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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

MARLON J. CURRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001170

APPENDIX

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STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	
COUNTY OF GREENVILLE)	TRANSCRIPT OF RECORD
)	
State of South Carolina,)	
)	
Plaintiff,)	
)	
-VS-	)	Case No(s) .:2009GS2309933
)	
Lamarus Mattison,)	
)	
Defendant.)	
-----)	
State of South Carolina,)	
)	
Plaintiff,)	
)	
-VS-	)	Case No(s) .:2009GS2303287
)	
Derrick McBee,)	
)	
Defendant.)	
-----)	
State of South Carolina,)	
)	
Plaintiff,)	
)	
-VS-	)	Case No(s) .:2009GS2307158
)	
Leon Perkins,)	
)	
Defendant.)	
-----)	
State of South Carolina,)	
)	
Plaintiff,)	
)	
-VS-	)	Case No(s) .:2010GS2301043;
	)	2010GS2301426;
Marlon Curry,	)	2010GS2301427
)	
Defendant.)	
-----)	
State of South Carolina,)	
)	
Plaintiff,)	
)	
-VS-)	
)	
Amanda Rose Fowler,	)	Case No(s) .:2010GS2304273
)	
Defendant.)	
-----)	

August 03, 2010
Greenville, South Carolina.

B E F O R E:

HONORABLE EDWARD W. MILLER, Judge.

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

JULIE J. ANDERS, Esquire
Assistant Solicitor

CHRIS POSEY, Esquire
Attorney for the Defendant

Teresa B. Johnson
Circuit Court Reporter

I N D E X

DIRECT CROSS REDIRECT RECROSS

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u> <u>EV</u>
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PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 2nd day of August, 2011 at approximately 12:40 p.m.)

THE CLERK: Your Honor, this is Indictment 2009-GS-23-9933, Lamarus Elford Mattison indicted for Possession of Cocaine Base, Crack Cocaine with Intent to Distribute. Pleading to Possession of Cocaine Base first. It is a waiver.

Indictment 2009-GS-23-3287, Derrick Antoine McBee indicted for Assault and Battery of High and Aggravated Nature. Pleading to the same. It is a true bill.

Indictment 2009-GS-23-7158, Leon Perkins indicted for Possession of Cocaine Base with Intent to Distribute. Pleading to Possession with Intent to Distribute third. It is a waiver.

Indictment 2010-GS-23-1043, Marlon Curry indicted for Possession of Marijuana with Intent to Distribute. Pleading to Possession with Intent to Distribute Marijuana second. It is a waiver. Indictment 2010-GS-23-1426 indicted for Distribution of Cocaine Base. Pleading to Distribution of Cocaine Base second

1 offense. It is a waiver. Indictment 2010-GS-
2 23-1427 indicted for Distribution of Cocaine
3 Base within Half Mile of a School. Pleading to
4 the same. It is a waiver.

5 Indictment, 2010-GS-23-4273, Amanda Rose
6 Fowler indicted for Manufacturing
7 Methamphetamine. Pleading to the same. It is
8 a waiver.

9 Please raise your right hand.

10 (WHEREUPON, each defendant is duly sworn.)

11 **THE COURT:** All right. You, uh, -- jail
12 days?

13 **MS. ANDERS:** For Mr. Mattison, 43.

14 **THE COURT:** Okay.

15 **MS. ANDERS:** Mr. McBee is three. Mr.
16 Perkins is 398. Mr. Curry, 27. And Ms. Fowler
17 is 199.

18 **THE COURT:** All right. In the last 24
19 hours, have you had any drugs, alcohol or
20 medication, Mr. Mattison?

21 **MR. MATTISON:** No, sir.

22 **THE COURT:** Mr. McBee?

23 **MR. MCBEE:** No, sir.

24 **THE COURT:** Mr. Perkins?

25 **MR. PERKINS:** No, sir.

1 **THE COURT:** Mr. Curry?
2 **MR. CURRY:** No, sir.
3 **THE COURT:** Ms. Fowler?
4 **MS. FOWLER:** No, sir.
5 **THE COURT:** Ever been treated for the
6 abuse of alcohol, drugs, mental illness or
7 emotional problems, Mr. Mattison?
8 **MR. MATTISON:** No, sir.
9 **THE COURT:** Mr. McBee?
10 **MR. MCBEE:** No, sir.
11 **THE COURT:** Mr. Perkins?
12 **MR. PERKINS:** No, sir.
13 **THE COURT:** Mr. Curry?
14 **MR. CURRY:** No, sir.
15 **THE COURT:** Ms. Fowler?
16 **MS. FOWLER:** No, sir.
17 **THE COURT:** All right. Mr. Mattison, Mr.
18 Perkins, Mr. Curry and Ms. Fowler, you each
19 have one or more indictments that have not been
20 presented to the Grand Jury. You have an
21 absolute right to require the State to present
22 those cases to the Grand Jury where they would
23 have to prove more probably than not that a
24 crime was committed and you did it. You want
25 to give that right up, which will allow you to

1 go forward today, Mr. Mattison?

2 **MR. MATTISON:** Yes, sir.

3 **THE COURT:** Mr. Perkins?

4 **MR. PERKINS:** Yes, sir.

5 **THE COURT:** Mr. Curry?

6 **MR. CURRY:** Yes, sir.

7 **THE COURT:** Ms. Fowler?

8 **MS. FOWLER:** Yes, sir.

9 **THE COURT:** All right. Mr. Mattison, you
10 are up here on 09-9933. It alleges you did in
11 Greenville County September 1, '09 possess with
12 intent to distribute a quantity of crack
13 cocaine. You're pleading to possession. That
14 carries three years and \$5000. You understand
15 that?

16 **MR. MATTISON:** Yes, sir.

17 **THE COURT:** Mr. McBee, you up here on 09-
18 3287. It alleges you did in Greenville County
19 March 21, '09 unlawfully commit an assault and
20 battery on Dunta Barber --

21 **MR. MCBEE:** Deonte Barber.

22 **THE COURT:** Okay. Accompanied by
23 circumstances of aggravation. 10 years. You
24 understand that?

25 **MR. MCBEE:** Yes, sir.

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THE COURT: Okay. Mr. Perkins, you up here on 09-7158. It alleges you did Greenville County June 30, '09 possess with intent to distribute a quantity of crack cocaine. And, uh, this is a third offense.

MR. POSEY: It goes to 30, Your Honor. I think it is suspendable.

THE COURT: What does the State say about that?

MS. ANDERS: We agree.

THE COURT: 10 to 30. Okay. This is a -- this would be a violent offense?

MR. POSEY: I don't think it would be violent. I don't know if it you would classify it as violent. It's just because of the time that it carries.

THE COURT: It's nonparolable. You understand that?

MR. PERKINS: (No response.)

THE COURT: You have to speak.

MR. PERKINS: Sir?

THE COURT: Whatever time you get, you can not get parole. Okay? You understand that?

MR. PERKINS: Yes, sir.

THE COURT: Mr. Curry, you're up here on

1 Indictment 2010-1043.. Alleges you did
2 Greenville County May 1, '08 possess with
3 intent to distribute a quantity of marijuana.
4 Five years, five thou -- second offense. 10
5 years, \$10,000. You understand that?

6 **MR. CURRY:** Yes, sir.

7 **THE COURT:** You also up here on 2010-1427.
8 Alleges you did in Greenville County July 23,
9 '09 distribute a quantity of crack cocaine
10 within a half mile of St. Anthony's Catholic
11 School, 10 years. And this is a serious
12 offense. If you get convictions for, uh, three
13 or more serious offenses, you are eligible for
14 life in prison without parole. Do you
15 understand that?

16 **MR. CURRY:** Yes, sir.

17 **THE COURT:** All right. And you're also up
18 here on 2010-1426. Alleges you did in
19 Greenville County July 23, '09 distribute to an
20 undercover operative a quantity of crack.
21 Distribution of crack, second offense. Let's
22 see.

23 **MS. ANDERS:** 5 to 30.

24 **MR. POSEY:** 5 to 30, Your Honor.

25 **THE COURT:** 5 to 30. \$50,000 fine.

1 **MR. POSEY:** Fine is nonsuspendable.

2 **THE COURT:** Nonsuspendable?

3 **MR. POSEY:** The fine is nonsuspendable.

4 The time is.

5 **THE COURT:** Okay. You understand that?

6 **MR. CURRY:** Yes, sir.

7 **THE COURT:** And I believe it's a no parole

8 offense as well. You understand that?

9 **MR. CURRY:** Yes, sir.

10 **THE COURT:** All right. Ms. Fowler, you're

11 up here on, uh, 2010-4273. Alleges you did in

12 Greenville County January 14th, 2010 knowingly

13 manufacture methamphetamine or provide

14 financial or other assistance to do that or you

15 were in actual or constructive possession of

16 the common ingredients used in the

17 manufacturing of methamphetamine. 15 years,

18 \$25,000. You understand that?

19 **MS. FOWLER:** Yes, sir.

20 **THE COURT:** All right. Understanding the

21 nature of the charges against you and the

22 maximum possible punishment, how do you want to

23 plead, Mr. Mattison?

24 **MR. MATTISON:** Guilty.

25 **THE COURT:** Mr. McBee?

1 **MR. MCBEE:** Guilty..

2 **THE COURT:** Mr. Perkins?

3 **MR. PERKINS:** Guilty.

4 **THE COURT:** Mr. Curry?

5 **MR. CURRY:** Guilty.

6 **THE COURT:** Ms. Fowler?

7 **MS. FOWLER:** Guilty.

8 **THE COURT:** Anybody forced you in any way

9 or coerced you, threatened you or promised you

10 anything to get you to enter that plea, Mr.

11 Mattison?

12 **MR. MATTISON:** No, sir.

13 **THE COURT:** Mr. McBee?

14 **MR. MCBEE:** No, sir.

15 **THE COURT:** Mr. Perkins?

16 **MR. PERKINS:** No, sir.

17 **THE COURT:** Mr. Curry?

18 **MR. CURRY:** No, sir.

19 **THE COURT:** Ms. Fowler?

20 **MS. FOWLER:** No, sir.

21 **THE COURT:** Do you each understand you

22 have an absolute right to a trial by jury where

23 you would be presumed innocent unless and until

24 the State could prove you guilty beyond any

25 reasonable doubt of each and every element of

1 each offense that you're charged with? You
2 would have a right to confront and cross-
3 examine the witnesses and the evidence put up
4 against you by the State.

5 You have the right to compel in court all
6 relevant and competent evidence in your own
7 defense or you can remain silent. Your silence
8 can not be held against you. You can never be
9 compelled to incriminate yourself. You
10 understand all those rights, Mr. Mattison?

11 **MR. MATTISON:** Yes, sir.

12 **THE COURT:** Mr. McBee?

13 **MR. MCBEE:** Yes, sir.

14 **THE COURT:** Mr. Perkins?

15 **MR. PERKINS:** Yes, sir.

16 **THE COURT:** Mr. Curry?

17 **MR. CURRY:** Yes, sir.

18 **THE COURT:** Uh, Ms. Fowler?

19 **MS. FOWLER:** Yes, sir.

20 **THE COURT:** You want to give all those
21 rights up to enter this plea, Mr. Mattison?

22 **MR. MATTISON:** Yes, sir.

23 **THE COURT:** Mr. McBee?

24 **MR. MCBEE:** Yes, sir.

25 **THE COURT:** Mr. Perkins?

1 MR. PERKINS: Yes, sir.
2 THE COURT: Mr. Curry?
3 MR. CURRY: Yes, sir.
4 THE COURT: Ms. Fowler?
5 MS. FOWLER: Yes, sir.
6 THE COURT: Are you guilty, Mr. Mattison?
7 MR. MATTISON: Yes, sir.
8 THE COURT: Mr. McBee?
9 MR. MCBEE: Yes, sir.
10 THE COURT: Mr. Perkins?
11 MR. PERKINS: Yes, sir.
12 THE COURT: Mr. Curry?
13 MR. CURRY: Yes, sir.
14 THE COURT: Ms. Fowler?
15 MS. FOWLER: Yes, sir.
16 THE COURT: Are you totally satisfied with
17 your lawyer, Mr. Mattison?
18 MR. MATTISON: Yes, sir.
19 THE COURT: Mr. McBee?
20 MR. MCBEE: Yes, sir.
21 THE COURT: Mr. Perkins?
22 MR. PERKINS: Yes, sir.
23 THE COURT: Mr. Curry?
24 MR. CURRY: Yes, sir.
25 THE COURT: Ms. Fowler?

1 **MS. FOWLER:** Yes, sir.

2 **THE COURT:** And have you had enough time
3 to review the evidence that the State has
4 against you, Mr. Mattison?

5 **MR. MATTISON:** Yes, sir.

6 **THE COURT:** Mr. McBee?

7 **MR. MCBEE:** Yes, sir.

8 **THE COURT:** Mr. Perkins?

9 **MR. PERKINS:** Yes, sir.

10 **THE COURT:** Mr. Curry?

11 **MR. CURRY:** Yes, sir.

12 **THE COURT:** Ms. Fowler?

13 **MS. FOWLER:** Yes, sir.

14 **THE COURT:** Okay.

15 **MS. ANDERS:** May it please the Court. On
16 September 1st, 2009, members of the Greenville
17 County Sheriff's Office Vice and Narcotics Unit
18 executed a search warrant at
19 Street. This defendant was located inside the
20 residence in close proximity to a medicine pill
21 bottle containing several white rocklike
22 substances. The rocks lab tested positive as
23 2.04 grams of cocaine base. This incident
24 occurred in Greenville County.

25 His prior record is a 2009 Simple

1 Possession of Marijuana from the same incident.
2 There is a recommendation of probation.

3 **THE COURT:** All right. Is all that true?

4 **MR. MATTISON:** Yes, sir.

5 **THE COURT:** Okay. What you want to tell
6 me?

7 **MR. POSEY:** Judge, he's a lifelong
8 resident of Greenville. His mother is here
9 with him in the courtroom today. Judge, he
10 does not have his high school diploma. He
11 needs to get that. He's been working various
12 odd jobs with temp agencies. We'd ask if you
13 would go along with the recommendation to
14 require him to get his GED. He is living at
15 home. He hasn't caused any more trouble.

16 **THE COURT:** You appointed?

17 **MR. POSEY:** Appointed.

18 **THE COURT:** Anything you want to tell me?

19 **MR. MATTISON:** Yes, sir. I learned my
20 lesson. It will never happen again. I just
21 want to put it to the past.

22 **THE COURT:** All right. When was the last
23 time you smoked crack?

24 **MR. MATTISON:** It's been, uh, -- I been
25 off of it. I been clean for like six months.

1 **THE COURT:** Feel better?

2 **MR. MATTISON:** Yes, sir.

3 **THE COURT:** Stuff will eat you up, won't
4 it?

5 **MR. MATTISON:** Yes, sir.

6 **THE COURT:** All right. Two years provided
7 upon the time you did. Probation for two. Get
8 your GED. Substance abuse counseling. Random
9 drug and alcohol testing. \$500 Public Defender
10 Fund.

11 **MR. MATTISON:** Yes, sir.

12 **THE COURT:** Good luck to you. Hope you
13 stick with it.

14 **PROBATION AGENT:** Have a seat on the front
15 row please.

16 **MS. ANDERS:** Mr. McBee. On or about March
17 21st, 2009 in Greenville county, the defendant,
18 a 32-year old, beat, punched and choked the
19 victim, a 14-year-old boy. The defendant
20 kicked the victim in the forehead while the
21 victim was curled upon the ground. Then he
22 knead the victim in the ribs as the victim
23 tried to flee.

24 He does have a prior record. 1999, CDV;
25 2002, CDV second, Malicious Injury to Personal

1 Property; and 2003, Public Disorderly Conduct.
2 There is a recommendation of one year suspended
3 to four years probation.

4 **THE COURT:** All right. Was all that true?

5 **MR. MCBEE:** Yes, sir.

6 **THE COURT:** What did you beat that guy
7 for?

8 **MR. MCBEE:** I would like to say the one --
9 the 14-year-old is my girlfriend's son. I been
10 with her -- I been with him every since he was
11 one year old. At the point in time when all
12 this was going on, he was getting in trouble in
13 school, he was disrespecting his mother and his
14 father is not there. I been with him since day
15 one.

16 Now, am I wrong for trying to discipline
17 him or let him go? But I don't think it was
18 right for him whatever he was doing. He was
19 stealing, doing all kinds of little stuff like
20 that, getting kicked out of school. By me
21 trying to get on him, he was trying to rebel
22 against me and his mother.

23 His father don't do nothing but spend on
24 him. Once he's there, he don't do nothing but
25 give him money. He don't teach him no

1 discipline, none of that. I do that. I clothe
2 him. I feed him. I give him all that. So I
3 mean, I'm guilty for doing what I was doing.
4 But at the same time, he's my size. What am I
5 to do to a child that's 14 and that's
6 rebelling? I mean, I don't know what else to
7 do.

8 **THE COURT:** Well, I'm sure they got some
9 counselors out there that would tell you how to
10 do it.

11 **MR. MCBEE:** You right. You right. But at
12 the point in time, he was running wild.

13 **THE COURT:** Yeah.

14 **MR. MCBEE:** You know what I'm saying?

15 **THE COURT:** Well, let me ask you this,
16 what were you like when you were 14?

17 **MR. MCBEE:** I was the same way. I was the
18 same way.

19 **THE COURT:** You turned out alright, didn't
20 you?

21 **MR. MCBEE:** Yes, sir. Yes, sir.

22 **THE COURT:** Somebody take a belt to you?

23 **MR. MCBEE:** Yes, sir. I've had some.

24 **THE COURT:** All right. Well, it's a heavy
25 price to pay for that. You might have gone

1 overboard. Must have.

2 **MR. MCBEE:** I probably have.

3 **THE COURT:** All right. One year provided
4 upon the time you did. Probation for two.
5 Random drug and alcohol testing. Anger
6 management. Ask them about it. Maybe they can
7 tell you how to -- give you some better ideas
8 about how to get him to behave. All right.
9 Good luck to you.

10 **PROBATION AGENT:** Have a seat on the front
11 row please.

12 **MS. ANDERS:** As to Mr. Perkins, on June
13 30th, 2009, a search warrant was executed at
14 this Defendant's home located at
15 Road in Greenville county. The search warrant
16 was obtained after a CI purchased crack from
17 this defendant on two occasions just days prior
18 to the execution of the search warrant. Arrest
19 warrants were issued for those two incidents as
20 well.

21 The defendant was the only person present
22 when the warrant was executed, although others
23 had been present when the CI was at the house
24 prior to June 30th. Officers executing the
25 warrant found the following: 5.77 grams of

1 crack cocaine, a Glock model 23 gun, digital
2 scales, multiple cell phones, a crack pipe,
3 miscellaneous paperwork belonging to this
4 defendant. He does have a prior record.

5 **THE COURT:** Okay.

6 **MS. ANDERS:** That is from 1985, Resisting
7 Arrest, Disorderly Conduct; '93, Possession of
8 Drug Paraphernalia; 1995, DUS, Resisting Arrest
9 with Assault times two, Disorderly Conduct;
10 from '97, Simple Assault and Battery, Indecent
11 Exposure, Resisting Arrest; from '99, DUS third
12 and HTO; 2001, DUS, Drug Paraphernalia, Open
13 Container; 2002, Possession of Crack, Habitual
14 Traffic Offender; 2003, Drug Paraphernalia;
15 2005, Possession of Crack second; 2006,
16 Receiving Stolen Goods; 2007, Receiving Stolen
17 Goods and DUS. There's no recommendation as to
18 sentencing.

19 **THE COURT:** All right. How much crack was
20 it?

21 **MS. ANDERS:** It was 5.77 grams.

22 **THE COURT:** All right. Is all that true?

23 **MR. PERKINS:** My record.

24 **THE COURT:** No?

25 **MR. PERKINS:** Never seen the dope.

1 **THE COURT:** Tell me. Tell me what.

2 **MR. PERKINS:** Yes, sir.

3 **THE COURT:** No, you just said no.

4 **MR. PERKINS:** They said they found it. I
5 never seen it.

6 **MR. POSEY:** A smokehouse, Judge, was where
7 he was.

8 **THE COURT:** They said you sold twice.

9 **MR. POSEY:** He may have.

10 **MR. PERKINS:** I may have, but I never seen
11 the dope.

12 **THE COURT:** What did you sell from?

13 **MR. PERKINS:** Sir?

14 **THE COURT:** Where did you get the dope to
15 sell?

16 **MR. PERKINS:** They said I was selling
17 dope. I ain't never sell dope. I smoke dope.
18 If the dope was in the house, I would have
19 smoked it before I would have sold it.

20 **THE COURT:** Well, whose house is it?

21 **MR. PERKINS:** I'm being honest.

22 **THE COURT:** All right. Whose house is it?

23 **MR. PERKINS:** My nephew's.

24 **THE COURT:** All right. Well.

25 **MR. POSEY:** Judge, it's basically a

1 smokehouse his nephew had.

2 **THE COURT:** Where is it? Where is it?

3 **MR. POSEY:** -- what's the address?

4 **MR. PERKINS:** Pendleton.

5 **MR. POSEY:** Pendleton.

6 **THE COURT:** Which house is that?

7 **MR. PERKINS:** Pendleton and Arch. Arch

8 Street.

9 **THE COURT:** Okay.

10 **MR. POSEY:** Uh, both the -- when the two

11 distributions that the search warrant was based

12 on made, I think it was like 10 people in the

13 house one time. Leon said he could very well

14 had been the one to hand them the drugs. He

15 said they handed each other drugs all the time.

16 Basically, the money was used to buy more drugs

17 to smoke. He said this since day one, he says

18 if he'd known there were five grams in there,

19 there wouldn't have been five grams to sell

20 because he would have smoked it all very

21 shortly.

22 **MR. PERKINS:** I sure wouldn't have been

23 sleeping.

24 **THE COURT:** Sleeping?

25 **MR. PERKINS:** Yeah, I wouldn't have been

1 sleeping.

2 **MR. POSEY:** He was sleep when they
3 executed the search warrant.

4 **MR. PERKINS:** I work also.

5 **THE COURT:** Whose dope was it?

6 **MR. PERKINS:** I don't know. It's five or
7 six people in the house at a time. All of them
8 had went to the store. I had got off from work
9 early. I went out about five o'clock in the
10 morning. Hit the door about 4:30. Come back
11 home. Went to sleep. They was there when I
12 went to sleep. When they came, they weren't.

13 **THE COURT:** All right.

14 **MR. POSEY:** Judge, you heard his record.
15 Most of it is magistrate level receiving stolen
16 goods and I think two prior possessions. He
17 told you he's been smoking for 20 years.

18 **MR. PERKINS:** 28.

19 **THE COURT:** 28. 1982? How do you know it
20 was 1982? Huh? Richard Pryor almost burned
21 his face off, didn't he?

22 **MR. PERKINS:** Yeah.

23 **MR. POSEY:** I think that's all it is.
24 He's been in jail for 398 days now.

25 **THE COURT:** What do I do with you, Leon?

1 **MR. PERKINS:** I need to go home. I got
2 things to do.

3 **THE COURT:** Things to do, dope to smoke.

4 **MR. PERKINS:** I had quit about -- I ain't
5 do dope when I got out. I hadn't been out but
6 about two months prior to that.

7 **THE COURT:** Where had you been before
8 that?

9 **MR. PERKINS:** In the detention center. I
10 had been up there seven and a half months.

11 **THE COURT:** For what?

12 **MR. PERKINS:** About some motorcycles.

13 **THE COURT:** Motorcycles? Receiving stolen
14 goods?

15 **MR. PERKINS:** No.

16 **THE COURT:** Those end up getting
17 dismissed.

18 **MR. PERKINS:** I called them out to my
19 house and tell them to come out here and get
20 these motorcycles off my property. Evidently,
21 I can't be receiving stolen goods.

22 **THE COURT:** Okay. All right.

23 **MR. PERKINS:** They turned around and put a
24 warrant out on me cause it was my property.

25 **THE COURT:** Whose motorcycle was it?

1 **MR. PERKINS:** I don't know.

2 **THE COURT:** Who did you call to come get
3 it?

4 **MR. PERKINS:** I called Greenville County.
5 I called the Cit-- the County to come pick them
6 up.

7 **THE COURT:** Okay.

8 **MR. PERKINS:** So I tore the house down.
9 So they can't do that no more.

10 **THE COURT:** How did you tear the house
11 down?

12 **MR. PERKINS:** I had it pushed over.

13 **THE COURT:** How do you dig graves? You
14 got a backhoe or you do it by hand?

15 **MR. PERKINS:** Do them by hand.

16 **THE COURT:** All right. What else?

17 **MR. POSEY:** Judge, we just ask you to
18 consider the amount of time he already been in
19 and that he's more of a user than anything
20 else.

21 **THE COURT:** You lucky they changed the
22 law. You know that.

23 **MR. PERKINS:** Yes, sir.

24 **THE COURT:** You can't do probation. See
25 here is the deal ---

1 **MR. PERKINS:** I can do it if I have to,
2 Judge.

3 **THE COURT:** -- that means you have to quit
4 smoking dope.

5 **MR. PERKINS:** I got emphysema.

6 **THE COURT:** Well, then you ought to quit.
7 You appointed on this one?

8 **MR. POSEY:** Yes, sir.

9 **THE COURT:** You get your GED?

10 **MR. PERKINS:** No, sir.

11 **THE COURT:** All right. Going to get you
12 smart. 12 years provided upon the time he's
13 done. Probation for three. Get your GED.
14 Substance abuse counseling. Random drug and
15 alcohol testing and \$500 Public Defender Fund.
16 You 53. Time to quit fighting the police and
17 smoking dope. Okay?

18 **MR. PERKINS:** Yes, sir.

19 **THE COURT:** All right.

20 **MR. POSEY:** Thank you, Judge.

21 **THE COURT:** Good luck to you.

22 **MR. PERKINS:** Yes, sir.

23 **THE COURT:** Where'd you play football?

24 **MR. PERKINS:** Played basketball.

25 **THE COURT:** Bask -- come on.

1 **MR. PERKINS:** I box.

2 **THE COURT:** I believe that. Hey, hey.
3 Could he play?

4 **MR. PERKINS:** He'll hit you.

5 **THE COURT:** He'd hit you? All right.
6 I was going to ask him if you could jump.
7 Okay. All right. Tell me about Mr. Curry.

8 **MS. ANDERS:** Yes, sir. On May 1st, 2008,
9 the homeowner of a property that did the
10 renting went to show the home to a real estate
11 agent. While there at 101 Kenmore Drive in
12 Greenville county, he and the agent observed
13 marijuana plants on the back deck of the home.
14 They called 911.

15 The police arrived to confirm that there
16 were six plants being cultivated on the deck.
17 While a search warrant was being procured, the
18 renter, this Defendant's wife and co-Defendant
19 arrived on the property and stated that her
20 brother-in-law, a third co-Defendant had
21 planted the marijuana. He then arrived and
22 claimed ownership of the plants outside.

23 A search warrant was procured. And this
24 defendant and his wife were found to have
25 possession of marijuana inside their bedroom in

1 a hamper filled with clothes. The weight of
2 the marijuana in the hamper was 523.54 grams.
3 Officers also located scales in the bedroom.
4 This defendant was only located on December
5 8th, 2009 and arrested on this charge and the
6 charges from the next factual count.

7 **THE COURT:** All right.

8 **MS. ANDERS:** On July 23rd, 2009, this
9 defendant sold 8.94 grams of crack cocaine to a
10 confidential informant working under the
11 surveillance of the Greenville Police
12 Department. The CI used \$500 in documented
13 funds and made the purchase outside
14 Street in Greenville county while the defendant
15 sat in a vehicle. The transaction was recorded
16 with audio and video surveillance. The CI knew
17 this defendant as Speedy and picked the
18 defendant out of a six-person photo lineup.

19 Again, on August 13th, 2009, the defendant
20 sold 5.7 grams of crack cocaine to a CI at the
21 corner of Ware Street and Perry Avenue
22 approximately 7 p.m. This transaction was also
23 recorded by audio and video. Again, \$500 in
24 documented funds were used. The defendant
25 picked up the CI -- no, the defendant drove by

1 the CI and threw the baggy out of the window of
2 the car and pointed to it as he drove away
3 after he received the money. The CI retrieved
4 it and turned it over to the detective
5 monitoring the sale. He does have a prior
6 record.

7 **THE COURT:** Okay.

8 **MS. ANDERS:** From 1992, Possession of
9 Cocaine. Jumping. From 1991, Unlawful
10 Carrying of Pistol; from '94, Possession of
11 Crack; and from 2007, Failure to Return Rental
12 Property. There is a recommendation. That is
13 for 10 to 12 years concurrent.

14 **THE COURT:** What's he doing? What you
15 doing?

16 **MR. CURRY:** (No response.)

17 **THE COURT:** What are you doing time for?

18 **MR. CURRY:** Probation from '94.

19 **THE COURT:** '94?

20 **MR. CURRY:** Yeah, my, uh, -- well,
21 actually, my brother -- one of my brothers was
22 killed behind dope. I moved to Greenville to
23 get away from everybody. So to be honest with
24 you -- and I raised my kids for the last eight
25 years by myself while my wife was in the

1 military. So I been clean for 15 years. I
2 haven't done anything. I got tied up doing
3 something for a friend. After I read the
4 paperwork, I mean, I knew it was wrong. But,
5 you know, I knew it was wrong.

6 **THE COURT:** How much time are you doing?

7 **MR. CURRY:** 18 months. I mean, I been in
8 no trouble. None. I been raising my kids.
9 They are all honor roll students. At the time
10 the stuff happened with the house with the
11 marijuana, I wasn't even living there. I was
12 living on Street.

13 **THE COURT:** where?

14 **MR. CURRY:** where the other
15 incident occurred. I wasn't even living in
16 that home.

17 **THE COURT:** Okay.

18 **MR. CURRY:** So I mean, like I said, I'm
19 not trying to play saint but I know I haven't
20 done anything in 15 years. I can put my life
21 on that because I have four kids.

22 **THE COURT:** You sold crack.

23 **MR. CURRY:** Well, yeah, I made that one
24 mistake.

25 **THE COURT:** Twice.

1 **MR. CURRY:** Yes, sir. I'm trying to --

2 **THE COURT:** You got caught twice.

3 **MR. CURRY:** Trying to help out.

4 **MR. POSEY:** Judge, it's a little unusual.

5 It's not your typical hand-to-hand sale from
6 this standpoint. The informant called Mr.
7 Curry. Asked did he know -- could he get him
8 some drugs. Mr. Curry said yes.

9 When this informant showed up at the
10 residence, and this is all in discovery, Mr.
11 Curry actually left, went to another person's
12 house to actually get the drugs and brought
13 back to the informant. He's not going to sit
14 here and tell you he wasn't making a little
15 money for doing it. He did, but he was not the
16 person in control of the drugs.

17 He's made some money off of it. He did not
18 have the drugs in his house. He did not sell
19 out of his home. Like he said, he did
20 something stupid trying to make some quick easy
21 money. That's the bottom line. He's had a
22 brother killed in that business. He's been
23 raising his kids. He's done a great job.

24 As you can tell, his record basically ended
25 in '94 other than a Failure to Return Rental

1 Property. And he for 15, almost 16 years has
2 done very well by himself. I understand the
3 State's recommendation was 8 to 12.

4 **MS. ANDERS:** It is 8 to 12.

5 **MR. POSEY:** I would ask you to consider
6 going far below that. I don't think he's a --
7 I really don't think he's a man who's in this
8 business all the time or a major league drug
9 dealer. I think he did something very stupid
10 after doing such a great job raising his kids
11 and family for 15 years and for whatever reason
12 decided to do this.

13 Like I said, he's lost family members to
14 this business. He knows better. And his kids
15 are doing wonderfully well. He's going to be
16 away from them for the period of time he's on
17 probation. I just ask that you consider -- I
18 think you can basically do whatever you want to
19 with sentencing on these. I just ask you to be
20 as lenient as possible with him.

21 **MR. CURRY:** Your Honor, I was also playing
22 semi-pro football and coaching kids in football
23 also in camps and stuff like that. So my -- I
24 kind of turned my life over to raising my kids
25 and doing things for other kids that don't have

1 fathers and situations like that. I feel like
2 I could teach them a lot. They can learn a lot
3 from me.

4 **THE COURT:** All right. Well, you should
5 have learned in the past. Okay. Distribution,
6 five years. Marijuana, ten provided upon five
7 years. Balance suspended to probation for
8 three. Substance abuse counseling. Random
9 drug and alcohol testing on the other five.
10 That's the proximity case. They are all
11 concurrent. When did you get the other time?

12 **MR. CURRY:** Uh, I been locked up like
13 seven months now.

14 **THE COURT:** When did you get the sentence?

15 **MR. CURRY:** January.

16 **THE COURT:** All right. Okay. Good luck.

17 **MR. POSEY:** Thank you, Your Honor.

18 **THE COURT:** All right. Ms. Fowler?

19 **MS. ANDERS:** On January 14th, 2010,
20 Deputies with the Greenville County Sheriff's
21 Office responded to _____ in
22 Greenville county in reference to possible drug
23 activity and to serve an active warrant on a
24 co-Defendant of this defendant who was believed
25 to be staying at the home. Upon arriving,

1 deputies observed a burn pile in the yard
2 containing coffee filters, blister packs,
3 aerosol cans, lithium strips and other items
4 consistent with manufacturing meth.

5 A search warrant was obtained and executed
6 which revealed various drug paraphernalia and
7 1.68 grams of methamphetamine. This defendant
8 did not live at the residence but was present
9 when officers arrived. This did occur in
10 Greenville county. She has no prior record.
11 There is a recommendation of probation.

12 THE COURT: Is all of that true?

13 MS. FOWLER: Yes, sir.

14 THE COURT: Who you related to?

15 MS. FOWLER: Jim Fowler.

16 THE COURT: Jim Fowler.

17 MS. FOWLER: Yeah.

18 THE COURT: He your dad?

19 MS. FOWLER: Yeah. He raised me every
20 since I was a year old, so he's just like a dad
21 to me.

22 THE COURT: He called me.

23 MS. FOWLER: He did?

24 THE COURT: Yeah, his momma died.

25 MS. FOWLER: My grandma, yeah.

1 **THE COURT:** Grandma?

2 **MS. FOWLER:** Yeah.

3 **THE COURT:** How did you get messed up with
4 methamphetamines?

5 **MS. FOWLER:** Hanging around the wrong
6 people.

7 **THE COURT:** Wasn't a family member, was
8 it?

9 **MS. FOWLER:** No.

10 **THE COURT:** Where's Danny?

11 **MS. FOWLER:** He's staying downtown
12 Greenville somewhere?

13 **THE COURT:** Huh?

14 **MS. FOWLER:** He's staying downtown
15 Greenville somewhere.

16 **THE COURT:** Downtown Greenville?

17 **MS. FOWLER:** Yeah. I know, right?

18 **THE COURT:** What about June?

19 **MS. FOWLER:** He lives in Piedmont next to,
20 uh, -- not to far from my dad.

21 **THE COURT:** And Jim?

22 **MS. FOWLER:** He's --

23 **THE COURT:** Who do you call dad?

24 **MS. FOWLER:** Jim.

25 **THE COURT:** Jim? Okay.

1 **MS. FOWLER:** He's staying with Betty.
2 They are divorced but they are still living
3 together.

4 **THE COURT:** Yeah. They've been -- yeah,
5 they are living together, they're fighting
6 together. He quit drinking?

7 **MS. FOWLER:** Not -- Huh-uh. I heard he
8 got real bad after my grandma passed away.

9 **THE COURT:** Did he?

10 **MS. FOWLER:** Yeah.

11 **THE COURT:** Well, if I put you on
12 probation, you're going to stay away from this
13 stuff?

14 **MS. FOWLER:** Yeah.

15 **THE COURT:** Cause it will eat you up. Eat
16 you up.

17 **MS. FOWLER:** I know. I'm going straight.

18 **THE COURT:** Anything you want to say?

19 **MR. POSEY:** No, sir.

20 **THE COURT:** It's mandatory time?

21 **MS. ANDERS:** I believe it's 0 to 15 years
22 and/or \$25,000.

23 **THE COURT:** I'm sorry we could not get you
24 out. What is all that? Hold from North
25 Carolina. What was that?

1 **MS. FOWLER:** I have no idea. I ain't even
2 been in North Carolina. He got that
3 straightened out. He got that took off.

4 **THE COURT:** Did you graduate high school?

5 **MS. FOWLER:** Huh-uh.

6 **THE COURT:** You going to. All right.
7 Seven years provided upon the time you did. 30
8 months probation. Get your GED. Substance
9 abuse counseling. Random drug and alcohol
10 testing. \$500 to the Public Defender Fund.
11 When you go to those drug classes, pay
12 attention. They're going to give you the tools
13 you need not to get involved in it again. All
14 right. Say hello to Jim for me.

15 **MS. FOWLER:** Okay. I will. Thank you.

16 **THE COURT:** Okay.

17 **MR. POSEY:** Thank you, Judge.

18 **(WHEREUPON, the proceedings conclude at**
19 **approximately 1:06 p.m.)**

20

21

22

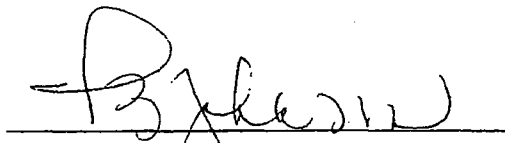
23

CERTIFICATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville, South Carolina, on this 3rd day of October, 2011.

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



Teresa B. Johnson
Official Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

County of Greenville)

IN THE COURT OF COMMON PLEAS

Marlen J. Coney 339456)
Full name and prison number (if any) of Applicant)

2011-CP-23- 05180

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

FILED
CLERK OF COURT
GREENVILLE CO. S.C.
BY W. W. KENSINGER

2011
MAR - 21
A 11:38

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention Livesay - A
2. Name and location of Court which imposed sentence Greenville County Courthouse 305 E North St. Suite 325 Greenville SC 29601
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) Cocaine Dist. Prod / Manufacture Dist. Crack / THC-PWID

J. D. ...
ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 11-30-2011 BY 37023

- (b) _____
- (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) Sentenced on 8-2-10 / Dist. of Crack 2nd Syrs. 85%
- (b) Dist. of Crack prox. 5 yrs.
- (c) PWIP Maj. 10 suspended to Syrs. 3 yrs. prob.

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

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

no

8. If you answered Ayes@ 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 Ano@ to (7), state your reasons for not so appealing:

- (a) No counsel present at sentencing to inform me of the right to appeal.

- (b) No instruction from judge as to my right to appeal
- (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) Violation of 6th Amendment - Right to Counsel
- (c) _____

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

- (a) Counsel not present during sentencing phase
- (b) Counsel not present at guilty plea
- (c) _____

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

- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no

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

- (a) the specific nature thereof:
 - i. _____
 - ii. N/A
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. N/A
 - iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

N/A

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

N/A

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

i. _____

ii. _____

iii. _____

iv. _____

N/A

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. _____

N/A

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

i. _____

ii. _____

iii. _____

N/A

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) _____

N/A

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

- (a) your arraignment and plea? no
- (b) your trial, if any? no
- (c) your sentencing? no
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

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

(a) the name and address of each attorney who represented you:

- i. _____
- ii. _____
- iii. _____

N/A

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

- i. _____
- ii. _____
- iii. _____

N/A

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

Withdraw of guilty plea.
Reconstruction of sentence from 85% to 65%
Trial by Jury

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

no

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Greenville)

VERIFICATION

I, Marlon Curry, 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.

Marlon Curry

SWORN to and subscribed before me this _____ day of _____.

Notary Public (L.S.)

My Commission Expires: _____

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

I, Marlon Curry, 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.

Marlon Curry
Applicant

SWORN or affirmed to and subscribed before me this _____ day of _____.

Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2011-CP-23-5180
COUNTY OF GREENVILLE)	
)	
Marlon Jamark Curry,)	
S.C.D.C. No. 339456,)	
)	
Applicant,)	
	)	RETURN
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

In response to the post-conviction relief application filed August 3, 2011, the Respondent would show this Court:

1.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Applicant waived presentment to the Greenville County Grand Jury on the charges of possession with intent to distribute (PWID) marijuana (2010-GS-23-1043), distribution of cocaine base (2010-GS-23-1426), and distribution of cocaine base within one half mile of a school (2010-GS-23-1427). Christopher T. Posey, Esquire represented the Applicant.

On August 2, 2010, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of ten (10) years suspended on the service of five (5) years and three (3) years probation for PWID marijuana, second offense, five (5) years for distribution of cocaine base, second offense, and five (5) years for distribution of cocaine base within one half mile of a school. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Greenville

County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel.
 - a. "Counsel not present during sentencing phase."
 - b. "Counsel not present at guilty plea."

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386

S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

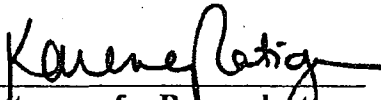
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

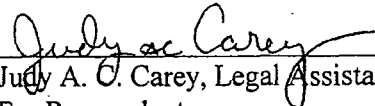
December 30, 2011

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)	
)	
	)	2011-CP-23-5180
)	
MARLON JAMARK CURRY, 339456)	
)	
Applicant,)	
)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

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

Marlon Jamark Curry (SCDC #339456)
Anderson County Detention Center
1009 County Home Road
Anderson SC 29625

DATED this 10th day of January, 2012.


 Judy A. O. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

MARLON J. CURRY,)
)
 PLAINTIFF,)
)
 -VS-)
)
 STATE OF SOUTH CAROLINA,)
)
 DEFENDANT.)
_____)

2011-CP-23-5180

APRIL 18, 2013

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE G. EDWARD WELMAKER, JUDGE

APPEARANCES:

CAROLINE HORLBECK, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

KAREN RATIGAN, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	PAGE
Marlon Curry					
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Ratigan		14			
Chris Posey					
Ratigan	17				
Horlbeck		20			
Certificate					22

EXHIBITS

(NONE)

1 April 18, 2013

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had.)

4 THE COURT: Ms. Ratigan.

5 MS. RATIGAN: Thank you, Your Honor. May it
6 please the Court. This is the case of Marlon Curry versus
7 the State. The docket number is 2011-CP-23-5180. Mr.
8 Curry waived presentment on charges of PWID marijuana,
9 distribution of cocaine base and distribution of cocaine
10 base within proximity of a school. He was represented on
11 those charges by Mr. Posey.

12 On August 2nd, 2010, he pled guilty before Judge
13 Miller. He received current sentences of ten years,
14 suspended on service of five years and three years
15 probation for PWID marijuana second offense; five years for
16 distribution of cocaine base, second offense; and five
17 years for distribution within proximity. He did not file
18 an appeal and the State is ready to proceed.

19 THE COURT: Ms. Horlbeck.

20 MS. HORLBECK: Your Honor, we would call Marlon
21 Curry to the stand.

22 THE COURT: All right, sir. If you'd come around
23 and be sworn.

24 THE CLERK: Mr. Curry, place your left hand on
25 the bible and raise your right hand the best you can.

1 You do solemnly swear or affirm that the testimony
2 you're about to give in this case will be the truth, the
3 whole truth and nothing but the truth, so help you God?

4 THE WITNESS: Yes, ma'am.

5 THE CLERK: Thank you. You may be seated.
6 Please state your full name for the record.

7 THE WITNESS: Marlon Jamar Curry.

8 **MARLON CURRY,**

9 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

10 **DIRECT EXAMINATION**

11 **BY MS. HORLBECK:**

12 Q. Mr. Curry, where are you incarcerated?

13 A. Livesey.

14 Q. Okay. And is that a result of the guilty plea that
15 you entered?

16 A. Yes, ma'am.

17 Q. What charges did you plead guilty to?

18 A. Distribution second, distribution of marijuana, and
19 school zone proximity.

20 Q. Okay. Who represented you on those charges at that
21 guilty plea?

22 A. Mr. Posey.

23 Q. All right. And as a result of that representation,
24 did you file this petition for post conviction relief?

25 A. Yes, ma'am.

1 Q. Okay. Now, one of your issues -- and you tell me if
2 I'm not saying it correctly. Is one of your issues the
3 fact that you believe you are not receiving credit for time
4 served, for two hundred and forty days?

5 A. Yes, ma'am.

6 Q. Okay. Tell us a little bit about that?

7 A. Well, when I had a conversation with Mr. Posey before
8 we came into the courtroom, he told me I was -- I asked him
9 would I receive credit, because I was already serving a
10 sentence for violation of probation. And he said that that
11 would go towards my sentence. He would get it ran
12 concurrent with my sentence. And I found out later that
13 that didn't happen.

14 Q. Okay. When did you have that discussion with Mr.
15 Posey?

16 A. Right before we came in the courtroom.

17 Q. Okay. When you say right before you came into the
18 courtroom, do you mean right before you came into the
19 courtroom to plead guilty?

20 A. Yes, ma'am.

21 Q. Okay. And you've just testified that the two hundred
22 forty days that you're talking about, that's time you
23 served on a probation violation that's unrelated to these
24 charges?

25 A. Yes, ma'am.

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6

1 Q. Okay. And as a result of your discussion with Mr.
2 Posey, did you believe that you would get credit for your
3 two hundred forty days?

4 A. Yes, ma'am.

5 Q. All right. Did you and Mr. Posey discuss any -- was
6 there a conversation about Mr. Posey asking the Judge to
7 backdate your sentence to when your probation violation
8 sentence started?

9 A. You mean like in the courtroom?

10 Q. Yes.

11 A. I didn't hear it. I didn't hear him ask that. But
12 the Judge ask me how long had I been down and how much time
13 had I already served and when did I go home. So I took
14 that as an assumption that that's what the questions was
15 asked for, so he could give me credit for that, because I
16 specifically asked Mr. Posey for that to happen as part of
17 the plea.

18 Q. Okay. Did Mr. Posey say anything about backdating
19 your sentence?

20 A. No, ma'am.

21 Q. Okay. But your recollection is that Mr. Posey said
22 what, about the two hundred forty days?

23 A. He said that I would receive credit for it. It would
24 count towards my sentence.

25 Q. All right. And based on that advice, what was your --

1 how did that impact your decision about what to do on your
2 charges?

3 A. Well, being that I would receive credit for that, I
4 mean, that would have knocked a big chunk out of the
5 sentence because I was already told that I would receive a
6 non-violent sentence. So being that it would be two
7 hundred and something days, I mean, I just -- that would
8 put me way above where I was -- you know, would have been
9 if I wouldn't have received those days.

10 Q. And based on his advice that you would receive that
11 credit for two hundred forty days, what did you decide to
12 do?

13 A. I decided to take the plea.

14 Q. All right. And if you had known -- well, let me back
15 up. How much time did you actually receive credit for; do
16 you recall?

17 A. Only thirty days that I spent in Greenville County.

18 Q. Okay. All right. And when did you find out that you
19 had, that you had only been credited thirty days?

20 A. When I talked to my caseworker.

21 Q. Okay. And is that before or after your guilty plea?

22 A. Well, that was after, after my guilty plea.

23 Q. Okay. All right. And if you'd known you weren't
24 going to receive that credit, would you have done anything
25 differently?

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PCR Hearing

8

1 A. Yes, ma'am.

2 Q. What was that?

3 A. Well, I wouldn't have took that plea for one, because
4 I would have tried to find out things on my own, being that
5 I felt like -- you know, after the fact, I felt as if I
6 didn't receive the right information. Or like, you know, I
7 was told something that I didn't get. And I would have
8 just looked into it in a different situation.

9 Q. Okay. Did you and your attorney discuss how much of
10 your sentence you would serve?

11 A. Yeah. He said it would be non-violent.

12 Q. Okay. And what did that mean to you?

13 A. You would serve half your sentence.

14 Q. Okay. Now, what specifically to your recollection,
15 did Mr. Posey tell you about how much time you would serve?

16 A. Well, he told me that -- he said the eight months
17 would go towards my sentence and that would put me at about
18 -- I think he said a non-violent sentence you serve half
19 the sentence. So from my recollection, if that was meaning
20 that that would be eight to nine months off of the
21 sentence, so I would only have to serve like eighteen more
22 months or something like that, you know.

23 Q. Okay. Eighteen more months and that's if you received
24 what kind of sentence? Did he give you an example? Like,
25 did he use numbers? If you get this sentence, I think

1 you'll serve this part of it. Did he give you examples or
2 no?

3 A. I can't really -- well, like I say, he mentioned the
4 fact that I would be serving a non-violent sentence.

5 Q. Uh-huh (affirmative).

6 A. And that that meant if I received the amount of time
7 he said -- the amount of time that I was going to receive
8 would be cut in half, basically.

9 Q. Okay. All right. And did you discuss the potential
10 sentence that you could receive with Mr. Posey?

11 A. Yes, ma'am.

12 Q. All right. And based on his advice that you would
13 actually serve about half of whatever sentence you
14 received, what did you decide to do?

15 A. Well, I decided to take the plea.

16 Q. Okay. Now, the reality is, you pled guilty back in
17 2010; is that correct, August 2010?

18 A. Yes, ma'am.

19 Q. Okay. And how many times have you come up for parole?

20 A. Once.

21 Q. Okay. And, obviously, you didn't make parole;
22 correct?

23 A. No, ma'am.

24 Q. Was that parole hearing last year?

25 A. Yes, ma'am.

1 Q. Okay. What's your max-out date?

2 A. 2014, October.

3 Q. Okay. All right. So did you talk about this
4 situation with your caseworker at SCDC?

5 A. Yes.

6 Q. All right. How much of your -- did your caseworker
7 explain to you how much of your sentence you were actually
8 serving?

9 A. Yes. She said, well, everything on my paperwork said
10 non-violent. But she said being about the time that I
11 wanted to receive, she said being that the way it was wrote
12 up on the sentencing sheet, she said the way it was wrote
13 up, she took it as though I would only receive credit.
14 Because it says to run concurrent with the sentencing,
15 starting on such and such date. And she say she took that
16 as though I was only receiving the thirty days credit
17 because that's what he put there. But it said to begin
18 with the sentence, running concurrent with the sentence, to
19 be -- to run concurrent with the sentence beginning on a
20 certain date.

21 Q. To your understanding, is there a percentage of your
22 sentence that you're serving?

23 A. Yes, ma'am.

24 Q. And what is that percentage?

25 A. Eighty-five percent.

1 Q. Okay. All right. And if you'd known you were going
2 to serve eighty-five percent of your sentence, would you
3 have done anything differently?

4 A. Yes, ma'am.

5 Q. What would you have done differently?

6 A. Well, I mean, I wouldn't have took the plea that day.

7 Q. Okay. Would you have gone to trial?

8 A. Probably so.

9 Q. Okay. All right. And how long did Mr. Posey
10 represent you?

11 A. Thirty minutes.

12 Q. No, I mean ---

13 A. I mean, yeah.

14 Q. I mean, how long -- I'm talking like how long was he
15 appointed? How many times did he come see you?

16 A. That day. That day. He never came to see me.

17 Q. Okay.

18 A. When I came to court that day, he was appointed to me
19 that day.

20 Q. Okay. Was he appointed -- you're telling me he was
21 appointed to you that exact day? He was not appointed to
22 you while you were serving your VOP sentence in SCDC?

23 A. No, ma'am. That day when I came, that's when I found
24 out who he was.

25 Q. Oh, okay. So that was the first time y'all met?

1 A. Yes, ma'am.

2 Q. Did you and he go over discovery?

3 A. Vaguely. I mean, not, you know, not to -- when I
4 would ask questions about certain things about it, I mean,
5 he kind of, you know -- I mean, like I say, there's no
6 excuse because I was there and I could have asked a lot
7 more questions, but the questions I did ask I felt like
8 either I was, you know, I was going in circles asking the
9 questions. So when he came and said that this is the
10 amount of time that you'd receive, knowing what I possibly
11 could have faced, you know, I just felt like, you know,
12 maybe that was the right thing to do. I don't know. I
13 mean, it just ---

14 Q. Well, did he review the police reports with you?

15 A. He went over a couple of things and I can't say
16 exactly all the things he went over, but he went over some
17 things. And when I had questions about things like the
18 police report, it's kind of like he would lead me in
19 another direction, away from what I was actually trying to
20 ask him or find out things that I was trying to find out.

21 Q. Did he review other evidence with you that the State
22 said they had against you?

23 A. No.

24 Q. Okay. And did he come to SCDC to visit you and talk
25 to you about your case?

1 A. No, ma'am.

2 Q. Did he mail you a copy of your discovery?

3 A. No, ma'am.

4 Q. All right. Are there any other issues that you want
5 to talk about today that we haven't already covered?

6 A. Well, being that, like I say, the fact that I'm
7 serving an eighty-five percent sentence.

8 Q. Anything that we haven't already covered?

9 A. Yes, ma'am. Well, like I say, when I talked to him,
10 the issue about the eighty-five percent has to do with like
11 work credits and stuff like that that you would receive.

12 That I was under the impression that I would receive
13 because it was a non-violent sentence. And those are
14 things that I haven't gotten.

15 Q. Okay. Did he talk to you specifically about work
16 credits and things like that?

17 A. Well, he said that's what will make my sentence the
18 way it is, because you get work credits, you get good
19 conduct credits, you get all that stuff.

20 Q. Okay.

21 A. And that's what make your sentence ---

22 Q. And the actuality is -- the reality is, is that you're
23 not receiving those credits?

24 A. No, ma'am.

25 Q. All right. Do you understand that the Judge today can

1 only grant or deny your petition?

2 A. Yes, ma'am.

3 Q. And do you understand that if he grants your petition
4 that you actually could face more time?

5 A. Yes, ma'am.

6 Q. Okay. And do you understand that if he grants your
7 petition you would face re-prosecution all over again on
8 all these charges?

9 A. Yes, ma'am.

10 Q. All right. And do you understand that if he denies
11 your petition, you've just got to serve out the remainder
12 of your sentence?

13 A. Yes, ma'am.

14 Q. All right. Knowing all that, do you still want to go
15 forward?

16 A. Yes, ma'am.

17 Q. Okay. Please answer any questions that Ms. Ratigan
18 may have for you.

19 THE COURT: Yes, ma'am.

20 MS. RATIGAN: Thank you, Your Honor. Just a
21 couple of quick questions.

22 **CROSS-EXAMINATION**

23 **BY MS. RATIGAN:**

24 Q. So you only had one meeting with Mr. Posey and it was
25 that morning?

1 A. Yes, ma'am.

2 Q. So why were you in the courthouse that day; do you
3 know why?

4 A. Because of the charges.

5 Q. Okay. But were you there to plead guilty or you have
6 no idea, they just brought you over?

7 A. They just brought me up.

8 Q. Did you have another attorney before Mr. Posey or was
9 he your first one?

10 A. First one.

11 Q. And Mr. Posey told you these were going to be non-
12 violent charges; that's correct?

13 A. Yes, ma'am.

14 Q. Now, when he was talking about the sentence you'd
15 serve, did he say anything about, you know, serving fifty
16 percent, sixty-five percent, eighty-five percent, did he
17 give you any kind of a number like that?

18 A. Well, like I said before, he said that I would be
19 serving half of my sentence because it would be a non-
20 violent sentence.

21 Q. So he told you that with non-violent on these charges,
22 that you'd be serving about fifty percent?

23 A. Yes, ma'am.

24 Q. Now, is that something he promised you, you know,
25 you're absolutely going to do this or just, you know, if

1 things go the way we anticipate, then you'll get the fifty
2 percent?

3 A. Well, I mean, there's no promises or nothing, but, I
4 mean, the way I took it was that's what I was going to do.
5 So I will take him at his word.

6 Q. Okay. So just kind of based on your conversation with
7 him, that's what you took it to mean?

8 A. Yes, ma'am.

9 Q. Okay. And did Mr. Posey tell you that day the State
10 was recommending an eight to twelve year kind of range of
11 sentence?

12 A. Excuse me?

13 Q. Did Mr. Posey tell you that when you went there to
14 plead guilty the State was going to recommend a range of
15 sentence between eight to twelve years?

16 A. Yes, ma'am.

17 Q. But you only ended up getting five; is that correct?

18 A. Yes, ma'am.

19 Q. Okay.

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

21 THE COURT: Any redirect?

22 MS. HORLBECK: No, Your Honor.

23 THE COURT: You may step down, sir.

24 MS. HORLBECK: Judge, the applicant rests.

25 MS. RATIGAN: The State would call Mr. Posey,

1 Your Honor.

2 THE CLERK: Mr. Posey, you do solemnly swear that
3 the testimony you're about to give in this case will be the
4 truth, the whole truth and nothing but the truth, so help
5 you God?

6 THE WITNESS: I do.

7 THE CLERK: Thank you. You may be seated.
8 Please state your full name for the record.

9 THE WITNESS: Christopher Todd Posey.

10 CHRISTOPHER TODD POSEY,

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MS. RATIGAN:

14 Q. Mr. Posey, do you recall representing Mr. Curry on
15 these charges?

16 A. I was appointed to represent him.

17 Q. So you were appointed. Do you have any recollection
18 of when you would have been appointed?

19 A. I could not find the appointment sheet. I could find
20 out from Indigent Defense. I just did not call and ask
21 them.

22 Q. Do you recall whether or not you were appointed the
23 day that he pled guilty?

24 A. I don't recall it being that specific date, but I know
25 I met with Mr. Curry on that date and I could not find

1 whether I represented him on the violation of probation or
2 not.

3 Q. Would you have filed, after you were appointed, the
4 usual Brady and Rule 5 motions?

5 A. I know we went over them that day. I do remember
6 that, before we went in the courtroom.

7 Q. So you would have filed a motion at some point?

8 A. Yeah.

9 Q. And Mr. Curry states he has no idea why he was brought
10 over. Do you know if he was brought over to plead or do
11 you have any idea why he was brought over that day?

12 A. I think they brought him over to see what his
13 intentions were.

14 Q. And it's on the record, both you and the State noted
15 that the recommendation was an eight to twelve year range;
16 does that sound accurate?

17 A. Yes.

18 Q. Is that something you would have gotten from the State
19 that day or something you would have gotten prior to that?

20 A. I think that was reduced that day. I think it was a
21 ten to twelve recommendation at first, and they lowered it
22 to eight to twelve. I think the eight to twelve was given
23 that day.

24 Q. Did you review that offer with Mr. Curry?

25 A. Yes.

1 Q. Did you review with him the maximum sentence he could
2 have received on all these charges?

3 A. I think we went over the fact he was pleading to a
4 second offense and what those sentences would be. And I
5 think I actually went over the fact that if he went to
6 trial, it would be a third offense, because it was actually
7 a third offense.

8 Q. Did Mr. Curry appear to understand this conversation
9 with you?

10 A. Yes.

11 Q. Did he waiver at all on his decision to plead or do
12 you recall?

13 A. I don't really recall him wavering, but I can't
14 absolutely say he did not have doubts at times.

15 Q. Would you have discussed with Mr. Curry whether these
16 were violent or non-violent?

17 A. My standard practice is, I would have told him they
18 were non-violent. But I also would have explained to him
19 they were eighty-five percent because of the time they
20 carry.

21 Q. In charges such as these, PWID second, distribution
22 second, would you have told Mr. Curry that he could
23 anticipate serving fifty percent of his sentence?

24 A. I have not done it before. I can't believe I would
25 have done it in that instance, but I don't have any

1 specific recollection.

2 Q. Was Mr. Curry -- when you were appointed, was he
3 already incarcerated for a violation of probation; do you
4 remember?

5 A. That's what -- I could not remember whether I -- I
6 don't believe I handled his violation of probation. I
7 think he was already incarcerated.

8 Q. Do you recall whether or not you advised him that he
9 would receive credit for the two hundred and forty days he
10 served on that?

11 A. I don't remember any specific conversation. I may --
12 usually, how I handle that is I will tell them I will ask
13 the Judge, that it's in the Judge's discretion whether they
14 get credit for that. That he's not legally entitled to it,
15 but some Judges will, at times will afford them that.

16 Q. And that's something you would have explained to Mr.
17 Curry?

18 A. Yes. That's standard practice of how I would explain
19 it. I would have told him he's only entitled to the actual
20 time he spent in the county.

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

22 THE COURT: You may cross-examine the witness,
23 Ms. Horlbeck.

24 **CROSS-EXAMINATION**

25 **BY MS. HORLBECK:**

1 Q. Mr. Posey, have you had the chance to review the
2 transcript in the case?

3 A. Briefly, I have, yes.

4 Q. Okay. Do you recall whether or not you specifically
5 asked Judge Miller to back-date the sentence to the start
6 of ---

7 A. I don't remember seeing it in there.

8 Q. Okay. And you said that you don't specifically recall
9 saying that Mr. Curry would serve fifty percent?

10 A. I can't imagine I did it, but I can't -- I don't
11 remember this conversation that specifically, no.

12 Q. Okay. All right.

13 MS. HORLBECK: That's all I have. Thank you.

14 THE COURT: Any redirect?

15 MS. RATIGAN: No redirect and the State would
16 rest at this time.

17 THE COURT: All right. Thank you, Mr. Posey.

18 You may step down.

19 All right. I'll review the file and the transcript
20 and issue an order.

21 MS. RATIGAN: Thank you, Your Honor.

22

23 [END OF REQUESTED TRANSCRIPT OF RECORD]

1 CERTIFICATE OF REPORTER

2

3 I, the undersigned Danette P. Hanks, Official Court
4 Reporter for the Thirteenth Judicial Circuit of the State
5 of South Carolina, do hereby certify that the foregoing is
6 a true, accurate, and complete transcript of record of all
7 the proceedings had and evidence introduced in the
8 trial/hearing of the captioned case, relative to appeal, in
9 the Circuit Court for Greenville County, South Carolina, on
10 the 18th day of April, 2013.

11 This transcript may contain quoted material. Such
12 material is reproduced as read by the speaker.

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

15 July 24, 2013

16

17

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19



Circuit Court Reporter

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
C.A. No. 2011-CP-23-5180

Marlon Jamarck Curry,
S.C.D.C. No. 339456,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 3, 2011. The Respondent made its return on December 30, 2011. An evidentiary hearing into the matter was convened on April 18, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Christopher T. Posey, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant waived presentment to the Greenville County Grand Jury on the charges of possession with intent to distribute (PWID) marijuana (2010-GS-23-1043), distribution of cocaine base (2010-GS-23-

1
[Handwritten signature]

1426), and distribution of cocaine base within one half mile of a school (2010-GS-23-1427). He was represented by Christopher T. Posey, Esquire.

On August 2, 2010, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of ten (10) years suspended on the service of five (5) years and three (3) years probation for PWID marijuana, second offense, five (5) years for distribution of cocaine base, second offense, and five (5) years for distribution of cocaine base within one half mile of a school. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. "Counsel not present during sentencing phase."
 - b. "Counsel not present at guilty plea."

At the PCR hearing, the Applicant proceeded upon allegations that plea counsel was ineffective in advising the Applicant about time-served credit and the length of sentence he would serve.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court 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).

² *AmH 2*

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he only had meeting with plea counsel and that they "vaguely" reviewed the discovery materials. The Applicant stated plea counsel told him that he would receive credit for the time he served for a probation violation (240 days). The Applicant stated he pled guilty in order to have received this credit. The Applicant stated, however, that he only received credit for the 30 days he served in the detention center. The Applicant stated plea counsel told him that he was pleading guilty to a non-violent sentence ^{and ew} that that, after the 240 days was applied to his sentence, he would only serve eighteen months. The Applicant stated plea counsel led him to believe, therefore, that he would only serve 50% of his sentence and he was actually serving 85% of that sentence. The Applicant stated, however, that he knew he was pleading guilty in exchange for a plea recommendation of 8-12 years (and that he only received a

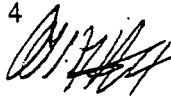
five year sentence).

~~Plea counsel testified he filed discovery motions and reviewed the discovery materials~~
with the Applicant. Plea counsel testified the Applicant was transported from the jail to the courthouse that day to "see his intentions." Plea counsel testified there was a plea offer for 10-12 years that was reduced to 8-12 years that day. Plea counsel testified he and the Applicant reviewed: the plea offer, the maximum sentences for second offenses, and that the charges would be third offenses if the case went to trial. Plea counsel testified the Applicant understood their conversation. Plea counsel testified he did not recall a conversation with the Applicant about potential credit for time-served. Plea counsel testified that, in this circumstance, his general practice would have been to advise his client that he was not legally entitled to this credit. Plea counsel testified his general practice would have been to advise the Applicant that, while the charge was non-violent, it would be treated as an 85% sentence. Plea counsel testified he would not have told the Applicant he would serve 50% of the sentence.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.14). The Applicant also told the plea judge he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced. (Plea transcript, pp.12-14).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not spend enough time reviewing his case. This Court notes "[t]he brevity of time spent in

4


consultation with a defendant alone is not indicative of inadequate trial preparation.” Smith v. State, Op. No. 4938 at *4 (S.C. Ct. App. filed Feb. 8, 2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). This Court further notes the Applicant has failed to articulate what more plea counsel should have done in order to investigate and prepare his case. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result).

This Court finds the Applicant failed to meet his burden of proving plea counsel incorrectly advised that he would receive 240 days of credit if he pled guilty. The Applicant testified he had been incarcerated for a probation violation and only spent 30 days in the county jail. This Court notes the Applicant has failed to demonstrate that he was entitled to more than those 30 days of credit. See S.C. Code Ann. § 24-13-40 (2007). While the Applicant testified plea counsel told him he would receive this credit and that he only pled guilty based on this assumption, this Court finds the Applicant’s testimony is not credible.

This Court finds the Applicant failed to meet his burden of proving plea counsel incorrectly advised him about the length of sentence he would serve. The Applicant stated plea counsel told him that he would only serve 50% of his sentence and that, if he had known he would actually serve 85% of his sentence, he would have gone to trial. Plea counsel testified he would never have told the Applicant he would serve 50% of his sentence and that his standard practice would have been to advise that 85% of this sentence would have to be served. This Court finds plea counsel’s testimony is credible and the Applicant’s testimony is not credible. Law enforcement used a confidential informant and documented funds when it recorded two drug transactions involving the Applicant. The informant later identified the Applicant from a

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photographic lineup. (Plea transcript, pp.29-30). This Court finds it highly unlikely that, given the strong evidence against him, the Applicant chose to plead guilty because he believed he would only serve 50% of his sentence. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms.. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance. This Court notes the Applicant pled guilty in exchange for an 8-12 year sentence recommendation and plea counsel successfully argued for a reduction down to an active five year sentence. (Plea transcript, pp.32-33).

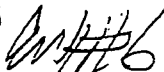
This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174:

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not

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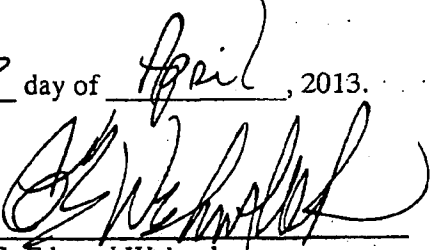
established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30 day of April, 2013.


G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

DOCKET NO. 2010-GS-23-
JRT 001043
The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

TERM 2010

SUSPENDS

Did Clerk receive driver's license?
YES NO

If no, explain

Defendant

THE STATE

vs.

MARLON JAMARK CURRY

supc

ARREST WARRANT NUMBER
1799639

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

posuy

Indictment for

RECEIVED

FEB 17 2010

Clerk of Court
Greenville County

POSSESSION OF MARIJUANA WITH INTENT TO
DISTRIBUTE

VIOLATION \$44-53-0370

Foreperson of Petit Jury

Date:

ENTERED
REC-1
[Signature]

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

At a Court of General Sessions, convened on _____ the Grand Jurors of Greenville
County present upon their oath:

That MARLON JAMARK CURRY did in Greenville County, on or about the 1st day of May 2008, possess with intent to distribute or aid, abet, or conspire to possess with the intent to distribute a quantity of Marijuana, a controlled substance, such possession not having been authorized by law. This is in violation of §44-53-370 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

DOCKET NO. 2010-GS-23-
JRT 001426

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

TERM 2010

DL SUSPENDS

Did Clerk receive driver's license?

YES _____ NO ✓

If no, explain _____

Defendant _____

THE STATE

vs.

MARLON JAMARK CURRY

Indictment for

3015
3039

DISTRIBUTION OF COCAINE BASE
(CRACK COCAINE)

VIOLATION § 44-53-0375

WITNESSES

G. S. Rhinehart

Greenville Police Department

12/8/2009

ARREST WARRANT NUMBER

M380330

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

RECEIVED

FEB 26 2010

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
DISTRIBUTION OF COCAINE BASE (CRACK COCAINE)

At a Court of General Sessions, convened on _____ the Grand Jurors of Greenville
County present upon their oath:

That MARLON JAMARK CURRY did in Greenville County, on or about the 23rd day of July 2009, distribute,
dispense, deliver, or aid, abet, or conspire to distribute, dispense or deliver to an undercover operative a quantity
of Cocaine Base (Crack Cocaine), a controlled substance, such distribution not having been authorized by law.
This is in violation of §44-53-375 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

DOCKET NO. 2010-GS-23-001427
JRT

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

TERM 2010

THE STATE

vs.

MARLON JAMARK CURRY

Defendant

ALL SUSPENDS

Did Clerk receive driver's license?

YES NO

If no, explain

WITNESSES

G. S. Rhinehart

Greenville Police Department

12/8/2009

ARREST WARRANT NUMBER

M380331

ACTION OF GRAND JURY

Foreperson of Grand Jury

VERDICT

Indictment for

0108

DISTRIBUTION OF COCAINE BASE WITHIN 1/2
MILE OF A SCHOOL

VIOLATION § 44-53-0445

Foreperson of Petit Jury

Date:

RECEIVED

FEB 26 2010

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
DISTRIBUTION OF COCAINE BASE WITHIN 1/2 MILE OF A
SCHOOL

At a Court of General Sessions, convened on _____ the Grand Jurors of Greenville
County present upon their oath:

That MARLON JAMARK CURRY did in Greenville County, on or about the 23rd day of July 2009, distribute a
quantity of Cocaine Base (Crack Cocaine), a controlled substance, while being within one-half (1/2) mile
proximity of SAINT ANTHONY'S CATHOLIC SCHOOL. This is in violation of §44-53-445 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