did you go over the discovery with Mr. Yarborough?

15 A No.

16 Q Do you know what the discovery, what that word means?

17 A No. Not really. You're talking about like the
18 motion, the paperwork that I got that was sent to me after
19 I was in prison?

20 Q Right. The State's evidence.

21 A Sir?

22 Q The State's evidence.

23 A Yeah. No. I didn't see any of that until after I
24 filed a PCR with you and I end up getting -- and then I
25 got a discovery.

1 Q Okay. And you didn't have an opportunity to go
2 through that with Mr. Yarborough?

3 A No. Never.

4 Q Did you talk about defenses, how he was going to
5 defend you, what your defenses would be?

6 A No, sir. No.

7 Q And any witnesses?

8 A There was witnesses to the occasion, but that never
9 was looked into or anything.

10 Q Okay. These were people that you supplied for him
11 or ---

12 A I told him about them back at the county jail.

13 Q Okay. Now, how did you feel about all this? I mean,
14 were you concerned?

15 A Yes. I -- I -- I mean, he was my lawyer. I -- I
16 guess he had some type of plan. I really don't know.

17 Q Do you know what that plan was?

18 A No, I don't. To me I feel it was I guess to work
19 with the police to try to get a deal.

20 Q Okay. Now, where were you arrested?

21 A In the parking lot right across the street from here,
22 Tsunami's.

23 Q Okay. And were you arrested while you were in the
24 car?

25 A Yes, sir. I was actually -- I was actually getting

1 out of the car and going back into the restaurant. I
2 stepped out of the restaurant to light a cigarette, me and
3 a friend of mine, and we got in the car, smoked a
4 cigarette and we were listening to some music while we
5 were smoking a cigarette.

6 Then when I was getting out of the car, a police
7 officer just grabbed my hand, told me my name, asked me
8 did I have anything on me. I asked him what was this
9 about. He asked me can he search me. I said no. He
10 asked me can he search the car. I told him no, that's my
11 girlfriend car. She was in another bar, that they had --
12 that they can go in there and get her and ask her. But he
13 continued to search me and the car.

14 Q Okay. Were you driving the car?

15 A No, sir.

16 Q Did you have keys to the car?

17 A Yes, sir.

18 Q Now, what were you charged with when you were
19 arrested?

20 A So when I got to the jail maybe a day -- a day later,
21 I got my warrants. It was -- it was a whole lot of
22 warrants. But I end up getting a driving under suspension
23 ticket, which I didn't understand that because I wasn't
24 driving, I wasn't pulled over, and nothing -- nothing of
25 that nature, which actually, I told Mr. Yarborough I

1 wanted to take that to trial because I felt like it was
2 illegal search and seizure. I didn't get pulled over, so
3 I don't know how I had a driving under suspension ticket.
4 I wasn't driving. And I guess we was going to take that
5 to trial, but nothing ever happened from that after I came
6 to prison for this plea.

7 I got a letter saying that there was a court date for
8 the trial for the driving under suspension. So I called
9 Mr. Yarborough and asked him was we going to attend that
10 because I really needed to so I could prove that I wasn't
11 driving and all of this stuff was seized illegally. He
12 told me he already handled it. He told me don't worry
13 about it. He told me that he got me time served for that.
14 And I told him that's not what I wanted. I didn't want
15 that. I didn't want time served. I wanted to actually go
16 to the trial so -- because I needed that. I needed to
17 prove that there was never a traffic stop, I never got --
18 I did not get pulled over. The police just bum -- they
19 just bum-rushed me, searched me without my consent,
20 searched the car. And if I could have proved that -- you
21 know, if I could have proved that, then they would have to
22 get rid of the evidence which would have been for the --
23 actually, that motion to suppress evidence. I believe
24 that's why he filed it because I told him about the
25 driving under suspension thing.

1 Q So you did talk to Mr. Yarborough about that.

2 A Yes.

3 Q About the search and seizure?

4 A Yes.

5 Q Okay. And was that going to be one of your defenses?

6 A That's -- yes. For me, yes.

7 Q Okay. And you found out that the search and seizure
8 or the traffic ticket was resolved just on a time-served
9 basis?

10 A Yes.

11 Q Okay.

12 A That was out of my presence. I was already in
13 prison.

14 Q You were already in prison.

15 A I didn't even go. I was already in prison when that
16 court date came up for that.

17 Q Okay. All right. So did you -- and I'm just
18 curious. Did you talk to Mr. Yarborough about anything
19 other than the search and seizure?

20 A I honestly can't recall. We just -- whenever I
21 talked to him, like I said, it was only -- it was only a
22 couple times. And most of the time it was, listen, you're
23 going to get this LWOP if you don't work with the police.
24 Life -- I guess that's life without parole.

25 Q Let me ask you about that because I don't really

1 understand that. And you've talked to me about the life
2 without parole. What did Mr. Yarborough, if anything,
3 explain to you about your exposure with life without
4 parole?

5 A We really -- I can't recall. We -- we really -- we
6 really didn't talk much. Every time Mr. Yarborough came
7 to see me, he really didn't know much about my case and he
8 just always tried to get me to work with the police.

9 Q So why did you think you had exposure of life without
10 parole?

11 A Just from the offense of the charge, that three
12 strikes you're out type of thing.

13 Q Do you know how many strikes you had going into this
14 situation? Or did you have any?

15 A I don't know how many I had. This -- this -- I mean,
16 this isn't -- I'm not happy to say this isn't my first
17 time in prison. This is actually my fourth time, which I
18 know it doesn't look good. But I definitely don't think
19 just because I had a drug problem 15 years in prison was
20 -- was worth that. I mean, yet alone life in prison, I
21 mean...

22 Q Let me -- did Mr. Yarborough ever talk with you about
23 the State's plan to try you on one of these charges and
24 then -- or you had numbers of charges including the ones
25 that were dismissed, the State trying you on one, getting

1 a conviction, trying you on another and getting a
2 conviction and building a case for life without parole,
3 for LWOP?

4 A No. I -- no. This is my first time hearing
5 something like that.

6 Q All right. So you didn't discuss that with
7 Mr. Yarborough.

8 A No.

9 Q All right. Which leads up to my next really main
10 question is how did you make the decision to go to
11 trial ---

12 A Okay.

13 Q --- or to plea?

14 A So I don't know how you want to call it. This is
15 just the way I think. I like to think I know a little bit
16 from my dealings with them, from my dealings with this
17 system.

18 So I'm looking at life without parole, okay. I mean,
19 that's really bad. But I'm already thinking for a drug
20 problem, life without parole? So like I said, I thought I
21 was getting -- signing a deal for seven years. Because if
22 Mr. Yarborough would have told me that, well, listen here,
23 they want to offer you 15 years -- a 15-year negotiated
24 plea, I definitely would have turned that down. And I'm
25 going to tell you why. Because -- because my dealings

1 with them, there's no way in the world -- this is the way
2 I think that they're going to come down from life without
3 parole to 15 years and I did not work with the police? I
4 just don't understand. I don't understand that. So I
5 definitely was fighting that, which I never really wanted
6 to take a plea anyway because, you know, my illegal search
7 thing that I was going to.

8 But I would have never took that first and foremost
9 because me, I'm thinking, okay, for life without parole,
10 maybe 25 or 30 years, they'll come at me like that, you
11 know. We'll give you 25 or 30 years instead of life,
12 that's -- that's more sensible. So if he would have told
13 me that morning that -- that there was a 15-year
14 negotiated plea, I -- I definitely would have turned it
15 down because I don't see them coming from life without
16 parole to 15 years whatsoever, and I did not work with the
17 police. I just don't see that. So I wouldn't have took
18 that plea. I mean, this is my life on the line. I
19 wouldn't have took it.

20 So when we came to it that -- that morning, I didn't
21 even know I was going to court. I was woken up at 3:00 in
22 the morning, said I was going -- said I was going to
23 court. I met with Mr. Yarborough maybe two or three times
24 in the back which he told me -- he told me he talked to my
25 father that morning and my father told him that I should

1 go ahead and take this plea, which I thought was an open
2 plea.

3 I thought I was signing an open plea. One was five
4 to 30 and one was seven to 25. And that's where I was
5 under the understanding that was going -- the minimum on
6 them because Mr. Yarborough told me he knew the judge,
7 they was friends, he seen her that morning on his way into
8 work.

9 So I'm thinking, okay, this is -- this is -- you
10 know. So I signed a plea, which that paper did not have
11 nothing about 15 years on it or anything. The first time
12 I heard anything about 15 years is when I got sentenced.
13 And I was so stunned and I was just rushed right out of
14 the courtroom so I couldn't say nothing. I immediately
15 called for him to come in the back and I asked him what
16 happened. He told me -- I really can't remember, but it
17 was like I tried, you know.

18 And he asked me did I want him to file an appeal. I
19 told him yes.

20 If I would have signed for 15 years -- for a 15-year
21 plea, I wouldn't be here right now fighting this for seven
22 years. I mean, I'm not -- I'm not slow. I'm not
23 ignorant, you know. I've signed plea deals before in my
24 previous prison terms. So...

25 Q Let me ask you this. Did you know for certain that

1 you were facing life without parole?

2 A Not for certain, for certain. That's just what I
3 believe one of the warrants had on it. It said life
4 without parole and/or death. I'm thinking to myself life
5 without parole and/or death for -- I can't remember. I
6 think it was -- I don't know if it was for the gun charge
7 -- for the gun charge at this time or one of the drug
8 charges. I think it was for -- I think it was for the gun
9 charge which was dropped.

10 Q Okay. All right. So if that's the case, then you
11 were not facing life without parole.

12 A No. I mean, now that you put it that way, now -- now
13 that I think about it.

14 Q All right. And I think you mentioned it, but when
15 did you find out that you were going to court?

16 A The morning that I went to court. 3:00 that morning.

17 Q Okay. What did you think the status of your case
18 was?

19 A I thought -- when they was telling me I was going to
20 court, I thought it was -- I thought it was for the motion
21 to suppress the evidence. But come to find out we was --
22 it was either take this plea or you're going to trial.

23 Q Okay. And that all happened that morning.

24 A That morning.

25 Q And if you had turned the plea down, you were on the

1 trial docket?

2 A That's -- that's -- that's what I was told.

3 Q And what was your understanding of what was going to
4 happen if you pled guilty to those two charges?

5 A That I was going to get -- that I was going to get
6 the minimum sentence, the minimum sentence on them, five
7 years and seven years, all ran concurrent.

8 Q For a total of what?

9 A For -- to me a total of seven years. That's why I
10 signed it. I'm thinking, well, I could be home in three
11 and a half, four years, you know. I did have a drug
12 problem. I did need to clean up, but -- you know, clean
13 up a little bit. But 15 years, I don't think I need that
14 much rehab for a drug problem. That's just the way I was
15 thinking.

16 Q But that was your understanding ---

17 A That was my understanding.

18 Q --- when you stepped up in front of the Court.

19 A Yes, sir.

20 Q Now, you and I talked about this. If you go back and
21 look at the transcript, that you pled with -- it was a
22 multiple defendant plea.

23 A A group of people. It was four people.

24 Q Four people.

25 A Yes.

1 Q And the judge would ask each one of you whether or
2 not you understood certain things.

3 A Yes.

4 Q And they asked you whether or not you were pleading
5 freely and voluntarily ---

6 A Yes.

7 Q --- and those things.

8 And you responded how?

9 A I -- I responded "yes" to everything. I thought it
10 was -- that's what I was going with, so I was going with
11 the flow just like -- just like 90 percent of everybody
12 else do.

13 MR. THOMAS: Your Honor, if I beg the Court's
14 indulgence just for a second.

15 BY MR. THOMAS:

16 Q All right. And it is at the time that they handled
17 you specifically. Do you understand that question?

18 A Yes.

19 Q Okay. At that point in time, is that when you found
20 out or it was mentioned that this was a negotiated plea?

21 A It was -- to me it was at the end when I got
22 sentenced. That's when I heard -- that's the first time I
23 heard of 15 years. Almost -- almost immediately after
24 that we was rushed out of the courtroom. Because I was
25 stunned.

1 Q All four of you.

2 A Yes. Actually, that transcript said they did
3 somebody after me. That is incorrect. I was the last
4 person to be seen that morning.

5 Q Okay. Why didn't you say something then that that
6 was not your understanding of what was going to happen?

7 A Like -- like I told you, when they said the 15 years,
8 I was stunned. And then immediately, we was all taken out
9 of the courtroom. And that's why I immediately had
10 Mr. Yarborough come back to the back and talk to me and
11 put in for that appeal.

12 Q Okay.

13 A If -- if -- if I knew it was 15 years, he would have
14 -- I would have -- I would have never filed the appeal
15 whatsoever.

16 Q And so you did file an appeal?

17 A I had him file an appeal which was denied for -- I
18 can't exactly word it. Insufficient ---

19 Q Explanation.

20 A Insufficient reason or something of why.

21 Q For this guilty plea.

22 A I guess so. I mean, that's -- that's what the paper
23 said. It didn't go into details or anything. It just
24 said it was denied for insufficient explanations or
25 something of the sort.

1 Q Now, when you spoke with Mr. Yarborough after this
2 plea, what did y'all discuss, if anything?

3 A Really nothing. Just to file the appeal and then
4 that was it. We didn't have too -- after that we didn't
5 really have no more words. So I really didn't have
6 nothing else to say. He said he was going to file the
7 appeal and that was -- that was pretty much that.

8 MR. THOMAS: Okay. All right. Now, the trafficking
9 in heroin that you plead to -- Your Honor, I think all
10 those sentencing sheets and indictments and stuff are in
11 the Court's record.

12 BY MR. THOMAS:

13 Q The trafficking in heroin, did you discuss that with
14 Mr. Yarborough?

15 A What do you mean, discuss it? How?

16 Q About -- you said something about fentanyl.

17 A Oh, no. We never -- we never had a -- we never had a
18 conversation about -- about that. It was just -- it was
19 just, listen here. This is -- this is -- you sign this
20 plea, sign these pleas. That's when I thought I was
21 getting five and seven on them. And, you know, that was
22 -- that's -- that was the only extent of our conversations
23 as far as ---

24 Q Okay. All right. Help me out just a little bit.
25 The cocaine, the trafficking in cocaine, what was the

1 weight of those drugs?

2 A I don't know. I think maybe 17, 18 grams.

3 Q Okay. And you pled to 10 to 28, right?

4 A Yes.

5 Q But a second offense.

6 A Yes.

7 Q Okay. And on the heroin charge, did you discuss with
8 Mr. Yarborough the drug analysis on that charge?

9 A No.

10 MR. THOMAS: Your Honor, may I approach?

11 BY MR. THOMAS:

12 Q I want you to look at this document and tell me if
13 you can identify this.

14 A (Reviews document) I've never seen this.

15 Q Never seen that?

16 A No.

17 Q Okay.

18 A I mean, I have a drug analysis, but -- in my motion.

19 Q You've never seen this one.

20 A But I've never seen this.

21 Q Okay. Now, just a little bit in kind of
22 housekeeping. You said that they searched your vehicle.
23 Did they bring a drug dog?

24 A No.

25 Q Okay. Did you consent to search of the vehicle?

1 A No.

2 Q Was it your vehicle?

3 A No.

4 Q Okay. Now, they also searched your phone; is that
5 correct? Are you aware of that?

6 A I'm assuming -- I'm assuming so. I don't know.

7 Q Don't know.

8 A They took my phone. I don't ---

9 Q Okay. All right. And you said you did discuss with
10 Mr. Yarborough the motion to suppress ---

11 A Yes.

12 Q --- for the unlawful search and seizure?

13 A Yes.

14 Q Okay. Do you know if that was ever heard?

15 A Not -- not that I know of.

16 Q At the time that you entered into your plea that you
17 pled to the heroin, did you know anything about the
18 fentanyl?

19 A No.

20 Q You didn't know at the time.

21 A No.

22 Q Okay. And when did you find out about that?

23 A When I got my motion from -- when I got my -- I was
24 in prison when I got my motion.

25 Q For discovery.

1 A Yes, sir.

2 Q Just a few more questions.

3 We talked about your plea, and I want to ask you
4 these questions. Was your plea, negotiated plea to the
5 15, was it freely and voluntarily given?

6 A No.

7 Q Was it knowingly and/or intelligently given?

8 A No.

9 Q And you're asking that the Court set aside your
10 conviction.

11 A Yes.

12 Q Now, we talked about this as well. You've been
13 waiting quite some time to appear in court.

14 A Yes, sir.

15 Q And this is your day for postconviction. I'm not
16 suggesting that I have forgotten or left something out,
17 but now is your time. Is there anything that I've
18 forgotten to bring to the attention of the Court or that I
19 may have forgotten?

20 A Not offhand. You pretty much covered it.

21 I just want to say that I'm not, not guilty. The
22 only thing I am guilty of is having drugs on me. Because
23 like I said, I do party a lot. I know when you hear
24 trafficking, only -- 90 percent of people, only one thing
25 in your mind when you hear trafficking, and that's, oh,

1 he's selling drugs or something like that, which is not --
2 which is not the case. I did have drugs on me. I don't
3 know how it led up to the police coming and mess with me.
4 I hang out in Greenville, downtown Greenville and party
5 all the time and never had a problem. And out of the
6 blue, police just grab me, search me, find drugs and now
7 I'm here in prison for 15 years for trafficking and here
8 fighting that today, just trying to get to what I thought
9 I was pleading to, seven years, which -- which I accepted
10 because I did have drugs on me. I partied a lot. I admit
11 that. That's ---

12 Q Let me ask you this. You're drug-free?

13 A Yes, sir.

14 Q Okay. Allendale has helped you?

15 A Yes, sir.

16 Q Are you in any drug classes?

17 A I -- I've completed the drug classes that -- I've
18 completed the drug classes that ---

19 Q You completed them.

20 A Yes, sir. I've been there almost five years. I'm in
21 my fifth year.

22 MR. THOMAS: Okay. All right. I have no further
23 questions, Your Honor.

24 MS. BROWN: May it please the Court.

25 THE COURT: Yes, ma'am.

CROSS EXAMINATION

BY MS. BROWN:

Q Mr. Burgess, I'm Melody Brown with the Attorney General's office.

A Yes, ma'am.

Q I'm going to ask you a few questions.

First thing I want to ask, have you seen a copy of the transcript of your guilty plea?

A Yes. I -- yes.

Q And have you read it?

A Some of it.

Q Some of it? Okay.

Okay. And you had a plea along with several other folks.

A Yes.

Q So that's kind of woven in there, correct?

A Yes.

Q But it starts out as far as you are concerned that you're here today to plead to trafficking in heroin 4 to 14 grams first offense, and trafficking in cocaine 10 to 28 grams second offense. Do you agree with me?

A Yes.

Q So initially, you knew you were there to plead to those two charges.

A Yes.

1 Q Okay. And you said today that you had cocaine on
2 you.

3 A Yes.

4 Q Correct?

5 A Yes, ma'am.

6 Q And you recalled for us the amount that was also
7 referenced at trial. I believe you said 17 or 18 grams,
8 didn't you?

9 A Yes, ma'am. Yes, ma'am.

10 Q And I believe the solicitor said 17.23 grams of
11 cocaine. That's pretty consistent.

12 A Yes, ma'am.

13 Q And you admitted to that.

14 A Yes, ma'am.

15 Q Okay. Now, you said that you have the two charges
16 and you had some other charges.

17 A Yes, ma'am.

18 Q What were those other charges that were pending?

19 A Yeah. I have a record of it. No charges -- no
20 charges. That's not what I'm here for right now.

21 Q But you remember that you were charged at the same
22 time, right? You had pending indictments at the same
23 time.

24 A From a year earlier.

25 Q Would one of those happen to be possession of

1 methamphetamine?

2 A Yes. That was one of the charges.

3 Q Would one of those happen to be possession of
4 lorazepam?

5 A Yes.

6 Q And tramadol?

7 A Yes.

8 Q Maybe another trafficking in cocaine?

9 A I don't know if -- I don't know if that was
10 possession or trafficking then.

11 Q A lot of drugs, though, sir, aren't there?

12 A Well, now, first and foremost, I mean, since you are
13 going there, it was four people in the car at that time,
14 and the other three people dispersed. And since I was the
15 only one still around, I was charged with it because I'm
16 not -- like I'm not going to put no names out there, but
17 Mike Dillard, it was me and Mike Dillard and two other
18 females. And that was his stuff, but I'm not going to put
19 his name out there. But the police, since it was -- it
20 was my father's car, charged me with the stuff because
21 they didn't put nobody else, which they should have put
22 everybody back that was in the car and got the bag from
23 where the person was sitting at. So that -- I was
24 definitely -- I was fighting -- I was fighting all of them
25 charges.

1 And there was nothing but a bunch of pills. I had
2 cocaine on me then. Like I said, I had a drug -- I used
3 to like cocaine. Okay. I'm not denying that. But since
4 you're going there with all them charges, I was going to
5 fight all of them because there was multiple people in
6 that car and I'm the only one that they came after because
7 the car was in my father's name, because it was my daddy's
8 car. So...

9 Q Now, are you talking about the second ---

10 A The first time.

11 Q The first offense?

12 A Yes. All the lorazapene [phonetic], them are a bunch
13 of pills that they had, a whole bunch of different type of
14 pills.

15 Q Let's break it down a little bit because there are a
16 couple of charges here and I want to make sure that we're
17 clear. When you were stopped and you were eventually
18 charged ---

19 A I was never stopped.

20 Q Okay. "On June 1, 2019, in Greenville County, law
21 enforcement observed this defendant driving a vehicle and
22 had prior knowledge of him having a suspended license."
23 Would you agree with me that that's what was said at the
24 plea?

25 A At the plea?

1 Q Yes, sir.

2 A I don't recall what they -- what they said at the
3 plea.

4 Q Okay. Would you like to see a copy of your
5 transcript and refresh your recollection?

6 A No. If that's what you said -- if you said that's
7 what they said, then that's what they said. But there's
8 nothing I can say -- say about that. That was at the
9 plea. That's what I was fighting in the very first place
10 with the driving under suspension because that was a lie.

11 MS. BROWN: I would like to be precise.

12 Your Honor, may I approach with a copy?

13 THE COURT: Oh, sure.

14 BY MS. BROWN: "

15 Q Mr. Burgess, I'm handing you a copy of the plea from
16 December 5, 2019. Does that look familiar to you?

17 A My -- the transcript that I got and my motion, the
18 papers is not like this, so this does not look familiar to
19 me. None of these people's names is on it, this Hunter
20 Christopher Blouin. I've never seen none of them names
21 before.

22 Q Is your name in the caption, sir, the caption in the
23 first part?

24 A Yes.

25 Q That is your name?

1 A Yes, ma'am.

2 Q Okay. Do you remember pleading guilty on December 5,
3 2019?

4 A Yes, I do.

5 Q Okay. Well, if you would turn over to page 9 in that
6 transcript, please.

7 A (Witness complies.)

8 Q And if you see the numbers there to the left, if you
9 go down to line 10, that's Mr. Blouin for the State. And
10 I believe he goes into the facts that we were just
11 referencing. "On or about June 1, 2019, in Greenville
12 County, law enforcement observed this defendant driving a
13 vehicle and had prior knowledge of him having a suspended
14 license." Is that correct?

15 A If that's -- if that's -- if that's what this says.

16 Q Okay. And the State asserted law enforcement
17 performed a lawful traffic stop and he was found to be in
18 possession of a handgun in his waistband, correct?

19 A Yes.

20 Q Okay. "He did not have a CWP"; is that correct?

21 A I did not.

22 Q Okay. "After a search, the defendant was found to be
23 in possession of 17.23 grams of cocaine. And they were
24 packaged into 24 separate baggies," correct?

25 A I don't -- no. I had 18 little baggies on me because

1 I had just bought them. And that's -- and that was all he
2 had at the time and I bought them all. So that's why they
3 was like that. But I only had 18 baggies.

4 So -- and then that you are with this, on this, so
5 that -- so the morning I noticed that the conversation
6 that Mr. Yarborough and Judge Verdin had is not in here
7 about them seeing each other that morning, the little
8 conversation that they -- they definitely had that
9 conversation. I wasn't the only one in the courtroom.
10 That's not in here. So with this transcript, I'm really
11 funny about this one because -- and also you have somebody
12 being sentenced after me, and that is not the fact. I was
13 the last person to be sentenced that morning. All the
14 other three were sentenced before me. I was the last
15 person to be sentenced. When they said that 15 years,
16 rushed out of the courtroom, and that was that.

17 So this is -- to me is not accurate. It's not
18 accurate. My father's here. My father was there. And
19 he'll tell you the same thing. I'm just saying.

20 Q Mr. Burgess, you didn't answer my question. Is that
21 what the State said about that particular point?

22 A I told you if this is in here what they said, this is
23 what they said. I don't remember -- I don't remember
24 everything they were screaming off. They were screaming
25 off about charges and whatnot. I don't know exactly --

1 exactly what they said, but I'm going to say this is --
2 this is what they said.

3 Q So pardon me. Is the answer yes, that's what they
4 said?

5 A Yes.

6 Q And in addition to the small separate baggies, you
7 had \$464 in cash, primarily \$20 bills wrapped in a rubber
8 band. Did they not say that at the plea as well?

9 A Yes.

10 Q Okay. "And post-Miranda the defendant admitted he
11 knew the substance was cocaine and he had a lot."

12 A Yes.

13 Q And you didn't object to those facts. You didn't say
14 wait a minute, Judge, those facts are wrong.

15 A Those facts are right. I had cocaine on me. I had
16 money on me. I understand that. I don't understand where
17 you're going with that. What does that have to do with me
18 -- me thinking I was signing a plea for seven years and
19 getting 15 years? I know I had cocaine on me. I had a
20 drug problem. I partied a lot. Yes. I understand that.
21 I am not denying that. I am guilty of that. I am guilty
22 of having drugs on me, okay?

23 Q In the amount of ---

24 A But I am not guilty, what is not correct is that I
25 was not pulled over. I told Mr. Yarborough that I have

1 witnesses that would prove I just stepped out of this
2 restaurant to go smoke a cigarette and came back, because
3 maybe seven minutes after I left out of that restaurant,
4 one of the waitresses stepped out to smoke a cigarette and
5 seen me being arrested. So how did I get pulled over?
6 And that was never followed up on. It was never followed
7 up on. It's the same waitress that put a note on the car
8 for them not to tow it, which the police never towed after
9 their searches and whatnot.

10 And, I mean, but this is not that accurate. There's
11 stuff that's missing out of here and some of the order is
12 wrong. So -- but I can't deny that they didn't say --
13 that they didn't say what was in. They was saying a whole
14 lot of stuff about me.

15 Q Okay. And you shared with us that you had a
16 background.

17 A Yes, ma'am.

18 Q And you've been to court before.

19 A Yes, ma'am.

20 Q And you know that there are pretty much two options
21 in most major case. What are those options?

22 A Oh, no, no, no. Rephrase that. Say that again?

23 Q Okay.

24 A This my first time -- this is my first time, I guess,
25 in a major case. Like I had a drug problem. To me I

1 really didn't know how major -- I didn't think it was, you
2 know, that major.

3 Q Well, we'll focus in on this proceeding.

4 At the time of the proceeding, you knew you had two
5 choices. You could either plead guilty ---

6 A Or go to trial.

7 Q --- or you could go to trial. And if you go to
8 trial, you get to put up whatever defenses that your
9 attorney thinks would be supported by the evidence, right?

10 A Yes.

11 Q You talk to them. You know you can go to trial. You
12 waived that right to go to trial. So you waived your
13 right to contest what the State had said.

14 A Yes. Because by that time now, I had no more
15 confidence in Mr. Yarborough.

16 And like I said, I did have drugs on me, I had a gun
17 on me. So seven years, okay, I can do that. I'm not --
18 I'm not totally not -- I'm not totally not, not guilty.
19 So that's why I signed it. That's why I signed the plea,
20 which when I signed the plea, it had nothing written on it
21 about 15 years or the 189 days credit. Now, the one that
22 I got now in my motion do, but it didn't when I signed it
23 because they didn't say nothing about 15 years, 189 days
24 credit till after I got sentenced. So I signed that. And
25 I signed that plea before I got sentenced. So that was

1 added onto the plea after I signed it.

2 Q Now, you agree with me on that same page we've been
3 looking at, Mr. Burgess, that the State says, "This is a
4 negotiated 15-year sentence."

5 A That was -- when they said that, that was towards the
6 end and I was rushed out of the courtroom after that. I
7 didn't have the opportunity to speak after that. That's
8 why I called Mr. Yarborough to the back and had him file
9 that appeal. I asked him what was this 15 years
10 negotiated. I never agreed to that. I thought I was
11 getting seven years.

12 Yes. I did say that. I do agree to that. That was
13 at the end. That was when they sentenced me and took me
14 right out of the courtroom.

15 Q Now, Mr. Burgess, my question was isn't it in the
16 transcript before the facts ---

17 A Yes. It's in there. Yes. That is in there.

18 Q --- this is a negotiated 15-year sentence?

19 A Yes. That's in there.

20 Q And the cocaine you admit to. But there are also
21 facts, and this is from page 9 going over to 10, about the
22 narcotics later obtained, the heroin-fentanyl mixture that
23 was located. Do you remember that?

24 A I didn't -- I didn't know it was heroin and fentanyl
25 mixture. From my -- from my analysis, it was just

1 fentanyl, which at that time there was no criminal charge
2 for fentanyl in the State of South Carolina.

3 Q Well, now, as I understand your testimony today,
4 Mr. Burgess, you said that you have drugs and they're
5 usually for your own use ---

6 A Yes.

7 Q --- and it's in a party situation, that sort of
8 thing, right? Will you agree with me the transcript shows
9 for the second charge, the charge happened the next day,
10 law enforcement was listening to the defendant's -- that
11 would be you -- your jail calls from the detention center?
12 On these calls, the defendant was talking about narcotics
13 at his father's residence. Law enforcement obtained a
14 search warrant and located 10.76 grams of a
15 heroin-fentanyl mixture which looked exactly where the --
16 that was located -- excuse me -- that was located exactly
17 where the defendant described.

18 A I never -- yeah. But I never heard of the heroin and
19 -- mixture. I -- I don't recall them saying -- saying
20 that. I just recall him saying heroin. That's it. But
21 yes, yes. I was -- I was ---

22 Q And the heroin was at your father's house.

23 A Yes. In my room.

24 Q Where you had described where it would be.

25 A Yes, yes.

1 Q Outside of the party. Nothing happening. You were
2 in the detention center.

3 A I was at the detention center. It was at the house.

4 Q Okay. And your prior record, Mr. Burgess: 2001,
5 possession with intent to distribute cocaine base,
6 possession of a controlled substance, UCAP, forgery,
7 resisting arrest; 2002, FTC fraud. Does that sound right?

8 A Yes, yes, yes. Like you see a lot of drugs in there
9 because I've been -- I mean, I've been using drugs a long
10 time out of my life. All the other things probably was
11 ways for me to try to get the drugs, forgery and stuff
12 like that.

13 Q And you recall Mr. Yarborough saying at the plea to
14 the Court, "His father's here. He's supportive. They
15 both told me that this man's had a drug problem for a
16 really long time."

17 A Yes.

18 Q Mr. Yarborough saying that ---

19 A Yes.

20 Q --- on your behalf.

21 A Yes.

22 Q Okay. And you remember the judge saying, "I've
23 either got to accept or reject the negotiations. And your
24 attorney has worked you out, in light of the
25 circumstances, a good deal." Perhaps if you go to

1 page 12, Mr. Burgess.

2 A What line is that?

3 Q You can start on the first line, sir.

4 A Yeah. I believe she might have said that. But I
5 don't recall that, when she said that, that that -- hold
6 on. Let me see. Yeah. That's -- that's -- that's when
7 she sentenced me.

8 Q Okay. And you said ---

9 A Which I thought that deal was that seven years that
10 I'd -- that's seven years and five years on one that --
11 that I've been talking about.

12 Q Well, now, you had a second offense cocaine charge.
13 You obviously had a background in drugs. You have shared
14 that with us. No problem.

15 Did Mr. Yarborough ever tell you that the second
16 offense for the heroin trafficking charge would be a
17 minimum of 25 years in prison?

18 A I don't recall.

19 Q You don't remember that?

20 A I don't recall.

21 Q 25 minimum would be pretty tough, wouldn't it?

22 A Yeah. Yes. But I've never been the type to run away
23 from what it is I was facing.

24 Q And all the facts that you've told the Court about
25 today about the parking lot for the cocaine charge ---

1 A Yes, ma'am.

2 Q --- getting out of the car, that sort of thing, those
3 are all facts that you knew at the time, I mean, that
4 nobody told you those. You were there, right?

5 A Yeah. That I had cocaine on me?

6 Q So if that was your perception of the facts, you had
7 it at that time and you could share it with Mr. Yarborough
8 or you could have gone to trial.

9 A Say that again?

10 Q Those were facts you had knowledge of at the time
11 before your plea.

12 A You're talking about the time of the plea?

13 Q Before your plea when you're talking to
14 Mr. Yarborough, you would have known those facts.

15 A I wanted to go to trial, but Mr. Yarborough kept
16 telling me, listen, if you go to trial, you're going to
17 lose and you're going to -- and you're going to end up
18 getting life without parole. So seven years, why wouldn't
19 I? Why wouldn't -- why -- why -- why wouldn't I take the
20 seven years that I thought I was getting?

21 Q Mr. Burgess, you would be happy if you just had seven
22 years right now on two charges?

23 A I would have been happy. I -- I -- there -- I would
24 not be here right now if I -- if it was the seven years
25 that I thought I was signing for.

1 Q So it's important to you to have a lower sentence.

2 A Excuse me?

3 Q It's important to you to have a lower sentence.

4 A It's important to me to have ---

5 Q If you were facing a 25-year minimum, you wouldn't
6 want to go back and get that.

7 A I would have went to trial. Because listen, I felt
8 like I could beat a lot of these charges. That's why they
9 dropped a lot of them charges. That's why they dropped a
10 lot of the charges. I know how the system works.

11 Like I said, I have a drug -- I had a drug problem
12 back at that time. 15 years for a drug problem, I don't
13 think -- I don't think I deserve that.

14 Okay. Now -- now -- so you can keep bringing up the
15 life without parole and all of that. I don't think I did
16 anything to deserve life without parole so I would have
17 fought it. And if that was -- and if that was -- was what
18 would have happened, I got life without -- life without
19 parole, then that's what God seen fit for me. I mean,
20 otherwise than that I was fighting it.

21 But -- but I had -- I had lost confidence in him, and
22 I took the seven years that I thought I was signing for
23 because I was ready to get it over with. And like I said,
24 I wasn't fully innocent. I had drugs and stuff on me.
25 That was that. But if it come down to me going to trial

1 fighting, I feel like it would have been a whole 'nother
2 ball game because now stuff would have had to been looked
3 into, stuff that -- stuff that I was saying, talking about
4 in the case. That's stuff that's not in here.

5 Q Mr. Burgess, did you tell Judge Verdin you were happy
6 with your attorney?

7 A Yes. I did before I was sentenced to -- before I was
8 told I have 15 years negotiated and then rushed out of the
9 courtroom. I've never seen her again or talked to her
10 either.

11 Q Never asked for a motion to reconsider the sentence?

12 A To -- for -- to who?

13 Q To Mr. Yarborough. You mentioned ---

14 A I guess if that -- that would be what the appeal is
15 for, right? When I got sentenced, me and Mr. Yarborough
16 talked for two minutes about an appeal, and that was that.
17 I guess he had other cases or something. That was that.
18 I didn't talk to him again until I got the court date for
19 the driving under suspension ticket when I was in prison,
20 which he told me he handled -- he already handled that.

21 Q Mr. Burgess, let's go back a little bit and take this
22 step-by-step.

23 You were sentenced.

24 A Yes, ma'am.

25 Q 15 years.

1 A Yes, ma'am.

2 Q And you're telling this court that you went out of
3 the courtroom and immediately talked to Mr. Yarborough.

4 A Yes.

5 Q That is what you're saying under oath today.

6 A Yes.

7 Q You immediately talked to him.

8 A Yes.

9 Q And you told him what?

10 A I can't exactly -- exactly remember. I asked him
11 what was this 15 years. He was like -- I can't exactly
12 remember. I know I was -- I was irate about the 15 years.
13 I was like that's not what I thought I was signing. He
14 told me -- no. I do recall him telling me, listen here, I
15 thought you hired me to get you the best deal, and that's
16 what I did, something of that nature.

17 And I said why would I hire you -- something to sort
18 of why would I hire you to get me the best deal? You
19 know, I hired you to help get me out of this.

20 That was about the extent of that.

21 He told me he'd file an appeal. This is my first
22 time seeing him since then. That was almost five years
23 ago.

24 Q So your testimony, Mr. Burgess, is that you told
25 Mr. Yarborough immediately after sentencing that you

1 understood you had 15 years.

2 A Yeah. I understood that I just got sentenced to
3 15 years. That's not what I understood I was -- the plea
4 that I signed what I was getting. Of course, he said
5 15 years. I'm mad. I just got 15 years. I understood
6 that.

7 Q Did you ask ---

8 A I got sentenced to 15 years.

9 MR. THOMAS: Your Honor, I would object. I think
10 this question has been asked and answered a number of
11 times.

12 THE COURT: Probably so.

13 MR. THOMAS: Yeah. Thank you, Your Honor.

14 MS. BROWN: May I go forward, Your Honor?

15 THE COURT: Sure.

16 BY MS. BROWN:

17 Q And in discussing this 15 years with Mr. Yarborough
18 immediately after sentencing, did you say, "Withdraw my
19 plea"?

20 A No. I don't know nothing about that.

21 Q Did you say, "Go ask for something else"?

22 A No. I didn't know -- I did not know that that was an
23 option.

24 Q Did you write anybody, try to get a new attorney?

25 A I seeked out the counsel of Mr. Thomas. Well, first,

1 we filed the appeal. That was denied. I filed to the bar
2 on Mr. Yarborough, things like that, whatever that was. I
3 immediately seeked out Mr. Thomas after that for this PCR,
4 which I didn't -- I learned from PCRs about some inmates
5 in prison. They was like, well, do you know -- they --
6 they told me about the PCRs. If the appeal doesn't go
7 through, you can get a PCR lawyer. That's when I seeked
8 out Mr. Thomas.

9 Q Okay. Well, help me to understand a little bit about
10 your allegations here. Maybe I have asked you a couple of
11 times about the 15 years because I'm trying to figure out
12 exactly when that complaint that you thought it was lower
13 occurred.

14 Now, you've seen your amendment.

15 A That occurred right when I got sentenced.

16 Q You've got your amendment, right? You've seen the
17 amendment to your PCR application?

18 A No, I haven't. No. I didn't see it.

19 MS. BROWN: Well, if I may approach, Your Honor.

20 THE COURT: Yes.

21 BY MS. BROWN:

22 Q This is the amendment to the postconviction relief
23 application.

24 MR. THOMAS: Your Honor, I would like to object.
25 Those are legal pleadings that have been prepared by me

1 through my office based upon information he's provided to
2 me. I don't know what kind of questions that she's going
3 to ask. If she's going to ask about the pleadings itself,
4 I don't think that's proper because he didn't prepare
5 them.

6 THE COURT: Well, it's his application. If he
7 doesn't know the answer, he can just say he doesn't know
8 the answer to -- he can refer her to you.

9 MR. THOMAS: Okay. Thank you, Your Honor.

10 THE COURT: Go ahead.

11 BY MS. BROWN:

12 Q Okay. In the first amendment, the allegation is he
13 thought that the plea was for 12 years and it turned out
14 to be 15. Is that correct from your reading of that on
15 this one?

16 A Okay. You can -- you can -- you can talk to
17 Mr. Tommy -- Mr. Thomas about why there's 12 years up
18 there because that's his understanding from a conversation
19 from me to him. But there's the second amendment is
20 because I corrected him. So you can talk to him about
21 where the 12 years came from.

22 Q That's not a problem at all.

23 Here's the second amendment. And the allegation --
24 factual allegation: He found out the night before that he
25 was going to court by one of the officers in the detention

1 center. He thought the plea was for the minimum on each
2 charge, five to seven to run concurrent.

3 A Yes, yes. To run concurrent, seven.

4 He -- so that's where you're getting 12 because that
5 seven and five equals 12. He -- you have to talk to him
6 about that, the second amendment, because we had a
7 discussion and I fixed that.

8 Q Okay.

9 MR. THOMAS: Your Honor, if it please the Court. If
10 she intends to call me as a witness, I'll be more than
11 happy to explain the amended applications. I would also
12 have to move at this time for a continuance in this matter
13 so my client could be appointed separate counsel if I'm
14 going to become a witness.

15 THE COURT: You're not going to be a witness. But
16 you can explain it. You prepared it. If you need to
17 explain it, you can.

18 MR. THOMAS: Yes. Oh, I'll be glad to. I just was
19 wondering if she was going to call me as a witness in this
20 case.

21 THE COURT: Well, I don't know if she is or not, but
22 you're not going to be called. You're not going to take
23 the witness stand.

24 MR. THOMAS: Okay. Thank you, Your Honor.

25 THE COURT: Okay.

1 BY MS. BROWN:

2 Q This is totally to find out your understanding of ---

3 MR. THOMAS: Your Honor, I can answer that question
4 now.

5 THE COURT: Well, yeah, I know. But you're not on
6 the witness stand now.

7 MR. THOMAS: Okay.

8 THE COURT: And you're not -- it's not your turn yet.
9 So when she gets through, you tell me what you want to.

10 MR. THOMAS: Thank you, Your Honor.

11 BY MS. BROWN:

12 Q So factually, you were never asserting a 12-year
13 sentence.

14 A No.

15 Q How did you know what the minimum was for each
16 charge?

17 A Because it was -- it was -- Mr. Yarborough told me
18 and it was on the plea -- it's on the pleas. It's on the
19 warrants.

20 Q So you knew the sentence exposure.

21 A Yes, ma'am.

22 MS. BROWN: Okay. The Court's indulgence for just a
23 moment, please, Your Honor.

24 Thank you, Mr. Burgess.

25 No further questions, Your Honor.

1 MR. THOMAS: Your Honor, if it please the Court, I'll
2 be glad to explain the differences in the two amendments
3 if the Court wishes.

4 THE COURT: Do you need to ask him anything?

5 MR. THOMAS: No. No, Your Honor.

6 THE COURT: You can step down.

7 Well, they speak for themselves, but if you think you
8 need to explain it, go ahead.

9 MR. THOMAS: Oh, I'm sorry, Your Honor. I
10 misunderstood. I thought you were asking if I needed to
11 ask him questions about ---

12 THE COURT: Anything.

13 MR. THOMAS: Oh, I'm sorry. I thought you were
14 talking about the amended applications. I do wish to ask
15 him ---

16 THE COURT: We're still in the examination of this
17 witness. Do you need to talk to him some more?

18 MR. THOMAS: Yes, Your Honor. Just briefly.

19 THE COURT: All right. Have a seat.

20 MR. THOMAS: If it please the Court.

21 THE COURT: Sure.

22 REDIRECT EXAMINATION

23 BY MR. THOMAS:

24 Q Mr. Burgess ---

25 A Yes, sir.

1 Q --- counsel asked you in regards to -- in regards to
2 these drugs. And you admitted that you had a drug
3 addiction?

4 A Yes, sir.

5 Q That's what the drugs were for?

6 A Yes, sir.

7 Q And you're telling the truth today. You've come
8 before the Court and admitted that you had these drugs?

9 A Yes, sir.

10 MS. BROWN: Objection, Your Honor. That is trying to
11 vouch for the testimony or support the testimony by the
12 question posed.

13 THE COURT: Overruled. Go ahead.

14 MR. THOMAS: Thank you, Your Honor.

15 BY MR. THOMAS:

16 Q Were you driving the vehicle?

17 A No. No, sir.

18 Q And you discussed this with Mr. Yarborough about your
19 not driving?

20 A Yes, sir.

21 Q Okay. Do you remember the plea?

22 A Excuse me?

23 Q Do you remember the plea, appearing in front of the
24 Court and pleading guilty?

25 A Do I remember pleading guilty?

1 Q Yeah.

2 A Yes.

3 Q Okay. Do you remember everything that happened that
4 day?

5 A What do you mean?

6 Q Were you very nervous when you went to this for this
7 hearing?

8 A For this hearing?

9 Q No, no. Not for this hearing but for the hearing for
10 the plea.

11 A A little.

12 Q All right. And do you remember everything that
13 happened?

14 A I mean, to the best -- to -- to the best of my
15 ability.

16 Q Okay. All right. So do you remember the mention of
17 the negotiated 15?

18 A When I got sentenced to the 15 years, yes.

19 Q Okay. Why didn't you catch it prior to that?

20 A Because I don't recall hearing anything about
21 15 years before I got sentenced to 15 years.

22 Q So you don't remember that.

23 A No. I don't remember hearing anything about 15 years
24 until I got sentenced to 15 years.

25 Q But it was said.

1 A It was said, yes, yes. That's when I learned about
2 15 years.

3 MR. THOMAS: Your Honor, if I could beg the Court's
4 indulgence, and then I may have one more question.

5 BY MR. THOMAS:

6 Q How about the filing of a motion to reconsider, did
7 you talk to Mr. Yarborough about that?

8 A No, sir.

9 Q Do you know what a motion to reconsider is?

10 A I have no idea.

11 MR. THOMAS: Your Honor, I have no further questions.

12 THE COURT: Okay. Thank you. You can step down.

13 MR. THOMAS: Your Honor, if it pleases the Court, if
14 I need to address those amendments, I'll be glad to at
15 this time.

16 THE COURT: Well, you'll have to decide if you need
17 to or not.

18 MR. THOMAS: Your Honor, I'll be glad to address
19 them.

20 THE COURT: Okay.

21 MS. BROWN: Your Honor, I object to addressing
22 amendments. The amendments have not been contested. The
23 factual assertions that the applicant would have provided
24 counsel were explored. The factual assertions that
25 applicant provided counsel, applicant is the one who

1 determined what he told counsel. Applicant has already
2 testified to that. So I do object to amending the
3 amendments or clarifying the amendments because at issue
4 was what the applicant said in verification of the
5 assertions, not the actual pleadings.

6 THE COURT: Okay. But he didn't prepare these. You
7 know that.

8 MS. BROWN: Right.

9 THE COURT: All right.

10 MR. THOMAS: Your Honor, if that's the case, then
11 what I saw as far as what the intent was was trying to
12 show some discrepancy with the client in regards to what
13 was in the second -- the first amendment, the second
14 amendment, and that is not the case because those
15 discrepancies, if anybody's fault, are mine because I
16 misunderstood what he had told me in a previous phone
17 conversation.

18 THE COURT: All right.

19 MR. THOMAS: Thank you.

20 THE COURT: Okay. You got any other witnesses?

21 MR. THOMAS: Your Honor, I do. If it please the
22 Court, would call Mr. Yarborough.

23 THE COURT: All right.

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

1 WHEREUPON,

2 WILLIAM YARBOROUGH, III

3 After having been duly sworn, testified as follows:

4 THE CLERK: Please state your full name for the
5 record.

6 THE WITNESS: William G. Yarborough, III.

7 MR. THOMAS: Your Honor, if it please the Court.

8 THE COURT: Yes.

9 DIRECT EXAMINATION

10 BY MR. THOMAS:

11 Q Mr. Yarborough, you had an opportunity to represent
12 Demond Burgess?

13 A I did.

14 Q All right. Sir, and when did you first get involved
15 in this case?

16 A Right on from the very beginning.

17 Q From the very beginning.

18 A I did.

19 Q Would you tell us a little bit about what you did? I
20 guess you were retained?

21 A Yeah. I think that we initially filed a bond motion.
22 We didn't -- weren't able to get a bond. There were a
23 number of charges, and they just weren't -- they weren't
24 going to give him a bond or it was going to be extremely
25 high.

1 I went down to the jail. I talked to him. I met
2 with the narcotics officers. They were very interested in
3 talking to him. I expressed that to him on numerous
4 occasions. And then I began trying to figure out the case
5 and eventually coming to the conclusion, with as many
6 charges as he had and where he was, that it was probably a
7 good idea to try to negotiate some kind of deal. And
8 that's what he told me was a good idea as well.

9 Q Yes, sir. Yes, sir. You heard testimony today about
10 the search warrant and some other things. In regards --
11 your discussions with him, you were able to meet with him
12 at the jail?

13 A Yep. A bunch of times, yeah.

14 Q Okay. And in that were you able to obtain
15 information from him about what he thought his concerns
16 were?

17 A You know, I didn't remember from the beginning about
18 his concerns about that driving under suspension charge.

19 Q Yes, sir.

20 A But when he said it in here, I remember him talking
21 about that at length. And, you know, thinking back on it,
22 I didn't think it was that big a deal at the time. And I
23 do remember him calling me after -- you know, long after
24 we had pled and asked me about the driving under
25 suspension. I told him that we had negotiated some kind

1 of no contest or something. I forgot what it was. It was
2 a -- it was a nothing charge. It was a magistrate level
3 offense. He had already done all the time on it.

4 Q And did that play a part in -- you did file a motion
5 to suppress.

6 A I did.

7 Q Okay. Do you remember what the basis for that was?

8 A I think the basis of the motion to suppress was that
9 he wasn't in the car when the car was searched.

10 Q Yes, sir.

11 A There was some testimony of him going back and forth
12 to I think it was a bar. But I think the police officers
13 were watching him, I think. That was -- I think when you
14 got into it, I think there was enough probable cause.

15 Q You think there was or there wasn't?

16 A There was. It was a -- it would have been an
17 interesting question, but I certainly wouldn't have taken
18 a chance on getting a big sentence and he didn't seem to
19 want to go to trial. He was concerned about a suppression
20 issue. But there were all these other charges too, so we
21 had to work out something.

22 Q Yes, sir. And were you representing him on all the
23 charges?

24 A I think I agreed to try to take care of all of them,
25 yes.

1 Q Okay. And there were a number of things that were
2 dismissed.

3 A I think there were -- I looked today. I think there
4 were nine or 11 charges dismissed afterwards.

5 Q Okay. How did you -- so did you prepare the case for
6 trial and plea? Or how did you ---

7 A I prepared the case for trial. I kept telling the
8 solicitor I think he's going to go to trial on this case.
9 And at that point I think the solicitor was telling me if
10 he goes to trial, he was going to try to LWOP him. I'm
11 not sure if we ever got notice of LWOP or not, but I
12 certainly conveyed that to Mr. Burgess on a number of
13 occasions just like he said today.

14 Q Do you know whether or not, based upon his prior
15 record, that he was subject to LWOP or was this something
16 that was going to happen on a multiple trial?

17 A I think it was going to -- the way I recall it was
18 there was something that was going to happen. He had a
19 prior record for drugs, but it was something that was
20 going to happen over again if he didn't enter into a plea.

21 Q So in other words, they were going to take those
22 charges and try them one after another.

23 A Yeah. I didn't -- I don't like that, but that's
24 something that you hear solicitors say every once in a
25 while.

1 Q So that would have been his potential exposure to
2 LWOP?

3 A That would have been. But he also had a possible 25
4 to 30, I think, on another charge, 25 to 35 or something
5 like that. I mean, we were looking at a lot of time.

6 Q Right.

7 A I mean, if you want to be honest, he got a hell of a
8 deal. Okay.

9 Q So if you prepared it for trial, what would the
10 defense have been at trial?

11 A On the first case, it would have been the one I was
12 -- would have prepared for trial, and that would have been
13 on the suppression issue.

14 Q Yes. Okay. And which case? Which one was that?

15 A That was the one where the drugs were found. I think
16 they were individual drugs in different -- 14 different
17 compartments or 12 different compartments, something like
18 that. And then there was something else that made it look
19 like there was more individual pieces, that it appeared
20 that somebody was selling drugs even if it wasn't him.

21 Q Okay. And I believe at the hearing you had made
22 mention to the judge that he had an addiction. You
23 remember that?

24 A Yeah. He always told me he had -- he was -- he had
25 an addiction to drugs. There's no question about that.

1 Q And did you also say that it was your belief that he
2 was not necessarily selling drugs or trafficking the
3 drugs, but he was buying these so he would have a supply
4 for his addiction?

5 A That's what he told me. He told me that he was
6 buying and selling it so he would have a supply for his
7 addiction. That's what he told me.

8 Q Okay. And not that he was just purchasing for his
9 own. In other words, he also said about selling to you?

10 A That's the way I recall it.

11 Q Yes, sir.

12 A That's what I recall. I mean, you're talking about a
13 lot of drugs. I mean, most people don't have that kind of
14 money just to run around and buy drugs like that.

15 Q How did the plea negotiations go with the State? How
16 did that happen?

17 A I think we were pushed up on the trial docket, the
18 way I recall it. And I was negotiating with Walker
19 Miller. And I believe that he had asked for 25 or -- 20
20 or 25 and we were asking for like seven. He always wanted
21 -- that's what Mr. Burgess wanted was seven years. And I
22 remember telling him we're just not going to get that.
23 And he said, well, I'm going to trial. And so we got it
24 ready for trial.

25 And so we're getting ready to go to trial, and he's

1 starting to back out at the last minute. I'm saying, you
2 know, once you go over there, it's over. And I called
3 Walker I think on the eve of trial, the day of trial. I
4 can't remember how that went. But I remember calling
5 Betty Strom, who at that point was the head of the
6 criminal division, had to approve pleas because Walker
7 said he didn't have the authority to give me less than 20
8 or 25. And she agreed to a negotiated 15 for everything.

9 Q Okay. And the plea was to cocaine, trafficking in
10 cocaine 10 to 28, I believe, second offense?

11 A I believe that's right.

12 Q Okay. And the -- let's see. The other one was to
13 trafficking in heroin.

14 A Correct.

15 MR. THOMAS: May I approach, Your Honor?

16 BY MR. THOMAS: .

17 Q Mr. Yarborough, I want to ask you if you can -- if
18 you remember seeing this or if you can identify that?

19 A Yeah. I do. And it's like I told you when you
20 brought this to me the first time, I don't believe in
21 2018, 2019, I was exactly 100 percent familiar with what
22 fentanyl was. I just knew it was a derivative of heroin.
23 It was something that was used to cut heroin. So that
24 would have been one of the -- to be honest with you, I
25 think that might have been the first time I ever saw the

1 word "fentanyl."

2 Q Right.

3 A I mean, I knew it was a derivative of heroin, and I
4 knew it was used to cut heroin.

5 MR. THOMAS: Your Honor, can we mark this
6 Applicant's 1, please.

7 THE COURT: Okay.

8 (WHEREUPON, Applicant's Exhibit Number 1 was marked for
9 identification.)

10 MS. BROWN: No objection, Your Honor.

11 BY MR. THOMAS:

12 Q Mr. Yarborough, in regards to the fentanyl, I think
13 that drug report comes back, the drug analysis, and says
14 that it's a mixture of heroin and fentanyl?

15 A I believe that's correct. I don't know what -- this
16 report to me looks like it's -- I don't see the amount of
17 heroin that is found in there. I see that the fentanyl is
18 10.76 grams.

19 Q Yes, sir.

20 A Looking at it now under the way the law is and
21 looking at it the way I recall it back then, it would have
22 still been counted as heroin.

23 Q As heroin?

24 A Yes, sir.

25 Q And so you said that was the first time that you'd

1 ever run across fentanyl?

2 A I believe that was the first time I'd ever run across
3 fentanyl. And I think right after that, if you go back
4 and look, that the legislature passed some statutes that
5 criminalized fentanyl pure. It doesn't mean that it
6 changed -- there's some case law back there that changed
7 heroin and fentanyl, but it -- you know, they did say it
8 couldn't be used as a cut.

9 Q When you saw that, did you think about -- at all
10 about there being some potential defense in regards to
11 this fentanyl?

12 A Did I ---

13 Q In other words, you said you've never seen the drug
14 or the word "fentanyl." Did that raise some ---

15 A I just thought it was a -- it was a cutting agent.
16 And I remember asking -- I think I asked Walker at that
17 point the way I recall it, and he said this is something
18 that, you know, is popping up all over the place. And I
19 think right after that there were some deaths in the
20 Upstate, and, you know, it got to be a significant issue
21 right after that.

22 Q So to the best of your knowledge, that was a
23 legitimate charge that he pled to?

24 A Yeah. Because -- I mean, because of the heroin.
25 Yes. Unquestionably, I think.

1 Q Now, was there ever any discussion about the
2 receiving the minimums? Did you talk to him about
3 receiving a minimum sentence on any of this?

4 A You know, I did. He just -- he had -- that's what he
5 wanted. I mean, he wanted the minimum. There's no
6 question when he says that that's what he wanted. And,
7 you know, I would go to Walker Miller and he would, you
8 know, laugh at me. They really felt like this was
9 somebody that they wanted -- they wanted to talk to him.
10 I told him all that. He knows that. They wanted to talk
11 to him. They felt like he had some ties that could help
12 them.

13 And I think probably when you asked me about it
14 before, I didn't put it in the same context with the
15 fentanyl. And I realize now if I go back, and what I
16 recall everything going on in the Upstate, I think that
17 would have been the reason.

18 Q I apologize. The reason for ---

19 A Them wanting to speak to him so bad was the fentanyl.

20 Q About the fentanyl.

21 A Yeah. I mean, you can -- I think Walker might have a
22 better idea of that.

23 Q Now, they searched his vehicle. You did file the
24 motion for a suppression.

25 A I did.

1 Q Did you see anything else that was objectionable
2 there or the search of the phone?

3 A You know, I thought it was a pretty -- it would have
4 been an interesting suppression hearing. I think that we
5 may have had a decent chance at winning a suppression
6 hearing on the search of the vehicle. But I thought when
7 you really got down to it, you're not going to win those
8 cases over and over again, and I told him that. I said,
9 you know, look, I don't think this is -- and, you know,
10 he's from a different place. He's not used to sentences
11 in South Carolina. I mean, where he's from, this was a
12 big sentence. Here, this is not.

13 Q Yeah.

14 A And so that was one of -- that was one of his -- you
15 know, this isn't somebody I didn't talk to a lot. This is
16 somebody I knew. This is somebody I spent time with.
17 This is somebody I went over discovery with. This is
18 somebody I knew his family, I talked to them. And so, I
19 mean, it's not like -- this is somebody that I spent a lot
20 of time with.

21 Q Okay. So that would have been -- I guess that would
22 have been part of a viable defense if it had gone to
23 trial?

24 A I think the case that was on the trial docket was the
25 search of the car. I think it had a viable defense. But

1 he didn't want to go to trial and take a chance on one
2 after another. If he gets hooked there, then that's two,
3 right?

4 Q Yes, sir.

5 A Two strikes, you're out.

6 Q And then ultimately -- or potential for LWOP.

7 A Yep.

8 Q Okay. But at the time of the plea, would it be fair
9 to say that he was not subject to LWOP?

10 A You know, I think that that was the position the
11 State took. I'm not 100 percent sure that was correct,
12 but we'll agree that he was at that point not subject to
13 LWOP.

14 Q Okay. As a matter of fact, in their recitation of
15 his prior record, they don't say anything about LWOP
16 potential.

17 A That's correct. I know that there had been
18 discussions about LWOP before that.

19 Q Yes, sir. Okay. Search of the phone, did you see
20 anything there?

21 A Search of the what?

22 Q Of the phone. I think they got some text messages
23 off the phone.

24 A I did. And I thought it was pretty standard what
25 they do here.

1 MR. THOMAS: Okay. And Your Honor, if I can beg the
2 Court's indulgence just for a second.

3 Your Honor, I don't think I have any further
4 questions.

5 MS. BROWN: I have some. I have just a few.

6 CROSS EXAMINATION

7 BY MS. BROWN:

8 Q I think that you told us that you went over the
9 charges, the elements. Those charges that were later
10 dismissed, you discussed that with your client.

11 A I did.

12 Q And it's correct that no matter how you would be
13 sentenced, if you have that many cases, you're going to
14 get a lengthy amount of time.

15 A Correct.

16 Q And you had cautioned him about that.

17 A I did, yeah.

18 Q For second offense trafficking on the heroin-fentanyl
19 mixture, a second offense would be a mandatory minimum
20 25 years; is that correct?

21 A Right. And I told him that.

22 Q So even on that charge alone, he could have 25 years.

23 A Sure. But let's be honest about that. We would have
24 made some arguments about the amount of heroin that was
25 involved.

1 And so I think that, you know, I was prepared to deal
2 with the fentanyl. And so -- and we discussed that. I
3 don't know how a court would rule, but we discussed it.

4 So, you know, when you say that he was looking at 25
5 to 30, I mean, that is a potential, but I think that that
6 was also very defensible not necessarily in his possession
7 of it, but in the fact of how much it would have actually
8 been. I don't think it's fair to say that he would have
9 had all that heroin because I think we could have argued
10 it. He's on the borderline.

11 Q Okay. And this is the charge that has 10.76 grams of
12 heroin-fentanyl mixture?

13 A Yep. That's what I was -- I was talking about the
14 mixture in the fentanyl.

15 Q Okay. And the statute does allow for a mixture to be
16 considered.

17 A It sure does. It does. It does. It -- you know, I
18 would have argued it.

19 Q I believe I heard you say that originally there was a
20 20-year offer. Was that something extended to you?

21 A I said 20 and I also said right after that that it
22 might have been 25. I think that we were talking 20 to 25
23 on the eve of trial, and I had to go to talk to Betty
24 Strom at that point and asked her if she could do me a
25 little bit better. And they did.

1 Q And you were able to obtain a variance from the
2 deputy solicitor.

3 A Yes, I did. That's correct.

4 Q Did you explain that process to your client?

5 A I don't know that I gave her the name. I said -- the
6 way I usually said it is I run it up the ladder, and,
7 look, I got this back a little bit. And they understand
8 what I'm talking about.

9 Q Did you explain to your client that originally it was
10 20 to 25 but you've gotten them down to 15?

11 A He knew that. We were on -- we were on the eve of
12 trial. He knew what it was.

13 Q I've got you. And you did appeal for Mr. Burgess.

14 A I think that -- if I recall correctly, I filed the
15 notice of appeal and somebody else did the brief. Now, if
16 that's incorrect, I'll stand corrected. But I believe I
17 just filed the notice.

18 Q Okay. Would it refresh your recollection to know
19 that you would have to put an explanation in with a guilty
20 plea?

21 A That -- that might -- that -- that would make sense.

22 Q Okay. Immediately after the plea, did you talk to
23 Mr. Burgess?

24 A I did. You know, I could tell when he was walking
25 out of the courtroom he was a little bit upset. So I went

1 down there to see him because I thought we had a pretty
2 good relationship. And he was going -- he started saying
3 this thing about he didn't understand. And I said, look,
4 man, we talked about this. This was a negotiated plea.
5 And, you know, that was the -- he asked me if I'd file the
6 appeal, and I did.

7 Q Did he ever ask you to have the judge reconsider or
8 do anything at that level?

9 A He wasn't going to take a chance on getting 25 or
10 life.

11 Q You didn't want to take that chance.

12 A Yeah.

13 MS. BROWN: Thank you, sir. I appreciate it.

14 No further questions, Your Honor.

15 MR. THOMAS: Your Honor, if I may, just two
16 questions. Your Honor, if it please the Court. You did
17 -- and I apologize. Maybe a little more than two. Same
18 subject.

19 REDIRECT EXAMINATION

20 BY MR. THOMAS:

21 Q You did file a notice of appeal?

22 A I -- yes. I recall him asking me, and I always do
23 anyway.

24 Q All right. And you spoke with him after the plea.

25 A I did. It was downstairs. I remember it just like

1 it was yesterday. Yeah.

2 Q And you said he was a little bit upset.

3 A He was upset, yeah. And, you know, I think that it
4 just kind of hit him that finally he was going to have to
5 do some prison time. I mean, it was just -- you know.

6 Q Is it fair to say the 15 years?

7 A Sir?

8 Q Is it fair to say the 15 years is what he was upset
9 about?

10 A 100 percent. I recall it. Yeah. Because I was just
11 shocked he was -- that's why I went down there. Normally,
12 I don't go down there and see him after. I went down
13 there to see him because I could tell he was upset. I
14 wanted to find out why he was upset.

15 Q Yes, sir. Now, counsel asked you about the motion to
16 reconsider. Did you talk to him about that? Did he know
17 about that or did you -- you just, as his attorney ---

18 A We never had that discussion.

19 Q Okay.

20 A And that's not part of my practice.

21 Q Right. I understand. I just need to clarify that.

22 A I can probably count in the last 30 years that
23 happening once, and it didn't go well.

24 MR. THOMAS: Yes, sir. Okay.

25 I have no further questions, Your Honor.

1 THE COURT: That's all you need from Mr. Yarborough?
2 Thank you for coming.

3 THE WITNESS: Thank you, Your Honor.

4 MR. THOMAS: Your Honor, if it please the Court, I
5 can make a very; very brief closing.

6 THE COURT: Are there any other witnesses?

7 MR. THOMAS: No, Your Honor. No other witnesses.

8 MS. BROWN: Your Honor, there's no witnesses from the
9 State.

10 Point of clarification, I didn't have an objection to
11 counsel's copy of the drug report coming in as I think
12 Applicant's 1, but I'm not sure it was formally moved in.
13 I just want to -- wondered if are we moving it in or is it
14 just marked?

15 MR. THOMAS: I thought I did, Your Honor, but I'll be
16 glad to move at this time.

17 THE COURT: Okay. It's in.

18 (WHEREUPON, Applicant's Exhibit Number 1 was admitted into
19 evidence.)

20 MR. THOMAS: All right. Thank you, Your Honor.

21 Your Honor, if it please the Court, I think, you
22 know, we heard a lot of testimony today. To me I think
23 the most pressing issue and believable issue is my
24 client's candor. He took the stand and he said, which
25 made me uncomfortable, I had the cocaine in my car and my

1 daddy had some drugs at his house. And, I mean, he
2 readily admitted to that and took responsibility for that
3 on the stand.

4 I think that bleeds over into two things: One, that
5 he thought when he entered into this plea that he was
6 going to get seven years, and based upon what
7 Mr. Yarborough told him or however he received that
8 information, that's what he believed at the time. I think
9 that there is some support to that when Mr. Yarborough
10 said I could tell he was upset. I went back to see him
11 after the plea and he was upset. I asked him about the
12 15, and he said yes.

13 So, Your Honor, I think it's admitted that he had the
14 drugs. What we're dealing with today is whether or not
15 the plea was freely and voluntarily given, which I don't
16 believe it was, and whether or not it was knowingly and
17 intelligently given, which I don't believe it was. It
18 can't be free and voluntary when he in his understanding
19 didn't realize that he was talking about a negotiated 15
20 and when he didn't have the knowledge and the intelligence
21 of the facts at the time to enter into that plea.

22 Because, again, he thought that he was going to receive
23 the seven, and I think it is evidenced by the fact of
24 Mr. Yarborough's testimony that he was upset at the time.

25 A lot of stuff going on in this case, but I really

1 think when it boils down, it comes down to whether or not
2 it was freely and voluntarily and knowingly and
3 intelligently given, and I don't think it was.

4 THE COURT: Okay.

5 MR. THOMAS: Thank you, Your Honor.

6 MS. BROWN: Your Honor, one thing that should be
7 controlling is the contemporaneous record from the plea
8 itself. And Mr. Burgess starts off acknowledging --
9 acknowledging the sentence exposure that he has, up to
10 25 years. I think counsel is very credible in his
11 testimony that he explained it repeatedly, and I think
12 especially credible about that last minute negotiation.
13 Going to trial, the solicitor in charge of the trial had a
14 cap, 20 to 25 years, and Mr. Yarborough went back and got
15 the extraordinary sort of variance exception and told his
16 client about it.

17 It is understandable, Your Honor, that Mr. Burgess
18 does not want to serve a long sentence in SCDC. That's
19 understandable. But he made a decision to reduce the
20 amount of time that he was potentially going to get from
21 these trafficking charges to a 15-year negotiated
22 sentence. It was a plea. He was not new to the judicial
23 system. He understood he had two options, trial or plea,
24 and he made that decision.

25 No one would argue that 15 years is a wonderful

1 sentence and everyone would want one, but it is a much
2 better sentence than life without parole. It is a much
3 better sentence than 25 minimum on one charge. And that's
4 the decision that Mr. Burgess had to make, and he made
5 that decision, Your Honor, with the assistance of counsel.
6 And he heard the judge talk about it, and he received the
7 sentence that was negotiated. The application should be
8 denied.

9 THE COURT: All right. I'll review it and issue an
10 order.

11 (WHEREUPON, proceedings concluded at 3:48 PM.)
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25

1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA)

4 COUNTY OF GREENVILLE)

5
6
7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South
9 Carolina, do hereby certify that the foregoing is a true,
10 accurate and complete Transcript of Record of the
11 proceedings had and evidence introduced in the trial of
12 the captioned case, relative to appeal, in the Court of
13 Common Pleas for Greenville County, South Carolina, on the
14 25th day of July, 2023.

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

17
18 March 11, 2024

19
20
21 Cheryl A. Smith
22 Cheryl A. Smith, CVR-M
23 Court Reporter
24
25



County of Greenville

DEPARTMENT OF PUBLIC SAFETY - FORENSIC DIVISION

DRUG ANALYSIS REPORT

Agency: Greenville Sheriff's Office

Agency Case #: 01-2019-095409

Officer: Vaughn, D.

Drug Lab #: G19-1566

DPS Case #:

Incident Date: 06/02/2019

Received From: Property & Evidence

Received Date: 06/04/2019

This is an official report of the Greenville County Department of Public Safety Crime Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no examinations of evidence submitted in this case have been or will be conducted by any other laboratory or agency.

*John Vandermosten, Assistant County Administrator
Department of Public Safety*

ITEMS OF EVIDENCE:

Item KM-1: Bag containing powder substance

Results: Heroin (C-I) found

Fentanyl (C-II) found 10.76 grams

Item KM-2: Bottle containing powder substance

Results: No controlled substance detected

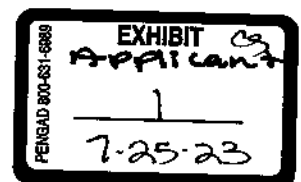
I am a Criminalist employed by Greenville County to perform chemical and physical examinations on evidence submitted by law enforcement agencies in criminal cases, and to testify in courts of record in the state of South Carolina on such examinations.

James W. Armstrong

James W. Armstrong

2019 JUN 13 AM 8:59

S/AKL/07/08/2019



Report Date: 06/07/2019

Report #: 1

Page 1 of 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
Demond D. Burgess, #304353,	)	Case No.: 2020-CP-23-05112
	)	
Applicant,	)	
v.	)	
	)	ORDER OF DISMISSAL
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

24 JAN 31 PM 2:37
Brice Garrett DDC GUL SC

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Demond D. Burgess, through counsel, on November 9, 2020. An evidentiary hearing was held July 25, 2023, in the Greenville County Courthouse. Applicant was present and represented by counsel, Tommy A. Thomas, Esq. Senior Assistant Deputy Attorney General Melody J. Brown represented Respondent, the State. At the close of the hearing, the undersigned took the matter under advisement. By a conditional Form 4 order issued on July 28, 2023, this Court indicated it would deny relief and directed Respondent's counsel to prepare and submit a proposed order.¹ After consideration of the testimony received, and after reviewing and considering the record, arguments presented by counsel, and the controlling case law, this Court finds that Applicant has failed to carry his burden of proof. Consequently, this Court DENIES relief for the specific reasons set out in this order.

General Procedural History

Applicant is presently confined in the South Carolina Department of Corrections in

¹ The proposed order was circulated among counsel prior to this Court's acceptance. See *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (providing a "proposed order should be transmitted to opposing counsel" for review and that counsel "should ... alert preparing counsel and the PCR court as to any deficiencies in the proposed order.").

Kershaw Correctional Institution pursuant to orders of commitment of the Greenville County Clerk of Court. A Greenville County Grand Jury indicted Applicant in February 2019 for possession of a weapon during the commission of a violent crime (2019-GS-23-001238); possession of a stolen firearm (2019-GS-23-007199); trafficking in cocaine (2019-GS-23-001242); three counts of possession of a controlled substance with intent to distribute (2019-GS-23-001240, 001241, and 001243); and, possession of methamphetamine (2019-GS-23-001239). In a subsequent term in September of 2019, the Grand Jury also indicted Applicant for trafficking in cocaine (2019-GS-23-007201); unlawful carrying of a handgun (2019-GS-23-007202); driving under suspension (2019-GS-23-007200); trafficking in heroin (2019-GS-23-007306); and, possession of a weapon during the commission of a violent crime (2019-GS-23-007201). William G. Yarborough, III, Esq., represented Applicant on the charges.

On December 5, 2019, Applicant appeared before the Honorable Letitia H. Verdin and pleaded guilty to trafficking in cocaine, 12-28 grams, second offense (2019-GS-23-007201), and trafficking in heroin, 4-14 grams, first offense (2019-GS-23-07306). The State placed on the record that "this is a negotiated 15-year sentence," and the provided the following recitation of facts:

[F]or the first incident, on or about June 1, 2019, in Greenville County, law enforcement observed [Applicant] driving a vehicle and had prior knowledge of him having a suspended license. Law enforcement performed a lawful traffic stop, and he was found to be in possession of a handgun in his waistband. He did not have his CWP. Also, after a search [Applicant] was found to be in possession of 17.23 grams of cocaine which were packaged into 24 separate baggies. He was also in possession of \$464 in cash, primarily \$20 bills wrapped in a rubber band. Post-Miranda [Applicant] admitted he knew the substance was cocaine and that he had a lot.

Then the second incident happened the next day . . . on June 2, 2019, in Greenville County. Law enforcement was listening to [Applicant's] jail calls from the detention center. On these calls [Applicant] was talking about narcotics at his father's residence in

Greenville County. Law enforcement obtained a search warrant and located 10.76 grams of a heroin-fentanyl mixture that was located exactly where [Applicant] described.

(Return Attachment, Tr. 9-10).

The State also set out that Applicant had a prior record that included a “2001, possession with intent to distribute cocaine base, possession of a controlled substance, UCAP, forgery, resisting arrest; 2002, FTC fraud,” and, during the recitation, the Judge Verdin interjected with a question to confirm that the sentence had been negotiated between the State and Applicant, which the State confirmed. (Return Attachment, Tr. 10). Judge Verdin then stated “I think we’re good,” and turned to Applicant to confirm that he wished to plead guilty in light of the factual basis provided, and Applicant confirmed that he did. (Return Attachment, Tr. 10). Defense counsel offered that Applicant has a “drug problem,” and “although it certainly does appear” from the State’s evidence that “he was distributing,” counsel suggest that “it all really goes to the fact that he was doing whatever he could to kind of maintain that ability to be able to do stuff.” (Return Attachment, Tr. 11). Counsel asked for leniency, and recognized that Applicant was looking at significant time:

... We’ve gone over the time and everything that he’s involved. He just wants you to know, Judge, it’s really important for him to let you know that he really is ... a good guy. ... He’s always worked with me hard. And we looked at this case. This case was on the trial docket. And we talked about it. He is not - - he’s always maintained he’s an addict, and he wants you to know that. And his father tells me that too. His father says he really needs some help in the long run. This is going to give him a chance to get cleaned up. He’s going to have to do some time, and we just urge the Court to be as lenient on him as you can under the circumstances.

(Return Attachment, Tr. 11).

Judge Verdin, noting that “in light of the circumstance,” that plea counsel had secured a favorable deal for him, and following the terms of the negotiation, Judge Verdin sentenced

Applicant to imprisonment for fifteen years for each offense, concurrent. The State, in keeping with the plea deal, dismissed the charges for two counts of possession of a weapon during the commission of a violent crime (2019-GS-23-007201 and 001238); possession of methamphetamine (2019-GS-23-001239); three counts of possession of a controlled substance with intent to distribute (2019-GS-23-001240, 001241, and 001243); trafficking in cocaine (2019-GS-23-001242); possession of a stolen firearm (2019-GS-23-007199); driving under suspension (2019-GS-23-007200); and, unlawful carrying of a handgun (2019-GS-23-007202). Applicant timely appealed.

The South Carolina Court of Appeals found that plea counsel failed to file a sufficient explanation for the appeal to continue.² *State v. Burgess*, S.C. Ct. App. Order dated January 14, 2020 (Appellate Case No. 2019-002051). The remittitur was issued on January 30, 2020.

Post Conviction Relief Allegations

In his initial application, Applicant generally raised ineffective assistance and asserted his plea was not voluntary. However, Applicant, through counsel, filed amendments to the application to expand and explain those claims. By amendment dated July 17, 2023, Applicant alleged:

1. Failure to properly investigate the case;
2. That Applicant plead to trafficking heroin. The drug tested positive for fentanyl. The Applicant is informed and believes that there was no appropriate statute to address the illegality of fentanyl at the time;
3. That the driving under the suspension charge was the basis for the search of his vehicle. That the applicant was not driving the vehicle, nor was he in possession of the keys to the vehicle. Based upon this fact, the Applicant is informed and believes that the seizure of any evidence from his car should have been suppressed.

² Plea counsel included argument and citations to authority in the notice of appeal, but did not file any response to the Court of Appeals' letter requesting further explanation as required by Rule 203(d)(1)(B)(iv), SCACR.

That this action was an unreasonable search and seizure;

4. That Applicant plead guilty to a fifteen (15) year negotiated sentence. That the Applicant did not understand the negotiated plea. He found out the night before that he was going to Court, by one of the officers in the detention center. He thought that the plea was for twelve years, and it turned out to be fifteen years;

5. The Applicant is informed and believes that his plea was not freely and voluntarily, nor knowingly or intelligently given.

In a second amendment dated July 18, 2023, Applicant alleged ineffective assistance as follows:

That Applicant plead guilty to a fifteen (15) year negotiated sentence. That the Applicant did not understand the negotiated plea. He found out the night before that he was going to Court, by one of the officers in the detention center. He thought the plea was for the minimum on each charge (5 years and 7 years) to run concurrent for a total of 7 years. It turned out to be fifteen years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearings and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance Claims

For claims that trial counsel provided ineffective assistance, this Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the

outcome” of the trial. *Strickland*, at 694. It is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland*, at 689. It is an applicant’s burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRPC. *See also* *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (“the burden of proof is on the applicant to prove the allegations in his application”). For a guilty plea, the analysis varies slightly as the issue is, at bottom, the voluntariness of the plea.

“Where, as here, a defendant is represented by counsel during the plea process and enters [the] plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’ ” *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Indeed, “[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” *Kolle v. State*, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); *Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000) (same). This is the *Strickland* test as applied in the guilty plea context.

Notably, statements made during a guilty plea should be considered true: “... accuracy and truth of an accused’s statements at ... his guilty plea ... are ‘conclusively’ established by that proceeding unless and until he makes some reasonable allegation why this should not be so.” *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975), *overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985); *Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) (same).

The record here supports that the plea was a voluntary choice among alternatives and that choice was guided by counsel against which Applicant had no complaints at the time of the plea. (*See* Return Attachment, Tr. 4-5). This Court finds Applicant's testimony that he understood he would receive only the minimum on each charge, whether concurrent or not, is not credible. The recommendation was plainly placed on the record and there was no objection or challenge to that recommendation at the time of the plea. Further, Applicant has shown no deficiency in counsel's investigation or advice, and certainly none that would support a finding that but for the advice, Applicant would not have pled guilty. Lastly, this Court finds that Applicant's claims regarding the search and seizure may not be heard on the merits as the knowing and voluntary plea acts as a waiver and bar to all non-jurisdictional errors and complaints.

Allegation Counsel Failed to Properly Investigate

Applicant testified at the hearing that counsel did not properly investigate the case, specifically, he did not consider the drug report that indicated the presence of fentanyl, and did not fully investigate the search and seizure. Counsel testified at the hearing that was not the case, and that he had investigated and considered his client's statements regarding the car and was also cognizant that trafficking in illegal drugs could be shown by a mixture that included heroin, and heroin was included in the mixture that Applicant had. In light of the contemporaneous record of the plea, this Court credits plea counsel's testimony.

"Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary." *Taylor v. State*, 404 S.C. 350, 363, 745 S.E.2d 97, 104 (2013) (citing *Strickland*, at 691). However, "[i]n the context of a guilty plea," it remains that "the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." *Taylor v. State*, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013).

Moreover, the “prejudice prong ordinarily requires more than simply a defendant’s assertion that but for counsel’s deficient performance he would not have pled but would have gone to trial.” *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009). Notably, the Supreme Court has instructed: “Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” *Lee v. United States*, 582 U.S. 357, 369 (2017).

Our Supreme Court has similarly found that “*Hill* makes clear that th[e] prejudice prong ordinarily requires more than simply a defendant’s assertion that but for counsel’s deficient performance he would not have pled but would have gone to trial.” *Stalk*, at 563, 681 S.E.2d at 595; *see also Taylor v. State*, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) (“Despite Petitioner’s assertions to the contrary, there is probative evidence in the Record before us that he would not have chosen to proceed to trial”); *Goins v. State*, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012) (“Although Goins testified at the PCR hearing that he accepted the plea because of the erroneous advice on the suppression of the evidence, his testimony specifically was found not to be credible. We therefore find evidence to support the PCR court’s finding that Goins failed to prove he was prejudiced by counsel’s ineffective assistance because he has not demonstrated he would have gone to trial absent the erroneous advice.”).

“To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007). “A defendant’s knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and

defendant's counsel, or both." *Id.*, (quoting *Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999)). Consequently, "[i]n determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). This Court has considered Applicant's allegations against counsel in light of all the evidence, both at the plea and that presented in the PCR hearing.

Here, the terms of the agreement were fully set out on the record including the fifteen- year sentence – a negotiated sentence that Judge Verdin accepted. During the plea, Applicant directly addressed Judge Verdin but gave no indication of any misunderstanding or complaint against the State's evidence, counsel's representation, or the terms of the negotiation. This Court finds, especially considering the contemporaneous record made of the plea proceedings, that Applicant's PCR testimony regarding error or deficiency by counsel is not credible. Applicant's testimony that he did not know about the plea and did not know about the negotiated sentence, but nonetheless believed he would receive a lesser amount of time is inconsistent. Moreover, the plea record demonstrates that Applicant was aware that he was pleading to trafficking in heroin, 4 to 14 grams, first offense, with a sentencing exposure of 7 to 25 years, and trafficking in cocaine, 10 to 28 grams, second offense, with a sentencing exposure of 5 to 30 years. (Return Attachment, Tr. 3-4). He denied any promise made to him to induce the plea. (Return Attachment, Tr. 5). Applicant acknowledged that he would be giving up his trial rights by pleading guilty, including specifically the right to have the State prove guilt to the jury beyond a reasonable doubt. (Return Attachment, Tr. 5-6). Applicant confirmed that he wished to plead guilty. (Return Attachment, Tr. 7). Further, after hearing the State's recitation of facts, he confirmed again that he wished to plead guilty. (Return Attachment, Tr. 10). Counsel was not ineffective in any way regarding the terms of the

agreement. Simply, Applicant “received the benefit of the agreement for which he bargained and cannot now complain.” *Rollison v. State*, 346 S.C. 506, 511–12, 552 S.E.2d 290, 293 (2001).

However, Applicant’s testimony does support this Court’s finding that Applicant cannot meet his burden of showing prejudice. At its base, Applicant’s testimony is that he still wishes to plead guilty, just with less time. This cannot demonstrate *Strickland/Hill* prejudice.

To the extent that Applicant’s testimony could be construed as an expectation or hope of a lesser sentence, that neither shows any deficiency in plea counsel’s representation nor the possibility of an involuntary plea. *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (fact that defendant “hoped” and “expected” to get reduced sentence does not render plea invalid); *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984) (fact that defendant “thought” judge would give lighter sentence was not a basis for relief). At any rate, the detailed information conveyed by Judge Verdin should have cured any misunderstanding Applicant may have held on his own. In fact, had counsel made an error in advice regarding the terms of the negotiated sentence, which this Court finds he did not, any such error would have been cured by Judge Verdin’s express and clear explanation. *Moorehead v. State*, 329 S.C. 329, 333, 496 S.E.2d 415, 416 (1998) (“When 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.”).

As to counsel’s investigation of the drugs, again, this Court credits counsel’s testimony. It appears that Applicant’s claim falls into two parts – counsel’s alleged failure to determine and advise Applicant of a possible defense to the trafficking charge as to knowledge of the type of drugs, and counsel’s alleged failure to determine and advise Applicant of a possible defense as to State’s ability to meet the elements of the offense. Both lack merit.

As an initial matter, this Court finds plea counsel's testimony on his investigation of the facts, including having received and reviewed the testing report, and that he had an understanding of the relevant criminal statute in regard to mixtures, is credible. The chemical report reflected a drug mixture. That mixture contained heroin. The State noted at the plea, in describing the facts supporting guilt, that "10.76 grams of a heroin-fentanyl mixture ... was located exactly where the defendant described." (Return Attachment, Tr. 10). Applicant did not contest that fact at the plea. (Return Attachment, Tr. 10). Applicant has failed in his burden of proof of showing deficient performance regarding investigation. In the alternative, this Court could also resolve the allegation on lack of prejudice alone as there is no merit to Applicant's position that the presence of some fentanyl in the mixture is somehow a defense for the charge.

As to knowledge, *State v. Miles*, 421 S.C. 154, 805 S.E.2d 204 (Ct. App. 2017), is instructive. In *Miles*, the Court of Appeals considered the "knowing" portion of the trafficking statute. The Court of Appeals resolved that "the Legislature did not intend to require the State to prove a defendant knew the specific type of illegal drug he was trafficking." *Id.*, at 161, 805 S.E.2d at 208. Relatedly, explaining the exact chemical analysis of all substances to ensure Applicant's understanding of the presence and approximate weight of each and every substance, given the statutory provision, would not be necessary for reasonable representation.

As far as meeting the requirements of the crime itself, the statute firmly addresses the point by providing that the crime is established by "four grams or more of any mixture containing these substances...." S.C. Code Ann. § 44-53-370 (e)(3).

Moreover, in failing to meet his burden of showing prejudice, Applicant has the persistent problem that he faced greater sentencing exposure on the remaining charge alone (*see* Return Attachment, Tr. 4, trafficking in cocaine, 5-30). Again, he cannot show a reasonable probability

that he would not have pled guilty in these circumstances; thus, cannot demonstrate sufficient prejudice. In particular, this Court credits counsel's testimony that Applicant wanted a seven-year sentence and that he had refused an original plea offer for upwards of twenty years. This Court also credits counsel's testimony that Applicant did not want to go to trial, but they were preparing for trial. Counsel noted, during the plea proceedings, that they had been on the docket at that time. (Return Attachment, Tr. 11). This Court further credits counsel's testimony that in light of the number of charges, Applicant was facing a life sentence if he should be convicted. Again, this Court finds that Applicant voluntarily and knowingly accepted the best negotiation that was offered. He cannot now complain. *Rollison, supra*.

Search and Seizure Claim

"Few principles of South Carolina criminal law are as ingrained as the notion that a knowing, voluntary, and intelligent guilty plea 'constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.'" *State v. Sims*, 423 S.C. 397, 400, 814 S.E.2d 632, 633 (2018) (quoting *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485 (2013)). "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the plea" *Rice*, at 332, 737 S.E.2d at 486 (brackets in original) (quoting *Tollett v. Henderson*, 411 U.S. 258 (1973)).

"It is beyond dispute that a guilty plea must be both knowing and voluntary." *Parke v. Raley*, 506 U.S. 20, 29 (1992). It is also clear the record should reflect that voluntary choice. *Boykin v. Alabama*, 395 U.S. 238 (1969) ("a guilty plea should only be accepted where the record

evidences ‘an affirmative showing that it was intelligent and voluntary.’”). That record is established “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)).

Applicant affirmed under oath to Judge Verdin that he understood his trial rights and that he would be waiving those rights in pleading guilty. (Return Attachment, Tr. 5-6). The judge advised of the potential sentence for the crimes. (Return Attachment, Tr. 3-4). Judge Verdin also inquired if Applicant was satisfied with counsel, and Applicant indicated he was. (Return Attachment, Tr. 4-5). The judge also ensured that Applicant was not coerced, or promised anything, or under the influence of anything when making the critical decision to plead guilty. (Return Attachment, Tr. 5). After listening to the solicitor’s recitation of facts, Applicant affirmed that he wished to plead guilty. (Return Attachment, Tr. 10). The record supports a voluntary plea. Consequently, Applicant cannot challenge the search at this point. *Sims, supra*.

Even so, this Court credits plea counsel’s testimony that he discussed the facts with Applicant and had prepared (or perhaps even filed) a motion to suppress. This appears consistent with part of Applicant’s testimony at the PCR hearing. Though Applicant maintains the plea was a complete surprise (which this court does not find credible), Applicant did suggest that he thought he was going to court on a motion to suppress. On the point of a motion for suppression, there seems to be common ground. However, the plea necessarily blocked counsel’s ability to make the argument or obtain a ruling on a motion. It is also a waiver of Applicant’s ability to revive complaints about the search and seizure.

But again, Applicant has failed to show counsel was ineffective in his advice concerning sentencing. Further, the record demonstrates a knowing and voluntary plea entered with the

assistance of counsel. Consequently, Applicant may not now challenge the statement as that ability was waived by entry of the knowing and voluntary plea. *Sims, supra*.

CONCLUSION

For the above stated reasons, this Court finds that Applicant failed to carry his burden of proof. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of her sentence.

AND IT IS SO ORDERED this 22nd day of January, 2024.

J. DERHAM CODE
Presiding Judge

Spartanburg, South Carolina.

Copy mailed to
Attorney General / Tommy Thomas
on 1 / 31 / 2024.