

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from York County

Lee S. Alford, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**  
APR 30 2012  
S.C. Supreme Court

KEVIN ALLISON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

DAYNE C. PHILLIPS  
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

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

ATTORNEYS FOR RESPONDENT

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1           Ms. Desch: May it please the court. Standing  
2 before you is Kevin Allison. He's here with his attorney  
3 John Sullivan of the Public Defender's Office. Your Honor,  
4 he is here on true bill indictment 2010-GS-46-1165. This is  
5 a charge of possession with intent to distribute crack second  
6 offense. He's here also here before you on 10-1692. Your  
7 Honor, it's a bit of an unusual situation. When we arrested  
8 him on the original charge the pwid crack they had down it  
9 basically was off a confidential informant buy and they held  
10 that distribution charge. When we were preparing for trial  
11 that warrant was going to be served on him based on a direct  
12 indictment. Actually, I'm sorry, the warrant was going to be  
13 served on him as we were preparing for trial instead of  
14 getting arrested and directly indicted and worked out with  
15 Mr. Sullivan Mr. Allison would not be rearrested and sent  
16 through the system, so essentially he's here waiving  
17 presentment to the grand jury but I would have arraigned him.

18           The Court: All right.

19           Ms. Desch: On that.

20           The Court: Why don't you go ahead and do that.

21           Ms. Desch: May I be so bold to have the indictment  
22 that is in front of you?

23           The Court: You may be so bold.

24           The Court: Which, 1692?

25           Ms. Desch: 1692, yes, sir.

1           The Court:   Okay.

2           Ms. Desch:   Thank you, Your Honor.   Kevin Franklin  
3 Allison, do you answer by that name?

4           Mr. Allison:   Yes.

5           Ms. Desch:   The State has signed an indictment  
6 charging you with distribution of crack cocaine under  
7 4453-375 B (2).   It's alleged that on August 28, 2009, in  
8 York County, South Carolina, that you the defendant Kevin  
9 Franklin Allison did distribute, dispense, a quantity of  
10 crack cocaine a controlled substance under the provision of  
11 section 44-35-3110 et cetera code of laws of South Carolina.  
12 How do you answer to that charge of distribution of crack  
13 cocaine second offense?

14          Mr. Allison:   No contest.

15          Ms. Desch:   Okay.   How do you wish to be tried?

16          Mr. Allison:   By my God and my country.

17          Ms. Desch:   Thank you.

18          The Court:   As to that indictment Mr. Allison, the  
19 one charging with the distribution of crack cocaine on August  
20 28, 2009, that indictment has not been before the Grand Jury  
21 of York County.   Do you wish to have that indictment reviewed  
22 by the Grand Jury or give up that right?

23          Mr. Allison:   Give up that right.

24          The Court:   He's signed and initialed indicating he  
25 is waiving presentment on that indictment.   As to each of

1 these indictments it's indicated there on the sentence sheets  
2 that you are entering a plea of no contest to these charges,  
3 is that correct?

4 Mr. Allison: Yes, sir.

5 The Court: Do you understand that the court treats  
6 a no contest plea the same as it treats a plea of guilt? Do  
7 you understand that?

8 Mr. Allison: Yes, sir.

9 The Court: The first indictment I'm going over  
10 alleges that on August 28, 2009, you were in possession of  
11 crack cocaine with intent to distribute it in violation of  
12 the laws of this State.

13 The second indictment alleges that on that date you  
14 did in fact distribute cocaine crack cocaine a controlled  
15 substance under the laws of this State. This carries from 5  
16 to 30 years, does not allow for probation or suspended  
17 sentence, it is a felony, and it is a parole ineligible  
18 offense. That is whatever sentence one receives on these  
19 charges they must serve at least 85 percent of that before  
20 they are eligible for any early release and if they were in  
21 fact granted an early release it would be into a community  
22 supervision program. Do you understand that?

23 Mr. Allison: Now I do, sir.

24 The Court: Okay. How do you plead to possession  
25 with intent to distribute crack cocaine on August 28, 2009?

1 Mr. Allison: No contest.

2 The Court: How do you plead to having distributed  
3 crack cocaine on that date?

4 Mr. Allison: No contest.

5 The Court: Any recommendation?

6 Ms. Desch: Your Honor, five years.

7 The Court: Other than the recommendation of a five  
8 year sentence, has anyone made you any other promise or  
9 threats to cause you today to enter your plea of guilt to  
10 this charge?

11 Mr. Allison: No, sir.

12 The Court: Are you today under the influence of  
13 anything that would cause you to be intoxicated?

14 Mr. Allison: No, sir.

15 The Court: Are you entering your plea today freely  
16 and voluntarily?

17 Mr. Allison: Yes, sir.

18 The Court: Have you served any time on any of these  
19 already?

20 Mr. Allison: No, sir.

21 The Court: You have a right to a trial by jury on  
22 these charges and you are presumed innocent of these charges  
23 until such time as the State is able to prove to a jury your  
24 guilt beyond a reasonable doubt.

25 As to the charge you have a right to remain silent,

1 the right to confront the witnesses against you, and you have  
2 the right to have your witnesses made to come to court to  
3 testify for you. You understand you have these rights?

4 Mr. Allison: Yes, sir.

5 The Court: Do you have any questions about them?

6 Mr. Allison: No, sir.

7 The Court: I advise you that by entering a plea of  
8 guilt as to the charge you are giving up those rights and you  
9 are also giving up any defense you might have to the charge,  
10 you understand that?

11 Mr. Allison: Yes, sir.

12 The Court: Knowing all those things I ask again how  
13 do you plead to these charges?

14 Mr. Allison: No contest, sir.

15 The Court: To both?

16 Mr. Allison: Yes, sir.

17 The Court: All right. Tell me the facts.

18 Ms. Desch: Thank you, Your Honor. On August 28,  
19 2009, at approximately 9:15 York County DEU met with a  
20 confidential informant who indicated that they could buy from  
21 Kevin Allison the defendant here before you, standing before  
22 you today. That confidential informant was wired, searched,  
23 given buy money by the DEU and monitored by the DEU as he met  
24 with Mr. Allison at a location.

25 When the confidential informant got to a location

1 here in York County where he was setting up a deal with  
2 Mr. Allison, he indicated that Mister, the defendant, was  
3 standing by a van when he approached the house; that the CI  
4 went up, said I need \$20 worth of crack, and at that point  
5 Mr. Allison went inside the house, got some keys, came back  
6 out and got crack out of the Ford Explorer, gave the crack  
7 for an exchange of 20 dollars, the confidential informant  
8 came back, and gave that crack to the DEU. That has since  
9 been tested and confirmed to be crack.

10 An hour later the CI went back to the address where  
11 the deal had gone down and when they approached Mr. Allison  
12 was again standing outside in the same location that he had  
13 been for the confidential informant. Your Honor, at that  
14 point there was another lady out there who has since plead to  
15 possession of marijuana charge, but she was, I think, the  
16 owner of the van where the CI first had seen Mr. Allison.  
17 When the officers arrived they asked Mr. Allison for ID. At  
18 that point the defendant started to walk toward that same  
19 Ford Explorer. The officer asked for consent. The defendant  
20 said yes then asked why and at that point one of the officers  
21 noticed a bag of marijuana in his left hand. The bag was  
22 dropped. It was approximately five grams of marijuana. The  
23 defendant was arrested at that point and eventually the  
24 officer walked over and, towards the Explorer, and  
25 immediately upon them walking toward the Explorer the

1 defendant starting yelling, "It's not mine. "It's not mine."  
2 Search incident to the arrest the officers found the \$20 that  
3 had been buy money, a partially smoked marijuana in shorts  
4 pocket; they also found in the defendant's shorts pocket the  
5 keys to the Explorer. Nobody around the area claimed the  
6 Explorer. When it was searched per inventory policy they  
7 found 4.3 grams of crack in the upholstery on the driver's  
8 side and \$315. Crack found in the Explorer was also tested  
9 and it turned out to be 2.69 grams of crack.

10 His prior record was a marijuana possession from  
11 December of '08.

12 The Court: All right. Mr. Allison, do you agree  
13 that if you went to trial those would be the facts the State  
14 would present to the jury?

15 Mr. Sullivan: With one exception, Your Honor.  
16 Obviously this is a no contest plea but just as a matter of  
17 clarifications, the \$20 that they actually provided to the  
18 confidential informant who made the purchase in this case was  
19 actually not taken off Mr. Allison's person. That was  
20 actually a different 20 and 20 was actually taken from the  
21 inside of the vehicle but other than that.

22 Mr. Allison: The female had just given it to me,  
23 sir, for just cutting the grass. That was the only \$20 I had  
24 on me.

25 The Court: The rest of the facts you agree that the

1 witness would tell the jury, is that correct, Mr. Allison?

2 Mr. Allison: No, sir.

3 The Court: Okay. I can't take his plea. He won't  
4 agree that those facts.

5 Mr. Allison: I plead no contest, sir.

6 The Court: I know but I have to be sure that you  
7 understand what you are pleading to and that is that this is  
8 what the facts that the jury would hear, that evidence.

9 Mr. Allison: I agree that's the evidence against  
10 me, yes, sir.

11 The Court: All right. Well, I accept your pleas  
12 now.

13 Mr. Sullivan: Thank you, Your Honor. May it please  
14 the court. Your Honor, just as a matter of understanding,  
15 Kevin's understanding of this, that this is a negotiated five  
16 year sentence. He's pleading of course guilty to two  
17 charges. He was also charged with the marijuana second  
18 offense which is being dismissed as part of this negotiation,  
19 Your Honor.

20 Just by way of background, Kevin is 45 years of age.  
21 He is the father of three children ages 24, 23, and 21. He  
22 is very actively involved in their lives. In fact, he spent  
23 the last couple of weeks with his youngest son trying to get  
24 him accepted into Appalachian State up in Boone, Your Honor.  
25 He's born and raised in Clover, has lived all over the world,

1 Your Honor. He served six years in the United States Army.  
2 He was honorably discharged an E-four. He was stationed in  
3 Germany. Most recently he was stationed in Spartanburg which  
4 is how he was able to come back to the area in the reserve  
5 army. Your Honor, he's always been gainfully employed. His  
6 last job at Uniroyal up in Gastonia. He was laid off from  
7 that job after working there for about two and a half years  
8 three years ago. Your Honor, up to that time when Kevin was  
9 42 years that was his one time with the law. That of course  
10 in that three year period in being laid off when he picked up  
11 the marijuana charge and is now standing before Your Honor  
12 unfortunately with two second offense drug charges which he  
13 understands in South Carolina these both carry a minimum of  
14 five years. Your Honor, Kevin has always maintained to me  
15 his innocence. Now again my office was only originally  
16 appointed to represent him on possession with intent to  
17 distribute, the distribution charges came along later, but  
18 Kevin always maintained his innocence to me with respect to  
19 that possession with intent o distribute. For the longest  
20 time we were preparing his case for trial and then about two  
21 weeks ago when we learned through the Solicitor's Office  
22 those distribution warrants were in fact going to be served  
23 on him; at that point that's when Kevin began to think that  
24 perhaps it was in his best interest to accept the State's  
25 offer in this case. The Solicitor was kind enough to put the

1 plea offer back on the table even though he was placed on the  
2 trial board this week, Your Honor. Again I think certainly  
3 there is evidence by which a jury could convict him. He's  
4 pleading no contest, but I think given the fact that they  
5 found the keys to the car in his pocket, of course, and there  
6 is going to be a confidential informant who would come in and  
7 testify as to what allegedly happened that day. Kevin  
8 understands and he and I talked about that you have evidence  
9 by which a jury could return a finding of guilty on that  
10 rather than running that risk of receiving 30 years. I think  
11 Kevin just wants to get this behind him. He has been working  
12 as a landscaper and he's actually in the process of trying to  
13 put together his own business but he does have a significant  
14 clientele so hopefully this is a resolution that would allow  
15 him to get back to his life, hopefully get him productive,  
16 leading a productive life as a citizen working. Your Honor,  
17 it's a tough situation for somebody who only has a marijuana  
18 charge and has never done any time in jail; nevertheless, he  
19 understands the situation he's in and we would just ask you  
20 to go along with the recommendation in this case.

21 The Court: Anything you want to say, Mr. Allison?

22 Mr. Allison: No, sir.

23 The Court: All right. Looking in the book just a  
24 minute I do not have this down as a serious offense on my  
25 cheat sheet, but serious offense is marked on the sentence

1 cheat sheet, but serious offense is marked on the sentence  
2 sheet so I just need to make sure.

3 Mr. Sullivan: It should not be a serious. The  
4 proximity charge would be serious.

5 The Court: That's what I thought, so my cheat sheet  
6 is right. I'm going to mark that off. I just want to make  
7 sure the paperwork is right because it comes back if I don't  
8 straighten it out. I didn't tell you about that because it  
9 doesn't apply.

10 Mr. Allison: Thank you, sir.

11 Mr. Sullivan: Thank you, Your Honor.

12 The Court: Sentences are five years on each to run  
13 concurrent and then make sure that's correct. Thank you.

14 Ms. Desch: Thank you, Your Honor.

15 Mr. Sullivan: Thank you.

16 (End of proceedings and no exhibits were presented.)

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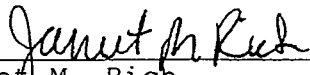
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I, Janet Rich, official court reporter for the Sixteenth Circuit of the State of South Carolina, do hereby certify that the forgoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for York County, South Carolina, on the 30 day of April 2010.

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

  
\_\_\_\_\_  
Janet M. Rich



(b) \_\_\_\_\_  
(c) \_\_\_\_\_

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

(a) April 30 2010 5 yrs 85%  
(b) \_\_\_\_\_  
(c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

(a) after a plea of guilty IE  
(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) Attorney Did Not Advise me I could

- (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 Plea
- (b) Counsel for failure to Investigate
- (c) Exoneration law

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

- (a) will send Memorandum when
- (b) PCR Counsel is appointed
- (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. \_\_\_\_\_
  - 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) Because this is my first PCR
- (b) and can only be raised in
- (c) PCR

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

- (a) your arraignment and plea? ✓
- (b) your trial, if any? \_\_\_\_\_
- (c) your sentencing? ✓
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? 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. Jonathan Sullivan  
York Co Public Defender's office
  - ii. P.O. Box 691  
1675-1E York Hwy
  - iii. York, S.C. 29745-0691
- (b) the proceedings at which each such attorney represented you:
  - i. Plea  
Sentencing
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

Guilty Plea Vacated

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 York )

VERIFICATION

I, Kevin Allison, 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.

*Kevin Allison*

SWORN to and subscribed before me this 31<sup>ST</sup> day of AUGUST, 2010.

*[Signature]* (L.S.)  
Notary Public

My Commission Expires: February 21, 2012

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

I, Kevin Allison, 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.

*Kevin Allison*  
Applicant

SWORN or affirmed to and subscribed before me this  
31<sup>ST</sup> day of AUGUST, 2010.

*[Signature]*  
Notary Public

My Commission Expires: February 21, 2012

Kevin Allison, # 340643

A-X-18 P.C.I.

430 Oakwood Rd

Pelzer, S.C. 29669

York County Clerk of Court

MOSS Justice Center

P.O. 690

1675-1E York Hwy

York, S.C. 29745-0691

### The Filing of PCR Application

Dear Clerk,

Would you please be so kind to file  
this PCR application at your earliest  
convenience.

Would you please also send me a  
check-stamped copy.

Thank you for your valuable time on  
this matter. In kind regards,

Sincerely

Kevin Allison

Kevin Allison, # 340643

A-X-18 P.C.I.

Pelzer, S.C. 29669

Col Filed

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	
	)	2010-CP-46-3809
	)	
Kevin Allison, #340643,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed September 8, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. The Applicant was indicted at the March 2010 term of the York County Grand Jury for Possession of Crack Cocaine with Intent to Distribute, 2nd offense (2010-GS-46-1165). The Applicant was also charged with Distribution of Crack Cocaine (2010-GS-46-1692). The Applicant was represented by Jonathan Sullivan, Esquire. On April 30, 2010, the Applicant waived presentment of the distribution charge to the grand jury, and pled no contest to both offenses as charged with a recommendation of five (5) years from the State. The Honorable John C. Hayes sentenced the Applicant to five (5) years for each charge, concurrent. The Applicant did not appeal his convictions or sentences.

Attached herewith and incorporated herein by reference are the records of the York County Clerk of Court regarding the subject convictions including the Applicant's plea affidavit,

the Applicant's records from the Department of Corrections, and the Applicant's plea transcript.

The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

In his current Application, the Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a) "Failure to investigate enhancement law"

## III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise questions of fact that are not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on these allegations. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.


Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

HARRISON D. BRANT  
Assistant Attorney General

By:   
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April 21, 2011.



I-N-D-E-X

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
Def.1	Plea Affidavit		P.37

Reporter's Note: All Exhibits were filed with the York County Clerk of Court's Office.

1 (COURT IN SESSION THURSDAY, JUNE 2, 2011 AT 12:25 PM.)

2 THE COURT: Is this expected to be lengthy?

3 MR. BRANT: I'm sorry.

4 THE COURT: Is this expected to be lengthy or not?  
5 Got a lot of witnesses?

6 MR. BRANT: It's not.

7 MR. MURPHY: Two, Your Honor. Two witnesses.

8 THE COURT: Try to get it in at least before lunch.  
9 It's Twenty-five after Twelve; we'll go ahead.

10 (APPLICANT ENTERING COURTROOM.)

11 MR. BRANT: May it please the Court.

12 THE COURT: Yes, sir.

13 MR. BRANT: Your Honor, this is York County Case 2010-  
14 CP-46-3-8-0-9. The Applicant's name is Kevin Allison, SC  
15 DC Number 340643.

16 He was indicted in March 2010 with possession with  
17 intent to distribute crack cocaine, second offense. He was  
18 also charged with distribution of crack cocaine, second  
19 offense and a possession of marijuana charge. He was  
20 represented by Jonathan Sullivan on these charges.

21 On April 30, 2010, he waived presentment of the  
22 distribution charge and pled no contest to possession with  
23 intent to distribute second offense and the distribution of  
24 crack cocaine, second offense. As a result of the plea,  
25 the State did drop the possession of marijuana charge. So,

KEVIN ALLISON: DIRECT BY MR. MURPHY

4

1 he appeared in front of Judge Hayes. Pursuant to  
2 recommendation from the State, he received a sentence of  
3 five years for each of those charges. He did not file an  
4 appeal.

5 THE COURT: Are those concurrent?

6 MR. BRANDT: Yes, sir.

7 THE COURT: It's a concurrent sentence?

8 MR. BRANDT: Yes, sir, two 5-year concurrent  
9 sentences.

10 He did not file an appeal. September 8, 2010, filed  
11 his application for post-conviction relief.

12 The State filed its return April 27, 2011, and I'll  
13 turn it over to his attorney Brian Murphy.

14 MR. MURPHY: Your Honor, the Plaintiff calls Mr. Kevin  
15 Allison.

16 MADAME CLERK: Mr. Allison, I can get you stop here  
17 and place your left on the Bible.

18 (WHEREUPON: KEVIN ALLISON, BEING  
19 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

20 MADAME CLERK: Thank you. You may have a seat.

21 DIRECT EXAMINATION

22 KEVIN ALLISON BY MR. MURPHY:

23 Q. What's your name?

24 A. Excuse me?

25 Q. What's your name?

1 A. Kevin Allison.

2 Q. What's your address?

3 A.

4 Q. A little slower.

5 A.

6 Q. Thank you.

7 And you were indicted for distribution of crack,  
8 second; possession with intent to distribute crack, second;  
9 and possession of marijuana; is that correct?

10 A. Yes.

11 Q. And Mr. Jonathan Sullivan of the Public Defender's  
12 Office represented you?

13 A. Yes.

14 Q. And you pled No Contest on April 30th, 2010 to  
15 distribution of crack, second; possession with intent to  
16 distribute crack, second?

17 A. Yes.

18 Q. You were sentenced to 5 years concurrent on both  
19 charges?

20 A. Yes.

21 Q. You were to sentenced 5 years?

22 A. Yes.

23 Q. And the possession of marijuana charge was noll prosed  
24 or trial. Correct?

25 A. No.

KEVIN ALLISON: DIRECT BY MR. MURPHY

6

1 Q. I'd like to talk to you a little bit about your plea  
2 counsel and what you were doing in preparation for your  
3 trial leading up to your plea.

4 Did he explain the charges to you?

5 A. Meaning what?

6 Q. What you were charged with?

7 A. Only the PWI because I ain't hear nothing about the  
8 distribution charge until the week before I came into  
9 trial -- Well, the week before I came before the judge.  
10 And then, that right there, was a situation where, I'm  
11 saying, I mean, it was like, I was doing what he advised  
12 me, and he was telling me to do.

13 Q. So he --

14 A. Because I wanted to take it to trial from the start.  
15 I wanted to go to trial all the way to the end.

16 But he was like -- He was more concerned about the  
17 interest of the Solicitor because he was always "Well let's  
18 see what the Solicitor is going to do" or "Let's see how  
19 the Solicitor's going to talk about how the Solicitor's  
20 going to take it." I mean, it's like -- He wasn't  
21 concerned about my interest, only the interest of the  
22 Solicitor.

23 Q. So, he didn't explain the charges?

24 A. Explain them how? I mean, the PWI, yeah, but the  
25 distribution, like I said, when I first came to him, I

1 wanted to know -- I wanted to see -- I asked for a motion  
2 of discovery, you know what I'm saying, because I wanted to  
3 see what type of evidence they had against me or whatever.  
4 Because I knew they didn't have no evidence on me, you know  
5 what I'm saying, because I hadn't done nothing. But he was  
6 like, "Well, the only way you can get a motion of discovery  
7 is if we take it to trial and they present it in the  
8 courtroom." And that's on the day of the trial.

9 Q. He told you that?

10 A. That's what he told me. And I never received a motion  
11 of discovery to this day until my mom, when I was at Perry  
12 Correctional Institution, last year, put in a request for  
13 it for me. She got a copy of my motion before I did.

14 Q. And you wanted to go to trial?

15 A. Yes, sir.

16 Q. Did you discuss your case with your attorney?

17 A. Not really because every time I go in and talk to him,  
18 it was either, "I was rescheduled," or "Let's see what the  
19 Solicitor talking about."

20 Q. Did he discuss the evidence against you?

21 A. I mean, how could he? I never seen a motion of  
22 anything.

23 Q. He didn't talk to you about the evidence? Would he  
24 prepare for trial?

25 A. I mean, how could we prepare for trial, you know what

KEVIN ALLISON: DIRECT BY MR. MURPHY

8

1 I'm saying, if every time I come in, it was always  
2 rescheduled. We only talked about the case, basically, for  
3 one day out of all the times that I came. And I came like  
4 at least once a week, at least 3 times a month. Sometimes  
5 I came twice in a week.

6 Q. Discussing your case with him?

7 A. No.

8 Q. You didn't?

9 A. 'Cause most of the time, I was getting rescheduled.  
10 And every time I would do -- I would talk to him, I would  
11 tell the man, "Look, I want to go to trial."

12 Q. Did you ask him to go to trial?

13 A. Yeah. I asked him the whole, I mean, all the way up  
14 until the last day I wanted to go to trial.

15 Q. Why did you plead guilty?

16 A. I didn't plead guilty. I pled No Contest.

17 Q. Why did you plead No Contest? I apologize.

18 A. Because, like I told him, I wasn't pleading guilty to  
19 something I didn't do. So then, I asked him about No  
20 Contest. He was like, "Well, if you plead No Contest, then  
21 you can appeal it and bring it back -- bring it back on an  
22 appeal."

23 Q. Did you appeal it?

24 A. That's when I put in a PCR.

25 Q. Did you file -- An appeal is different than a PCR.

1 Did you file an appeal?

2 A. You see, I didn't know an appeal was different from a  
3 PCR.

4 Q. Did you ask your attorney to file an appeal?

5 A. I mean, when I left the courtroom that day, he was  
6 like, "Don't worry about it, I'll take care of it." I  
7 mean, his word was, you know what I'm saying, you take this  
8 right here -- You see, it was 5 years, I mean. They  
9 offered me 5 years, and I turned it down all the way up  
10 from the time I got out of jail up until the time when I  
11 came before him that last week. And then it was like,  
12 "Well, if you don't take this right here, then they're  
13 going to bring a distribution warrant on you. And if you  
14 go ahead and take this, then you won't have to worry about  
15 the distribution. It will be just the 5 years." And I'm  
16 like, "Well," you know what I'm saying? "How much is 5?"  
17 He say, "Well, you only have to do like two and a half, two  
18 and a half years on 5 years." You know what I'm saying?  
19 It wasn't no 5-85 or nothing like that.

20 Q. What do you mean by 5-85?

21 A. 5-85 means that I -- Because he was like, "Well, how  
22 much time are you willing to do?" I'm like, "I'm not  
23 willing to do no time." You know what I'm saying?  
24 "Really, if you want to talk to me, I'm not willing to do  
25 no time." He said, "Well, two and a half years, that's

KEVIN ALLISON: DIRECT BY MR. MURPHY

10

1 really not much time."

2 Q. You were expecting to get -- to actually serve two and  
3 a half years.

4 A. Yeah.

5 Q. You weren't aware that this was an eighty-five percent  
6 no-parole charge?

7 A. Not not 4 -- not no 4 years and 6 months. I mean,  
8 that's 5 years.

9 Q. He didn't tell you that?

10 A. Not no 4 years and 8 months. No, sir.

11 And then he was like, "Well --" In the courtroom --  
12 courtroom when they read the distribution out -- the  
13 warrant for distribution out in the courtroom, it was like  
14 he called me and told me to come to court. I didn't know I  
15 was going before the judge to go to jail that day. I  
16 thought I was going before the judge to talk about, you  
17 know what I'm saying, the plea and all of that to find out  
18 where I stand. I didn't know I was going to jail that day.

19 So, when they was reading out the distribution  
20 warrant, and they was saying that what they had found on my  
21 possession -- saying they found buy money on my possession,  
22 I'm like "That's not right." He was like, "Don't worry  
23 about it. We're going to take care of it." I mean,  
24 "You're not even arguing for me." "Don't worry about it.  
25 I got you."

1 Q. You wanted to go to trial?

2 A. Yes, sir.

3 Q. You wanted your attorney to go to trial?

4 A. I wanted to go to trial.

5 Q. You didn't want to plead guilty?

6 A. No, sir.

7 Q. Now he asked a lot -- You answered a lot of questions  
8 in your plea agreement. If you didn't want to plead  
9 guilty, why would you answer those questions?

10 A. Like I said, I answered the questions -- Like he told  
11 me in the courtroom -- He told me, "Just whatever I tell  
12 you to say, just answer it." You know what I'm saying?  
13 Every time the judge would say something to me, he would  
14 say, "Say, yeah." "Say, yeah." "Say, yeah." So, I'm  
15 answering as my attorney told me to do. You know what I'm  
16 saying? I mean --

17 Q. Did he explain your Constitutional rights to you?

18 A. I mean, I ain't know nothing about -- No, he didn't  
19 explain my Constitutional rights. He didn't explain the  
20 Sixth Amendment, Fourteenth Amendment, or none of that to  
21 me.

22 Q. How about the right to speedy trial?

23 A. None of that?

24 Q. Compel witnesses?

25 A. (INAUDIBLE.)

KEVIN ALLISON: DIRECT BY MR. MURPHY

12

1 Q. Have a lawyer in all aspects --

2 MADAME COURT REPORTER: I'm sorry, I'm sorry. I need  
3 a verbal response. I'm sorry, sir.

4 A. No, sir. No, sir.

5 No, ma'am.

6 THE COURT: You can take your time.

7 A. No, sir.

8 THE COURT: Don't testify.

9 A. No, sir.

10 THE COURT: Let him answer the question.

11 MR. MURPHY: Thank you, Your Honor.

12 THE COURT: That's the reason he ain't got time to  
13 answer.

14 MR. ALLISON: No, I was shaking my head instead of  
15 answering.

16 THE COURT: Sir.

17 MR. ALLISON: Yes, sir.

18 THE COURT: That's not an answer on the record, Mr.  
19 Allison.

20 MR. ALLISON: Yes, sir.

21 THE COURT: And when I want you to talk, I'll ask you  
22 something, okay?

23 MR. ALLISON: Yes, sir.

24 THE COURT: All right, proceed, Counsel.

25 MR. MURPHY: Thank you, Your Honor.

1 Q. We're talking about Constitutional rights, Mr.  
2 Allison.

3 A. Yes, sir.

4 Q. Did he review your Constitutional right to have a  
5 lawyer in all aspects of the proceeding?

6 A. Meaning what?

7 Q. Have a lawyer assist you at your trial?

8 A. No, we never discussed that.

9 Q. How about to take the witness stand?

10 A. No, sir, because we didn't even go to trial.

11 Q. How about your right to silence not to incriminate  
12 yourself?

13 A. (INAUDIBLE.)

14 Q. How about to have the government prove the allegations  
15 beyond --

16 THE COURT: I didn't hear the response.

17 A. No, sir.

18 Q. How about your right to have the government prove the  
19 allegations beyond a reasonable doubt?

20 A. No, sir.

21 Q. Did you discuss your right to appeal?

22 A. No, sir, other than the thing about the no contest.  
23 That was it.

24 Q. How about the right to a jury trial?

25 A. Well, that's what I was asking for from the start.

KEVIN ALLISON: DIRECT BY MR. MURPHY

14

1 Q. So, you wanted to go to trial?

2 A. Yes, sir.

3 Q. Your attorney didn't discuss the evidence against you  
4 with you?

5 A. No, sir.

6 Q. He wasn't prepared for trial?

7 A. No, sir. Because he was more intent on me taking the  
8 plea than me going to trial.

9 Q. He told you that you'd be eligible for work release,  
10 and you're not?

11 A. Right.

12 Q. He didn't tell you there was an eighty-five percent  
13 time sentence?

14 A. He didn't explain to me what eighty-five percent was.  
15 And I said -- He told me if I went ahead and signed the  
16 plea that day, then the distribution wouldn't come up to  
17 where I would have to do eighty-five. It would just be the  
18 5 years, not eighty-five.

19 Q. What are you asking this court to do?

20 A. The same thing I started from the beginning. I wanted  
21 to go to trial.

22 Q. Thank you. Please answer any questions of the  
23 Attorney General's Office.

24 A. Yes, sir.

25

CROSS EXAMINATION

1 KEVIN ALLISON BY MR. BRANDT:

2 Q. Mr. Allison, the last thing you said, your attorney  
3 told you that it would be just the 5 years, not eighty-  
4 five. Is that what you said?

5 A. Yes, sir. A 5-year sentence, not a 5-85.

6 Q. So, you understood that it would be a 5-year sentence?

7 A. A 5-year sentence is 5 years, two and a half. It's  
8 two and a half years on a regular 5-year sentence. A 5-85  
9 is 4 years and 8 months.

10 Q. So, did he --

11 A. And he also --

12 Q. Did he say that you would get a 5-year sentence or  
13 that you would get --

14 A. He said I would get the 5-year sentence.

15 Q. But he said that it would be two and a half years  
16 served?

17 A. Yes, sir. And he said that I would be eligible for  
18 work release, and I'm not eligible for work release until  
19 the last 90 days of a 5-year sentence, a 5-85.

20 Q. And you said your attorney told you how to answer the  
21 judge's questions at the hearing?

22 A. I mean, he's standing right beside me. And every time  
23 the judge asked me, to say something to me, he would say,  
24 and I would answer as he answered, yes.

25 Q. So he was just kind of giving you answers in your ear?

KEVIN ALLISON: CROSS BY MR. BRANT

16

1 A. Yes, sir.

2 Q. So everything that you said was just repeating what he  
3 told you?

4 A. Yes, sir. And then he told me to say, if the judge  
5 asked me how I wanted to be tried, he said to say, "By my  
6 God and my country."

7 Q. And each question after that, he still told you how to  
8 answer it?

9 A. Yes, sir. And when the judge asked me about the 85, I  
10 was like -- He asked me did I understand. I said, "I  
11 didn't, but I understand now because you're telling it to  
12 my now in the courtroom."

13 Q. Did your attorney tell you to say that?

14 A. No, that's what I said because I really didn't  
15 understand -- I didn't know until then, so that's why I  
16 answered it.

17 Q. So you understood at that point when the judge asked  
18 you that it was an eighty-five percent?

19 A. And then I said something to my attorney. He was  
20 like, "Well, don't worry about it, I'm going to take care  
21 of that."

22 So, then after it was over, when they ran out of the  
23 courtroom, the -- about -- When they read the distribution  
24 warrant in the courtroom, they said that they found buy  
25 money in my possession. And I'm like, that's not right. I

1 didn't have any money on me. And he was like, "Don't worry  
2 about it, don't worry about it. We're going to take care  
3 of that." And he never argued the issue.

4 So then we went in the back after the courtroom  
5 session, I was talking to him, I would say, "Well, how you  
6 didn't argue the issue?" He say, "Well, we're going to  
7 take care of that at a later date." You know what I'm  
8 saying? Just, "I'll take care of it." And then he  
9 guaranteed me that he would help me get work release.

10 Q. He did?

11 A. He said that, "Well, I'm not supposed to do this, but  
12 I'll make a special effort for you. I will make, you  
13 know -- If I've got to write somebody, whatever, I will see  
14 that you go to work release."

15 Q. Did your attorney not tell the court that you  
16 disagreed with one fact regarding the money?

17 A. But he never argued the issue. He didn't -- I mean,  
18 he didn't explain what he -- what fact I disagreed with or  
19 what. I mean, it was a whole lot I disagreed with because  
20 none of it was true. That's why I wanted to take it to  
21 trial.

22 Q. You said you had in spite of your offer from the time  
23 you were charged all the way up to the hearing - -

24 A. And, I turned it down.

25 Q. But then things changed and they added the

KEVIN ALLISON: CROSS BY MR. BRANT

18

1 distribution charge?

2 A. No, he told me to take -- to go ahead and take the  
3 five. And I was like, "I don't want to take the five  
4 because I didn't want to take nothing. He was like,  
5 "Well" -- That's why I pleaded no contest.

6 Q. The original 5-year offer you got was just for that  
7 one PWID charge. Correct?

8 A. Right, and he said if I had -- If I went on and signed  
9 it, then that's where it would stand. It wouldn't be 5-  
10 and-5, two different charges. The day when I went before  
11 the judge, it was two different charges.

12 Q. So, you went before the judge, and they added the one  
13 charge with the same --

14 A. They read it in the courtroom.

15 Q. But with the same offer for the two charges?

16 A. No, no, it wasn't the same offer now. It's 5-85. It  
17 went from 5 to 5-85. That's two different sentences.  
18 That's two different charges.

19 Q. You had a different offer for 5-year concurrent  
20 sentences for two different charges at 85?

21 A. No, it was 5. If I signed the -- If I signed the plea  
22 now, it's 5 years, not 5-85. If I don't sign the plea,  
23 then it goes to 5-85. And it was like, "Well, you only do  
24 two and a half years on 5-85. And you'd be -- " I mean,  
25 "on 5 years, and then you would be at work release in no

1 time." No more of the 90 days to 120 days, if it would  
2 have been 5 years. On 5-85, it's totally different. 5-85,  
3 you have to do 4 years and almost 8 months.

4 Q. So on August 28th, you came -- No, not August 28th.  
5 The day of your plea was on April 30, 2010. You came to  
6 court and you knew at court that you were there for a plea.  
7 Correct?

8 A. I knew that I was going on before the judge to discuss  
9 my plea. I didn't know I was going before the judge to be  
10 sentenced. But that's what he told me.

11 Q. You thought you were going to plea, but not receive  
12 your sentence?

13 A. No, I was advised I was going before the judge to  
14 discuss it.

15 Q. Okay.

16 A. But, like I said, I been -- I wanted to go to trial to  
17 the end.

18 Q. And the judge --

19 A. But I couldn't even see -- I couldn't even receive my  
20 own evidence, a motion of discovery or nothing, none of  
21 that. I mean, then I was told by another attorney at a  
22 different time after I'd been sentenced that I could -- I  
23 was supposed to have gotten my motion of discovery at the  
24 beginning. They said they give that to their clients from  
25 the beginning. I mean, I never received any kind of

KEVIN ALLISON: CROSS BY MR. BRANT

20

1 motion, no kind of evidence, or none of that. I mean, I  
2 felt like I was denied that by my own attorney.

3 Q. Why didn't you just tell him that day, "I want to go  
4 forward. I want to go to trial."

5 A. I did tell him. I did tell him.

6 Q. Why didn't you tell the Court when they asked you if  
7 you wanted to plead?

8 A. Well, like I said, when I got in the courtroom before  
9 the judge, when the judge was talking, that's when I  
10 realized -- At that time when he sentenced me, that's when  
11 I realized I was being sentenced. I thought I was in there  
12 to go before the judge to discuss my plea. Not to go to  
13 trial and to be sentenced to go to jail.

14 Q. When the judge asked you if you understood that you  
15 were waiving your right to a jury trial; or your right to  
16 remain silent; your right to confront the witnesses, to  
17 call witnesses, you said you understood that you were  
18 waiving that. Correct?

19 A. I mean, I said, I answered what he told me to. And at  
20 that time, you know what I'm saying, he was saying if I  
21 take this plea, now I understand that's what's being done.

22 Q. So if you answered that you understood that, you  
23 didn't understand that; did you?

24 A. No, sir.

25 Q. So, were you being truthful at the time?

KEVIN ALLISON: CROSS BY MR. BRANT  
REDIRECT BY MR. MURPHY

21

1 A. At the time, yeah I was being truthful because, I  
2 mean, like I said, he said, If I take the plea, then that's  
3 what I was doing.

4 Q. But you just said you didn't understand that you were  
5 waiving the right to a jury trial?

6 A. Not until that day when I got in the courtroom.

7 Q. So, you understood it when you said it?

8 A. What do you mean, "I understood it when I said it"?

9 Q. In your hearing you said you understood you were  
10 waiving the right to a jury trial. Did you understand  
11 that?

12 A. I mean, I understood then that if I signed the papers,  
13 taken that plea, then I was waiving the right to a jury  
14 trial. But like I said, I wanted to go to trial from day  
15 one. But, I mean, I thought it was my lawyer's job to  
16 defend me and satisfy me, not the Solicitor. I mean he's  
17 supposed to be working for me not the Solicitor. But it  
18 seemed like the whole time he was working for the Solicitor  
19 instead of me because he was more concerned about what the  
20 Solicitor wanted out of the case than me. I mean, it's my  
21 life on the line, not the Solicitor's.

22 MR. BRANDT: Nothing further, Your Honor.

23 REDIRECT EXAMINATION

24 KEVIN ALLISON BY MR. MURPHY:

25 Q. Mr. Allison, you wanted to go to trial?

KEVIN ALLISON: REDIRECT BY MR. MURPHY  
RECROSS BY MR. BRANT

22

1 A. Yes, sir.

2 Q. You did discuss your case, the evidence against you  
3 with your attorney?

4 A. Like I said, sir, we talked one day.

5 Q. So, that's a "No," you did not discuss it?

6 A. Only thing we discussed was, he asked me, "Did I do  
7 it"? You know what I'm saying? And I'm like, "No, why  
8 would I sit here and say I did something if I'm telling you  
9 I didn't do it."

10 Q. And he wouldn't prepare for trial?

11 A. No, sir.

12 Q. And he told you that the deal -- You would be  
13 sentenced to 5 years, but you would serve about two and a  
14 half of that?

15 A. Yes, sir.

16 Q. He told you that you would be eligible for work  
17 release?

18 A. Yes, sir.

19 MR. MURPHY: No further questions, Your Honor.

20 MR. BRANDT: Just briefly?

21 THE COURT: Yes, sir.

22 RECROSS EXAMINATION

23 KEVIN ALLISON BY MR. BRANDT:

24 Q. Mr. Allison, did you say that you only met with him  
25 one time to discuss --

1 A. No, sir. I said that we only discussed my case one  
2 time. I met with him frequent times, at least 3 times a  
3 month.

4 Q. Okay.

5 A. And a couple of times, I met with him twice in the  
6 week because we had to reschedule.

7 Q. What would you talk about during those meetings?

8 A. The Solicitor. And if he had got any more evidence --  
9 I mean, got any more information from the Solicitor about  
10 the case. That was it.

11 MR. BRANDT: Nothing further, Your Honor.

12 THE COURT: Let me ask you this, Mr. Allison. Because  
13 I calculate eighty-five percent of 5 years is 4.25 years,  
14 or four and a fourth years. Does that sound right?

15 MR. ALLISON: No, sir. I had to do 4 years and  
16 almost -- It's between 6 -- It's like 6 months and some  
17 change.

18 THE COURT: You've got to do more than eighty-five  
19 percent?

20 MR. ALLISON: I've got to do more than 4 years. Yes,  
21 sir.

22 THE COURT: I know you've got to do more than 4 years.  
23 But the way I calculate it, I multiply .85 time 5, and I  
24 came up with 4.25.

25 MR. ALLISON: Well, on my -- on my max out date is

1 2014, October 2014, I think. Either August or October  
2 2014.

3 THE COURT: Now, if you wanted a trial, why didn't you  
4 tell the judge? When he started asking these questions,  
5 why didn't you tell him, "Hey, I'm not pleading anything to  
6 these charges. I want a trial. I'm not guilty, and I want  
7 a trial." Did you tell the judge that?

8 MR. ALLISON: No, sir, because --

9 THE COURT: "Don't ask me all these questions. I want  
10 a trial."

11 MR. ALLISON: Because my lawyer --

12 THE COURT: Did you tell him that?

13 MR. ALLISON: No, sir, because my --

14 THE COURT: Don't tell me what your lawyer said,  
15 you've got a brain, hadn't you?

16 MR. ALLISON: Yes, sir.

17 THE COURT: You can think for yourself, can't you?

18 MR. ALLISON: Yes, sir.

19 THE COURT: You've been around for a while; haven't  
20 you?

21 MR. ALLISON: Yes, sir. But I haven't been in a  
22 courtroom.

23 THE COURT: And, and, you understood him.

24 MR. ALLISON: No, sir.

25 THE COURT: He asked you these questions, you knew you

1 could go to trial. Why didn't you tell the judge you  
2 wanted a trial?

3 MR. ALLISON: Excuse me?

4 THE COURT: Why didn't you tell the judge you wanted a  
5 trial? You didn't want to plead.

6 MR. ALLISON: Because I told my lawyer I wanted a  
7 trial. And my lawyer --

8 THE COURT: Now, don't tell me about your lawyer. I  
9 want to talk about you. You are a person --

10 MR. ALLISON: My lawyer was talking for me, sir.

11 THE COURT: Do you think?

12 MR. ALLISON: Yes, sir.

13 THE COURT: Can you answer for yourself?

14 MR. ALLISON: Yes, sir.

15 THE COURT: Why didn't you tell the judge, "I don't  
16 want this plea, and I don't want this 5 years - -

17 MR. ALLISON: Because my lawyer told me he could take  
18 care of, and he was going to take care of me.

19 THE COURT: Wait a minute. Just let me finish my  
20 question, will you?

21 MR. ALLISON: Yes, sir.

22 THE COURT: You're not going to outtalk me - - -

23 MR. ALLISON: No, sir.

24 THE COURT: - - - and you're not going to out-think  
25 me.

1 MR. ALLISON: I'm not trying, sir.

2 THE COURT: But I want you to answer my questions  
3 while you're on the stand.

4 MR. ALLISON: Yes, sir.

5 THE COURT: Under oath.

6 MR. ALLISON: Yes, sir.

7 THE COURT: Why didn't you tell the judge, "My  
8 lawyer's not doing what I want him to do. He's not  
9 answering my questions. He's not providing me with  
10 anything. And I don't want to plead. I want a trial."  
11 Why didn't you tell --

12 The judge explained to you all of that: That you have  
13 a right to remain silent; that you have a right to a trial;  
14 the state has to prove you guilty beyond a reasonable doubt  
15 to a jury of twelve people, all twelve people have to agree  
16 that you're guilty before you can be found guilty. Didn't  
17 he tell you all that stuff?

18 MR. ALLISON: Yes, sir.

19 THE COURT: Right there on the record.

20 MR. ALLISON: Yes, sir.

21 THE COURT: Why didn't you say, "You know that's  
22 exactly what I want, a trial."

23 MR. ALLISON: Because like I said, sir --

24 THE COURT: Well, if you're going to tell me what your  
25 lawyer said I'm not- -

1 MR. ALLISON: I'm not.

2 THE COURT: Your lawyer does not make your decisions.

3 MR. ALLISON: I was -- I was under the influence that  
4 I wasn't going to trial that day.

5 THE COURT: Why didn't you tell him, "I'm not ready to  
6 go forward today. I want a trial. But I don't want to go  
7 forward today because my lawyer hadn't provided me what I  
8 need." Did you tell the judge that?

9 MR. ALLISON: No, sir.

10 THE COURT: He advised you, you're looking at 5 to 30,  
11 no parole; didn't he?

12 MR. ALLISON: Who?

13 THE COURT: The judge.

14 MR. ALLISON: No, sir.

15 THE COURT: Did he tell you, you're looking at 5 to  
16 30? Let me read it to you. First indictment I'm going  
17 over "alleges that on August the 28th" - -

18 Counsel, I'm on page 4 of the plea transcript.

19 "Alleges that on August the 28th, 2009, you were in  
20 possession of crack cocaine with intent to distribute. You  
21 were in violation of the laws of the State."

22 The second indictment alleges that "On that date, you  
23 did, in fact, distribute cocaine, crack cocaine, a  
24 controlled substance under the laws of this State. This  
25 carries from 5 to 30 years, does not allow for probation or

1 suspended sentence. It is a felony, and it is a parole  
2 ineligible offense. That is, whatever sentence one  
3 receives in these charges, they must serve at least eighty-  
4 five percent of that before they're eligible for any early  
5 release. And if they were, in fact, granted an early  
6 release, it would be into a community supervision program.  
7 Do you understand that?" You answered, "Now, I do, sir."

8 But you understood it. Did you say then, "Your Honor,  
9 I understand that. I don't want this plea. I want to go  
10 to trial"? You didn't say that; did you?

11 MR. ALLISON: No, sir.

12 THE COURT: All right, sir. Asked you how you pled,  
13 you said, "No contest." He told you that a no contest plea  
14 is the same as the guilty plea for the record; is that  
15 correct? Didn't he advise you of that in the court?

16 MR. ALLISON: Yes, sir.

17 THE COURT: The State presented what they intended to  
18 prove at trial if you went to trial to the Court in a  
19 guilty plea.

20 The Assistant Solicitor Ms. Desch told the Court that  
21 "On August the 28th, 2009, at approximately 9:15, York  
22 County Drug Enforcement Unit met with a confidential  
23 informant who indicated they could by from Kevin Allison,  
24 the Defendant here before you, stands before you today.  
25 That confidential informant was wired, searched, given buy

1 money by the DEU and monitored by the DEU, as he met with  
2 Mr. Allison at a location. And the confidential informant  
3 got to a location here in York County, he was setting up a  
4 deal with Mr. Allison. He indicated that Mr. -- the  
5 Defendant, was standing by a van when he approached the  
6 house, that the CI went up and said, 'I need Twenty Dollars  
7 worth of crack.' At that point, Mr. Allison went inside  
8 the house, got some keys, came back out, got the crack out  
9 of the Ford Explorer, gave the crack for an exchange of  
10 Twenty Dollars. The confidential informant came back and  
11 gave that crack to the DEU. That has since been tested and  
12 confirmed to be crack. An hour later, the CI went back to  
13 the address where the deal had gone down and as he  
14 approached Mr. Allison again standing outside of the same  
15 location they had been with the confidential informant. At  
16 that point, there was another lady out there who has since  
17 pled to a possession of marijuana charge, but she was, I  
18 think, the owner of the van where the CI first had seen Mr.  
19 Allison. When the officers arrived, they asked Mr. Allison  
20 for ID. At that point, the Defendant started walking  
21 towards that same Ford Explorer. The officer asked for  
22 consent, the Defendant said, 'Yes.' They ask him, at that  
23 point one of the officers noticed a bag of marijuana in his  
24 left hand. The bag was dropped. It was approximately 5  
25 grams of marijuana. The Defendant was arrested at that

1 point. Eventually the officer walked over and towards the  
2 Explorer. And immediately upon walking towards the  
3 Explorer the Defendant started yelling, 'It's not mine.  
4 It's not mine.' Search incident to arrest the officers  
5 found the Twenty dollars that they had, had been buy money,  
6 partially smoked marijuana in his short pocket. They also  
7 found in the Defendant's shorts pockets, the keys to the  
8 Explorer. They went on and searched the vehicle and found  
9 a substantial amount of crack cocaine.

10 Is that what they said at there -- Isn't that what the  
11 Solicitor said they were prepared to prove at trial? You  
12 remember that?

13 MR. ALLISON: Yes, sir. That's when I argued with --  
14 That's what I was arguing with my lawyer about - - -

15 THE COURT: Okay.

16 MR. ALLISON: - - - because on the other warrant they  
17 said that they found the buy money in the car. And on that  
18 warrant they said they found the buy money in my  
19 possession. And there was two different statements. And  
20 that's when I argued with my lawyer. I was like, "That  
21 ain't right." Because I didn't have no money -- I didn't  
22 have no buy money on me.

23 THE COURT: All right, but in any event, you had the  
24 right to say to the Court that you didn't want to plead,  
25 that you wanted a trial. Correct? And the Court explained

1 what was involved in the trial and what your rights were,  
2 and that you were given the plea?

3 MR. ALLISON: If I signed the plea, yes, sir.

4 THE COURT: And, but you didn't ever -- You never told  
5 the Court you hadn't gotten the information you needed from  
6 you lawyer, and you weren't going to plead you needed a  
7 trial. You didn't say that?

8 MR. ALLISON: No, sir, because my lawyer told me that  
9 he was going to take care of it.

10 THE COURT: All right. All right, thank you.  
11 Any questions related to the questions I asked?

12 MR. MURPHY: No, Your Honor.

13 MR. BRANT: No, Your Honor.

14 THE COURT: Thank you, sir. You may stand down, sir.

15 (WITNESS LEAVING WITNESS STAND.)

16 MR. MURPHY: A brief moment, Your Honor?

17 THE COURT: Yes, sir.

18 MR. MURPHY: Thank you.

19 (PAUSE AT 01:00 PM.)

20 MR. MURPHY: The Plaintiff rests, Your Honor.

21 MR. BRANDT: Your Honor, the State would call John  
22 Sullivan.

23 (WHEREUPON: JONATHAN SULLIVAN,  
24 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

25 DIRECT EXAMINATION

JONATHAN SULLIVAN: DIRECT BY MR. BRANT

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1 JONATHAN SULLIVAN BY MR. BRANT:

2 Q. Mr. Sullivan, you represented Mr. Allison on these two  
3 drug charges?

4 A. Yes, sir.

5 Q. You were present for his testimony?

6 A. Yes, I was.

7 Q. Do you recall how many times you met -- Or actually,  
8 when did you -- When were you appointed to take his PWID  
9 case?

10 A. I was originally appointed to represent Kevin in  
11 October of 2009. He had his initial appearance on October  
12 the 12th of 2009, which would have been our first and  
13 probably most lengthy meeting beginning in October of 2009.

14 Q. Did you request discovery from the State?

15 A. I did, and I had that And, in fact, my notation in the  
16 file indicates that Kevin and I reviewed, of course,  
17 whatever discovery materials we would have had at his  
18 initial appearance date on October the 12th.

19 Q. And would you have had all of the discovery at that  
20 point?

21 A. Yes, sir.

22 Q. What about information pertaining to CI?

23 A. No, we didn't -- As far as the electronic listening  
24 device, no they -- The Solicitor who was prosecuting the  
25 case does not turn that information as far as just the

1 recording device over to us up until the case is called to  
2 trial. So, we did not have the electronic listening  
3 device. But other than that, we had all the other  
4 discovery.

5 Q. When did you first learn about the distribution of  
6 crack, second-offense charge?

7 A. Basically, of course there was -- It probably requires  
8 some explanation. According to the discovery materials, of  
9 course as you heard, they originally sent out the  
10 confidential informant at about Nine o'clock on August the  
11 29th. And then later on the narcotics officers came in  
12 about an hour later, I believe. And that's when they  
13 arrested Mr. Allison for the possession with intent to  
14 distribute. They held out the distribution warrants and  
15 did not serve them on him for who knows whatever reason  
16 that was. The original plea offer was actually a 6-year  
17 plea offer. And we were in trial posture for many months.  
18 Of course, you know, we had to wait on the drug report and  
19 things like that, but we were in trial posture. And then,  
20 I believe, in March or actually April when the case got  
21 called to trial, that's when we received information from  
22 the State that they intended to serve those distribution  
23 warrants on Mr. Allison. So, it would have been in March  
24 or April when they indicated they were actually going to go  
25 forward and serve those warrants.

JONATHAN SULLIVAN: DIRECT BY MR. BRANT

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1 Q. And the evidence for the two cases were related.

2 Correct?

3 A. Yes, and it was part of the exact, same file.

4 Q. That original 6-year offer, were any other details  
5 discussed regarding - -

6 A. The only offer, I mean -- The only details as far as  
7 that would have been concerned was because they weren't  
8 going forward on the distribution. So, it would have just  
9 been a 6-year offer to cover the possession with intent to  
10 distribute, dismissing the marijuana charge.

11 Q. And then, when did the 5-year offer come around?

12 A. The 5-year offer came around as we got closer to the  
13 tentative trial date probably in April, I would guess. I  
14 know he pled, I guess, the end of April, so probably  
15 sometime right around when he pled in April.

16 Q. It was, I guess, closely related in time?

17 A. Correct.

18 Q. Did you ever advise him regarding the parole  
19 eligibility?

20 A. I don't recall as far as what -- what, you know. I  
21 think I indicated in my file that the charge carries up to  
22 eighty-five percent, but as far as the details of that, I  
23 don't know what we got into. And I don't have that notated  
24 in my file.

25 Q. Are you aware of any reason you would have advised him

1 that you would get out in two and a half?

2 A. No.

3 Q. Did you advise him regarding the work-release program?

4 A. I did mistakenly advise him that he would be eligible  
5 for work release.

6 Q. As far as you are aware, is he eligible for release  
7 right now?

8 A. I do not know the details of that.

9 Q. Did Mr. Allison indicate, as he testified, up until  
10 the day of the plea hearing that he wished to go to trial?

11 A. Sure. From the inception, Kevin always maintained to  
12 me that he was innocent, you know, of the possession with  
13 intent to distribute of these charges. So, that's why we,  
14 you know, from the very beginning, our preparation was that  
15 this case was going to go to trial.

16 But then once we received information from the State  
17 that they were going to then, in turn, serve those  
18 distribution warrants, that placed us in a much tougher  
19 position.

20 Kevin was placed on the trial board, I believe, the  
21 week of April the 26th, the same week that he pled. He was  
22 listed as a backup trial. At that point, the distribution  
23 warrant had not been indicted, which means the Solicitor  
24 could have gone forward -- intended to go forward on that  
25 possession with intent to distribute as a second offense

JONATHAN SULLIVAN: DIRECT BY MR. BRANT

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1 carrying 5-up-to-30. Had Kevin been convicted of that  
2 charge, they could have still brought back that  
3 distribution warrant, unfortunately, placing him in an even  
4 tougher position where it would have been a distribution  
5 third, placing him in the 15-to-30 year-category.

6 So, that's when, you know, we changed posture as far  
7 as -- And, that's when I advised him that I thought it was  
8 in his best interest to take the State's plea offer.

9 Q. When did he indicate to you that he was willing to go  
10 forward with the plea?

11 A. We met on April the 23rd, and we discussed that in my  
12 office. That would have been a non-court week, I believe.  
13 That would have been a Friday. We discussed the situation.

14 We also, actually, reviewed a plea affidavit, in which  
15 case I advised him of his right to trial and all of those  
16 things. He signed that. He also signed the paperwork on  
17 the 23rd, I believe, that we didn't go in front of the  
18 judge. The reason we arranged that is because I didn't  
19 want Kevin to be in a situation where the law enforcement  
20 was out trying to serve that additional warrant on him.

21 So, we were able to negotiate with the Solicitor's  
22 Office that if he would come in and sign the paperwork in  
23 good faith to indicate that he intended on pleading, that  
24 they would hold back those warrants and not arrest him on  
25 them. So, that was the reason that we had done that the

1 Friday before.

2 Q. And I see you have your files in front of you.

3 A. I do.

4 Q. Do you have that plea affidavit in your file?

5 A. Yes, I do.

6 MR. BRANT: Permission to approach, Your Honor?

7 THE COURT: Yes, sir.

8 Q. And you reviewed this with him - -

9 A. On April the 29th. That's my signature, and that's  
10 his signature, which would have been Friday.

11 Q. The 23rd?

12 A. Excuse me, the 23rd. That would have been a Friday,  
13 and I believe he pled the next -- the next week.

14 Q. And you saw him sign this?

15 A. That's actually my signature there, but that's his  
16 signature. Yes, we reviewed that together.

17 Q. And he appeared to understand everything that was on  
18 this sheet?

19 A. Yes.

20 MR. BRANDT: Brian, do you want to look at this?

21 Your Honor, I'm going to put this in evidence.

22 MR. MURPHY: No objections.

23 THE COURT: In without objection.

24 (WHEREUPON: DEFENDANT'S EXHIBIT NUMBER ONE IDENTIFIED  
25 AND MARKED, RECEIVED INTO EVIDENCE.)

JONATHAN SULLIVAN: DIRECT BY MR. BRANT

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1 Q. And did Mr. Allison ever indicate to you reasons why  
2 he wanted to accept the plea on the 23rd when he signed the  
3 affidavit?

4 A. I don't remember the specific discussion, I guess, the  
5 details of the discussion that we had other than once, you  
6 know -- once we were apprised by the State that the  
7 distribution warrants were going to be served, you know,  
8 that's, of course, when I advised him that I thought it was  
9 in his best interest to take that offer, you know -- you  
10 know.

11 But, he did always maintain his innocence to me.  
12 That's the reason for the No Contest plea. But, I think at  
13 that point, we were in a much different position that we  
14 were back in October when I first tried representing him.

15 Q. And, did he indicate that he wanted the opportunity to  
16 have the second -- for the distribution charge remain a  
17 second and not, I guess, risk having a consecutive  
18 sentence? That means not going to trial separately.

19 A. Correct, I think that was the thrust of our  
20 conversations.

21 Q. And the possession of marijuana charge, that got  
22 dropped?

23 A. Was dismissed, yes. And that was originally part of  
24 the plea offer all along. Even the original 6-year plea  
25 offer, they were going to dismiss that marijuana charge.

1 Q. And are you aware of how much time he faced if he had  
2 gone to trial on all these charges?

3 A. Thirty years on each one. . And I guess a year on the  
4 marijuana charge.

5 Q. Did you tell him that?

6 A. Yeah, we discussed that at the initial appearance on  
7 October 12th.

8 Q. So, he knew that he faced upward to 60 years?

9 A. Well, at that point, he only was looking at up to 30.  
10 But, yes, he knew what the possession with intent to  
11 distribute as far as it carrying the maximum penalty of up  
12 to 30 years.

13 Q. And he knew that could be a percent to be tacked on  
14 for the second charge?

15 A. We did discuss consecutive versus concurrent  
16 sentences.

17 MR. BRANT: I beg the Court's indulgence.

18 Q. Did you tell Mr. Allison at the plea hearing how to  
19 answer the judge's questions?

20 A. No, I did not. I mean, as far as, I guess, I don't  
21 know if he's confusing what I said. But, as far as, we  
22 went over that plea affidavit which, of course, contains  
23 many of the questions that the judge will advise a client.  
24 And what my practice is, is I orally read each question to  
25 my clients, and then have them answer it to me and then I

JONATHAN SULLIVAN: DIRECT BY MR. BRANT

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1 write their answer down on the line. So, to that extent,  
2 if that's -- If he interpreted that to mean I advised him  
3 how to answer it, I guess the answer would be, yes. But as  
4 far as whispering in his ear, no, that was not something  
5 that I did.

6 Q. So, when he answered the judge's questions verbally,  
7 you were not verbally feeding him answers?

8 A. No. I know there was an issue, as Mr. Allison  
9 indicated, with respect to the Twenty Dollars. The  
10 Solicitor misstated those facts when she was reciting them  
11 to the judge as part of the plea. Kevin brought that to my  
12 attention, so that's why I went on the record to clarify  
13 that for the judge. I think that was -- I do recall having  
14 that conversation with him at the bench.

15 Q. So, the conversation that you had with him, the plea  
16 just regarding --

17 A. As best as I can remember, yes.

18 Q. You heard his testimony about --

19 THE COURT: Excuse me, let me clarify that. And I  
20 didn't think I went far enough. But, was that corrected to  
21 say that the Twenty Dollars was found in the vehicle and  
22 not in the pocket?

23 MR. SULLIVAN: I think that ended up being correct  
24 because I believe it's either indicated on the evidence  
25 inventory sheet or something that Ms. Desch had misstated

1 that fact to the Court. So, we wanted to clarify that.

2 THE COURT: So, it was found in the automobile?

3 MR. SULLIVAN: In the automobile. Not on Mr.

4 Allison's person.

5 THE COURT: Okay. Go ahead, I'm sorry. I just wanted  
6 to clear that up when I had a chance.

7 Q. You heard Mr. Allison's testimony about your interest  
8 in pleasing the Solicitor? Or being interested in what the  
9 Solicitor's interests were and not his.

10 A. That's, you know, that's not the case. Obviously, I  
11 try to place my client's interest ahead of everyone's. In  
12 this case, obviously, it had a non-traditional setting as  
13 far as them not originally serving those distribution  
14 warrants. So, unfortunately, you know, the Solicitor had a  
15 lot of leverage in this case. So, we had some discussions  
16 about that.

17 Q. But, if you would just elaborate on your role in  
18 communicating with the Solicitor when it comes to the trial  
19 and plea. You understand what I'm asking?

20 A. Sure. Of course, a lot of it depends upon the  
21 particular Solicitor as far as whether or not they give you  
22 a deadline or not a deadline, in which case, accept the  
23 plea offer. This particular Solicitor does not give a plea  
24 deadline up until she knows when her case is going to be  
25 called for trial. Then, at that point, we lose the plea

1 offer.

2 Kevin maintained to me he was innocent from the very  
3 beginning of this case. So, you know, which case I convey  
4 to Ms. Desh that, you know, that we were in a trial  
5 posture. You know, Kevin and I also discussed the  
6 possibility of me trying to negotiate further with Ms. Desh  
7 to see if she would come down off of the original 6-year  
8 offer. So, although we were in trial posture, we continued  
9 to try to negotiate to get that sentence down from six,  
10 down to the lowest amount possible.

11 Q. Then why is it important to, based on his testimony,  
12 be interested and keep up with the Solicitor's position on  
13 the case?

14 A. Well, of course, in a situation, particularly in these  
15 drug offenses, which carry so much time, you know, the plea  
16 offers are dictated and come from the Solicitor. In this  
17 situation, obviously, with the distribution warrants, that  
18 complicated things that much further.

19 I didn't want Kevin to be in a situation where he got  
20 arrested and had to go bond out of jail, pay all that money  
21 and things like that, for the second set of charges. So,  
22 again, we were able to negotiate a situation with the  
23 Solicitor where they would not serve those warrants and  
24 arrest him. And they would just be disposed of when he  
25 came to court.

1           So, those are the two primary issues that I, of  
2 course, negotiated with the Solicitor.

3 Q.   And the Solicitor wanted to the Solicitor could have  
4 not made these offers and could proceed to trial on both of  
5 them separately?

6 A.   Sure.

7 Q.   Did you feel like you met and conferred with Mr.  
8 Allison a sufficient number of times?

9 A.   I do. I note, you know, there were several times,  
10 many times, in fact, when Kevin would come up here, and I  
11 wouldn't really have any details to discuss with him, so I  
12 would, you know, release him or things like that.  
13 Particularly, we were waiting several months for the drug  
14 report to come back. So, you know, after we would meet,  
15 still waiting on the drug report, I wouldn't really have  
16 anything to report to him. So, I would release him without  
17 really discussing much details of his case. But, we did  
18 meet, you know.

19 Q.   Were you ready to go to trial if he wanted to?

20 A.   Yes, we were ready to go on that possession with  
21 intent to distribute.

22 Q.   You were prepared?

23 A.   Yes.

24 Q.   Or, you were prepared?

25 A.   Yes.

JONATHAN SULLIVAN: CROSS BY MR. MURPHY

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1 MR. BRANT: Nothing further, Your Honor.

2 MR. MURPHY: Thank you, Your Honor.

3 CROSS EXAMINATION

4 JONATHAN SULLIVAN BY MR. MURPHY:

5 Q. You told Mr. Allison that he would be eligible for  
6 work release?

7 A. I did. I made a mistake.

8 Q. And that was wrong?

9 A. Yes.

10 MR. MURPHY: Permission to approach, Your Honor.

11 THE COURT: Yes, sir.

12 MR. MURPHY: I hand you Defendant's One.

13 Q. There's a "yes" besides these questions. Who wrote  
14 that yes in?

15 A. I wrote that yes. As I indicated to the Assistant  
16 Attorney General, my practice with respect to these is as I  
17 read the question, I tell them, pretend like I'm the judge  
18 in this situation, I'm going to be asking you these  
19 questions. Give me an answer. Once they -- Once I elicit  
20 an answer, I write that in. That was my handwriting.

21 Q. Just to go a little bit out of order. What did you  
22 tell him regarding the work release?

23 A. I don't -- I do recall telling him that he would be  
24 eligible for work release. I don't remember telling him  
25 specifically when he would be eligible. But I did do that.

JONATHAN SULLIVAN: CROSS BY MR. MURPHY  
REDIRECT BY MR. BRANT

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1 And my reason for that, I made a mistake thinking that only  
2 violent offenses would not be eligible for work release.  
3 And so I, you know, I did advise, errantly advise him of  
4 that.

5 MR. MURPHY: No further questions, Your Honor. Thank  
6 you.

7 MR. BRANDT: I beg the Court's indulgence.

8 REDIRECT EXAMINATION

9 JONATHAN SULLIVAN BY MR. BRANDT:

10 Q. Mr. Sullivan, do you know when you first advised him  
11 regarding work release?

12 A. I believe it would have been about the same time he  
13 signed that paperwork, probably about April the 23rd when  
14 he signed that paperwork. Because I know that was a big  
15 concern of his. I know Kevin has family up here in the  
16 area, and he wanted to try to get as close as possible back  
17 to his family. So, it would have been right about the time  
18 he pled in April.

19 Q. Based on your conferences with him, your discussions,  
20 was it your understanding that he wanted to plead  
21 guilty, he was more interested in having the second set of  
22 charges run concurrent with the 5-year sentence and, or,  
23 was he more interested in the work release? Does that make  
24 sense?

25 A. No, I don't -- No, I mean I -- I really don't know if

1 I know how to answer that question. But for that second  
2 set of charges, being informed that, that was going -- He  
3 was going to be served with those and be facing those  
4 charges, you know, we were in a trial posture all the way  
5 up to that point. It wasn't until we found out the  
6 information about those charges, which of course, that's  
7 when, you know, things changed drastically. And then, you  
8 know, as a matter of course when we were signing the  
9 paperwork, Kevin just had the normal questions that every  
10 client has. So, I wouldn't say that, you know - -

11 Q. So, he informed you that he wanted to plead guilty  
12 before you advised him about work release?

13 A. I don't that. I don't know the answer to that  
14 question, honestly, timing-wise.

15 Q. You just said that after that he made the decision,  
16 you were filling out the paperwork, and that's when he  
17 asked you - -

18 A. I'm reluctant to testify because I don't know if I  
19 could do it accurately. I just don't -- I really don't  
20 know chronologically which took place first.

21 MR. BRANDT: Nothing further, Your Honor.

22 MR. MURPHY: Nothing further, Your Honor.

23 THE COURT: Thank you, sir.

24 MR. SULLIVAN: Thank you, Your Honor.

25 THE COURT: Anything further?

1 MR. BRANDT: Nothing further, Your Honor.

2 MR. MURPHY: Your Honor, a rebuttal for Mr. Allison.

3 THE COURT: On what? I'm not going to let him skip  
4 back up here and go through this whole litany like he did  
5 before.

6 MR. MURPHY: No, Your Honor.

7 THE COURT: Huh?

8 MR. MURPHY: No, Your Honor. I will instruct him not  
9 to. Simply --

10 THE COURT: What is he going to respond to then, tell  
11 me.

12 MR. MURPHY: On work release, Your Honor.

13 THE COURT: What is he going to say, that was  
14 important to him? All right, put him back up.

15 You're under oath.

16 REDIRECT EXAMINATION

17 KEVIN ALLISON BY MR. MURPHY:

18 Q. Mr. Allison, you're under oath.

19 A. Yes, sir.

20 Q. Your attorney told you would be eligible for work  
21 release?

22 A. Yes, sir.

23 Q. You were not eligible for work release?

24 A. No, sir.

25 Q. Would you have pled guilty had you been properly

KEVIN ALLISON: REDIRECT BY MR. MURPHY

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1 advised that you were not eligible for work release?

2 A. No, sir.

3 MR. MURPHY: No further questions, Your Honor.

4 MR. BRANT: Nothing further, Your Honor.

5 THE COURT: Mr. Allison, do you understand that being  
6 eligible for work release and getting it are two different  
7 things? Not everybody who is eligible for work release  
8 gets it. Do you understand that? Only a percentage of  
9 them get it. Are you aware of that?

10 MR. ALLISON: No, sir.

11 THE COURT: You haven't found that down there where  
12 you are? You've got all this other information, but --

13 MR. ALLISON: I'm saying, what --

14 THE COURT: You haven't got the information that  
15 everybody that applies for work release doesn't get it?  
16 You're not aware of that?

17 MR. ALLISON: That everybody --

18 THE COURT: There's no guarantee of getting work  
19 release just because you are eligible?

20 MR. ALLISON: If you are eligible for work release,  
21 then once you run low, you get work release after -- You've  
22 got to be there 60 days. They say, 60 days.

23 THE COURT: You'd be eligible. It doesn't mean you're  
24 going to get it. They don't have enough work release for  
25 everybody who wants it.

1 MR. ALLISON: I mean, it's not guaranteed that you'll  
2 find a job.

3 THE COURT: Exactly. There's no guarantee you're  
4 going to get it. Correct?

5 MR. ALLISON: There's no guarantee you'll find a job.  
6 Correct.

7 THE COURT: And no guarantee you'll get work release  
8 because if they don't have anything for you to do, there  
9 won't be work release.

10 MR. ALLISON: Well, they send you out -- They send you  
11 out on interviews. Once you rollover, they send you out on  
12 interviews. It's up to you to win the -- whoever hiring,  
13 over. I mean, that's just like an interview on a regular  
14 job.

15 THE COURT: They also have a place, at a work release  
16 site for you, a bed for you; don't they?

17 MR. ALLISON: Yes, sir.

18 THE COURT: Yes, sir. And so not everybody gets it;  
19 do they?

20 MR. ALLISON: I don't know.

21 THE COURT: Now let me ask you this. And, I'm sure  
22 your attorney has probably explained this to you that, of  
23 course, I can't change your sentence if you were to get  
24 relief in this.

25 The only possible relief you could get would be

1 you -- You could get a new trial and the sentence would be  
2 vacated. You'd come back, and then they could try you on  
3 possession with intent to distribute. And if you are found  
4 guilty on that charge -- the jury might find you not  
5 guilty -- but if they find you guilty on that charge, you  
6 could get up to 30 years with no parole.

7 MR. ALLISON: Yes, sir.

8 THE COURT: You understand that?

9 MR. ALLISON: Yes, sir.

10 THE COURT: And then they could try you on the  
11 distribution of crack cocaine charge. And if you were  
12 convicted on the first charge, and they tried you on the  
13 other one, the second charge, you could get another 30  
14 years, no parole, on that charge, which could be concurrent  
15 or consecutive. There are no guarantees about the five.  
16 That's the point I'm trying to make.

17 You'd be looking at, the maximum you could get if you  
18 come back and get tried on both of these and get convicted,  
19 would be 60 years, no parole. Do you understand that?

20 MR. ALLISON: Yes, sir.

21 THE COURT: Okay. And that's what you're asking the  
22 Court to do? At least to give you a new trial, so you can  
23 go to trial on this charge?

24 MR. ALLISON: Yes, sir.

25 THE COURT: Thank you. Any questions related to the

1 question I asked?

2 MR. MURPHY: No, Your Honor.

3 MR. BRANDT: No questions.

4 THE COURT: You may stand down.

5 (WITNESS LEAVING WITNESS STAND.)

6 THE COURT: Counsel, I'm going to ask you, if you  
7 will, I'll take this case under advisement. There's only  
8 one issue insofar as the Court is concerned. And that is  
9 whether the being advised, although, of course -- and, you  
10 can take this into consideration as well when you do your  
11 research -- The judge advised him that it is a no parole  
12 sentence. It was five; it was going to be no parole and he  
13 had to serve at least eighty-five percent. And he wouldn't  
14 be eligible. Then if he got released after eighty-five  
15 percent, which according to my calculations is 4.25 years,  
16 that he would be on community supervision if he got out.  
17 That's what the judge advised him. That's what he was  
18 aware of when he pled guilty. So, you take that into  
19 consideration as well.

20 But the question would be whether if his attorney  
21 advised him he would be eligible for work release --  
22 there's no guarantee anybody's going to get work release, I  
23 do not believe. But, if he would, that he would be  
24 eligible for work release. And he was advised of that and  
25 pled, that's a collateral consequence of his plea. But

1           whether that would entitle him to get a new trial or not --  
2           whether that would render ineffective assistance to the  
3           extent that he would get a new trial again is a collateral  
4           issue. And, so I don't know. That would be the issue.  
5           You can take and consider also research because there may  
6           be something somewhere in a case where the trial Court --  
7           where the plea judge advises him that, that's not the case,  
8           whether that would control or not. In other words, take  
9           both of those factors in, and see if you can find any legal  
10          authority on that. We'll be looking for it to. As far as  
11          the Court's concerned, that's the only issue in this case.

12                 Yes, sir.

13                 MR. MURPHY: Thank you, Your Honor. From the  
14          Plaintiff's standpoint, it would be a collateral issue.  
15          Completely understood, I don't think he had to be advised  
16          of that at all. But, I believe that once he is advised of  
17          that improperly that, that becomes an issue for a reversal  
18          of the plea and for a new trial.

19                 THE COURT: And that's what I want you to find out for  
20          me and give me some authority on it. And take into  
21          consideration the fact that the judge advised him  
22          differently at the time he took his plea and before he took  
23          his plea. And whether that makes a difference or not. And  
24          whether or not he was advised by his attorney. If the  
25          judge advised him that, that was not the case, and take the

1 plea, he accepted the plea, nevertheless, whether that  
2 makes a difference.

3 MR. MURPHY: Thank you, Your Honor.

4 THE COURT: So those, to Court those are the issues in  
5 this case. That is the issue in this case.

6 MS. ELLIOT: I think maybe not on this particular  
7 point, as far as work release, there is a case, it's my  
8 recollection, there is a case out there that basically says  
9 the judge's colloquy cures any issues - -

10 THE COURT: Well, that's what I'd like to see. We'll  
11 be looking for it too. See what you can find. That's why  
12 I raised that point because if the judge didn't address  
13 it, what his sentence would be, and that it was a no parole  
14 offense, if he didn't address it, that would be a different  
15 factual situation than if the judge did. And so, I don't  
16 know if it makes a difference in the cases or not. So, you  
17 need to consider both of those and find them. See if you  
18 can find both of the same case would be helpful.

19 MR. MURPHY: And Your Honor, I think it would be a  
20 little bit different in that case because work release  
21 wasn't specifically referred to by the judge. It was  
22 definitely eligible - -

23 THE COURT: But, Counsel, Counsel, come on. The judge  
24 advised him 5 years, no parole. You've got to serve  
25 eighty-five percent of this before you are eligible for

1 anything. And so to say that, that means the judge didn't  
2 advise him that there would be no work release, he did  
3 advise him of being work release. He said, "You've got to  
4 serve eighty-five percent."

5 MR. MURPHY: Thank you, Your Honor.

6 THE COURT: All right. So now, whether that overrides  
7 the erroneous information given to him by his attorney or  
8 not, that's what I don't know. I just know he had that  
9 information at the time he pled and he still chose to go  
10 forward with his plea. And so one might presume from that,  
11 assume from that, that he went forward with the plea  
12 nevertheless. That it wasn't any work release, and he was  
13 aware of that and the plea agreement was more important to  
14 him than the work release. But, I don't know that.

15 I'd like to see if this case has come before the  
16 appellate courts before and what position they took. I'd  
17 like to see that. And, we'll do our own research as well.  
18 But please let me have something on that in about ten days  
19 or so.

20 MR. MURPHY: Thank you.

21 THE COURT: All right, thank you.

22 (COURT RECESSED FOR LUNCH AT 01:30 PM.)

23 -- END OF TRANSCRIPT OF HEARING --  
24  
25

CERTIFICATE OF REPORTER

State of South Carolina )  
 )  
County of York )

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 2nd day of June 2011.

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

Wanda Nelson

Wanda Nelson, CVR

Certified Verbatim Reporter,  
Official Court Reporter,  
Notary Public, in and for  
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 11-28 / 1 2011

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF GENERAL SESSIONS  
SIXTEENTH JUDICIAL CIRCUIT

State of South Carolina )  
 )  
 )  
 )  
 )  
 )  
 )  
 )  
 )  
 )

NO Contest

AFFIDAVIT OF DEFENDANT FOR  
GUILTY PLEA

V.

Kevin Allison

Defendant.

not → Marijuana charge is being dismissed.

no contest

The Defendant states to the Court that the Defendant wants to plead guilty to the following charges:

PWID Crack, 2<sup>nd</sup>  
Distribution Crack, 2<sup>nd</sup>

The negotiated plea agreement is as follows:

5 years on each charge to Run CONCURRENT

In connection with the plea, I certify that the answers to the following questions are true:

- 1.) Are you under the influence of any alcohol, drugs, narcotics, medicines, pills or any other intoxicants? yes
- 2.) Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand the element of every charge? yes
- 3.) Have you and your lawyer discussed the possible defenses, if any, to the charges? yes
- 4.) Are you satisfied with your lawyer's legal services? yes
- 5.) Do you understand that you have the right to plead not guilty and be tried by a jury? yes
- 6.) Do you understand you have the right to remain silent, that is the right against self-incrimination? yes
- 7.) Do you understand that you have the right to confront and to cross-examine witnesses against you? yes
- 8.) Do you understand that at a jury trial you have the right to have a jury determine whether the State has produced enough evidence to convict you beyond a reasonable doubt? yes
- 9.) Do you understand that a jury would be told that you are presumed innocent unless the State has proved beyond a reasonable doubt that you are guilty of the charge or charges against you? yes
- 10.) Do you understand that if you plead guilty you give up all of your constitutional rights: (Except the right to appeal)? yes
- 11.) Do you understand that even though you have entered a guilty plea to the charge or charges you have a right to appeal the case and the sentence of the Court, but you must do that within 10 days? yes

no contest

Date: 4/23/10

[Signature]  
Defendant

[Signature]  
Attorney for Defendant

STATE OF SOUTH CAROLINA ) FILED-RECEIVED ) IN THE COURT OF COMMON PLEAS  
COUNTY OF YORK ) 2011 SEP 16 ) AM 11:32 ) SIXTEENTH JUDICIAL CIRCUIT

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

2010-CP-46-3809

Kevin Allison, #340643,  
Applicant,

v.

State of South Carolina,  
Respondent.

**ORDER OF DISMISSAL**

This matter comes before the Court by way of Application for Post-Conviction Relief filed September 8, 2010, and amended on September 23, 2010. The Respondent filed its Return on April 27, 2011. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on June 2, 2011. The Applicant was present at the hearing and was represented by Brian R. Murphy, Esquire. The Respondent was represented by Harrison D. Brant, Esquire, of the South Carolina Attorney General's Office.

The Applicant testified on his own behalf at the hearing. The Applicant's trial counsel, Jonathan C. Sullivan, Esquire, also testified at the hearing. This Court had before it the records of the York County Clerk of Court including the Applicant's signed plea affidavit, the Applicant's records from the South Carolina Department of Corrections, and the plea transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. He was indicted at the March 2010 term of the York County Grand Jury for Possession of Crack Cocaine with Intent to Distribute, 2nd offense (2010-GS-46-1165). He was also charged with Distribution of Crack

Cocaine (2010-GS-46-1692). He was represented by Jonathan Sullivan, Esquire. On April 30, 2010, the Applicant waived presentment of the distribution charge and entered a no contest plea to both offenses as charged with a recommendation of five (5) years from the State.<sup>1</sup> The Honorable John C. Hayes sentenced him to five (5) years for each charge, concurrent. He did not appeal his convictions or sentences.

The Court had before it the records of the York County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Applicant's plea transcript, and a copy of the Applicant's plea affidavit.

#### STATEMENT OF FACTS

On August 28, 2009, the York County Drug Enforcement Unit ("DEU") met with a confidential informant ("C.I.") who indicated they could buy from the Applicant. (Tr. 6). The C.I. was wired, searched, given money, and monitored by the DEU as he met with the Applicant. The C.I. approached the Applicant who was standing by a van near a house. (Tr. 7). The C.I. said he needed twenty dollars (\$20.00) worth of crack. The Applicant went inside the house, grabbed some keys, came back out and got crack out of the Ford Explorer. The Applicant then gave the C.I. crack in exchange for the twenty dollars. The C.I. then came back and gave the crack to the DEU, which was subsequently tested and confirmed to be crack cocaine.

About an hour later the DEU went back with the C.I. to the location, and the Applicant was again standing outside the house in the same location by the van. (Tr. 7). They asked the Applicant for identification, and at that point he started walking toward the Ford Explorer. An officer asked for consent to search. The Applicant consented, at which point an officer noticed a bag of marijuana in his left hand. The bag was dropped, and the Applicant was arrested. One of

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<sup>1</sup> The transcript reveals the Applicant was also charged with a marijuana offense that was dismissed in exchange for his plea. (Tr. 9).

the officers then started to walk toward the Ford Explorer, at which point the Applicant immediately started yelling, "It's not mine, it's not mine." (Tr. 7-8). The officers searched the Applicant and found a twenty dollar bill, a partially smoked marijuana cigarette, and the keys to the Explorer. (Tr. 8). The Explorer was searched and officers found 4.3 grams of crack and \$315.00 in cash in the upholstery of the driver's side. The crack found in the Explorer was tested and found to be 2.69 grams of crack.

### **ALLEGATIONS**

In his application for post-conviction relief, and through his testimony at the evidentiary hearing, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel/ involuntary guilty plea
  - a) "Failure to investigate enhancement law"
  - b) Counsel incorrectly advised Applicant he would only serve 2.5 years and be eligible for work release
  - c) Failure to advise of right to appeal

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

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

#### **Ineffective Assistance of Counsel/ Involuntary Guilty Plea**

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against

him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the post-conviction relief hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

*Failure to Investigate Enhancement Law*

In his application, the Applicant alleges he was improperly sentenced as a second offender. The record establishes the Applicant pled guilty to PWID crack cocaine and distribution of crack cocaine. He was sentenced as a second offender for both charges based on his prior 2008 conviction for possession of marijuana. He presented no further evidence on this allegation at the evidentiary hearing.

At the time the offenses were committed, the law provided that these crack cocaine offenses were to be enhanced if “the offender has been convicted of any of the laws of the United States or of any state....relating to narcotic drugs, *marijuana*, depressant, stimulant, or hallucinogenic drugs.”<sup>2</sup> S.C. Code § 44-53-375(B)(2) (Supp. 2009) (emphasis added). Furthermore, Sections 44-53-470(1) & (2) (Supp. 2009) provided that any violation for an offense found in Article 3, Chapter 53 of Title 44 is enhanced based on a prior “violation of a provision of this article or of another state or federal statute relating to narcotic drugs, marijuana, depressants, stimulants, or hallucinogenic drugs.”

This Court finds this allegation is conclusively refuted by the record. The Applicant’s convictions for these crack cocaine offenses were properly enhanced pursuant to Sections 44-53-

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<sup>2</sup> As is clear from the Applicant’s amended application, his argument is based on our Supreme Court’s holding in Rainey v. State, 307 S.C. 150, 414 S.E.2d 131 (1992). However, the holding in Rainey was based on a prior version of Section 44-53-375(B), which only allowed for a crack cocaine offense to be enhanced based on a prior conviction for any offense “relating to narcotic drugs.” Rainey at 151, 414 S.E.2d at 132 [citing § 44-53-375(B) (1985)].

375 or -470 based on his 2008 marijuana possession conviction. Accordingly, this claim is denied and dismissed.<sup>3</sup>

*Advice Regarding Time to be Served and Eligibility for Work Release*

The Applicant alleges counsel incorrectly advised him regarding the amount of time he would serve and his eligibility for work release. Each of these allegations concern matters that are collateral to the Applicant's sentence. "A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)). However, if counsel gives a defendant erroneous advice about a collateral consequence, "the defendant must prove he relied on the misinformation to receive PCR." Frasier at 389, 570 S.E.2d at 174.

With regards to the amount of time he would have to serve, this Court finds the Applicant's testimony on this issue not credible, while also finding the testimony of counsel credible. The Applicant testified counsel advised him that he would serve only 2.5 years before he would be released, and did not advise him that he would have to serve 85 percent of his 5 year sentence. However, counsel's testimony refuted this claim. Counsel testified he did not advise the Applicant he would be released after 2.5 years, and he can see no reason why he would have done so. He stated his file reflects that one of the charges carried 85 percent. Furthermore, the trial judge advised the Applicant that the distribution charge was a parole ineligible offense, and he would have to serve at least 85 percent before he was eligible for release. (Tr. 4). The

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<sup>3</sup> The Court notes the current version of Section 44-53-470 does not allow a conviction for a prior marijuana offense to enhance an offense involving a controlled substance. However, the current version went into effect on June 2, 2010. The Applicant committed the offenses he pled guilty to on August 28, 2009. Therefore, the change in the statute provides no support for the Applicant's allegation.

Applicant replied that he understood. Accordingly, this claim is denied and dismissed as being without merit.

With regards to eligibility for work release, the Applicant testified counsel advised him that he would be eligible for work release. He further testified that this advice was incorrect, and he relied on this advice when he pled guilty. Counsel confirmed that he did in fact advise the Applicant he would be eligible for work release. However, he stated he did not advise the Applicant of *when* he would be eligible for work release. He testified it was his belief that only violent offenses were ineligible for work release.

Regardless of the testimony presented on the issue, the record before this Court and the relevant statutory provisions indicate the Applicant is eligible for work release. The record reveals the offenses the Applicant pled guilty to were not violent offenses, but the distribution charge was a Class A felony and a "no parole offense." See S.C. Code §§ 16-1-10, -90 (Supp. 2009). Furthermore, eligibility for work release is governed by S.C. Code Section 24-13-125 (Supp. 2009). Pursuant to that section, an inmate serving a sentence for a no parole offense is eligible for work release after serving 80 percent of his or her sentence. The Applicant is therefore eligible for work release, and the advice of counsel was not erroneous. In addition, the Applicant's SCDC records do not indicate he is disqualified from work release eligibility. Accordingly, this Court finds the allegation is denied and dismissed as being without merit.

Moreover, even assuming counsel rendered erroneous advice with regards to either of the above issues, this Court finds the Applicant failed to prove beyond a preponderance of the evidence that he would not have pled guilty but for such advice. The record before this Court shows the Applicant was initially indicted for PWID crack cocaine and a marijuana offense. The PWID charge was a second drug offense and carried a sentence of five to thirty years.

Testimony at the evidentiary hearing established the State initially offered a six year deal, and closer to trial offered a five year deal which the Applicant declined. However, about two weeks before he was scheduled to go to trial, the Applicant learned he would be indicted for distribution of crack cocaine, which also carried five to thirty years. (Tr. 10). The Solicitor then put the five year offer back on the table and agreed to run the sentences concurrent to each other. Counsel testified they were in trial posture until the distribution charge came along. He stated that based on conferences with the Applicant, the Applicant pled guilty because he did not want to face a second trial and the additional marijuana charge that was dropped, and he wanted the distribution charge to be run concurrent to the PWID charge. This Court finds the Applicant did not plead guilty in reliance on eligibility for parole or work release; therefore, he failed to meet his burden of proof as to these claims. Accordingly, these claims are denied and dismissed.

*Failure to Advise of Right to Appeal*

The Applicant alleges counsel failed to advise him of his right to appeal his plea. "Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Jones v. State, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009) (citing Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). However, "[t]he bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Id. at 596, 677 S.E.2d at 23-4 (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)). "Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal." Id. (quoting Weathers at 61, 459 S.E.2d at 839).

The Applicant's allegation is conclusively refuted by the record. The Applicant signed a plea affidavit in which he indicated he understood that he had ten days to appeal his plea or

sentence. Furthermore, the Applicant failed to present proof of extraordinary circumstances such that he should have been advised of such right. Accordingly, the Court finds the Applicant was advised of his right to appeal; therefore, this claim is denied and dismissed.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence trial counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, the allegation of ineffective assistance of counsel is denied.

#### *Voluntariness of Plea*

This Court otherwise finds the Applicant failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered. At the plea hearing, the Applicant testified he understood the charges and their potential punishments. (Tr. 4). He testified he understood his constitutional rights and that he was waiving his right to a jury trial, his right to remain silent, his right to present defenses to the charges, and his right to confront the witnesses against him. (Tr. 5-6). He stated he wanted to plead no contest to these charges, and agreed with the facts as stated by the Solicitor. (Tr. 6-9). He testified he was entering these pleas freely and voluntarily. (Tr. 5).

Furthermore, the overwhelming evidence in the record and the testimony of the witnesses presented at the hearing establish that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Because a

guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The Applicant showed no reason why he should be allowed to depart from the truth of the statements he made during his guilty plea hearing. Therefore, this Court finds that Applicant's guilty plea was freely and voluntarily entered.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

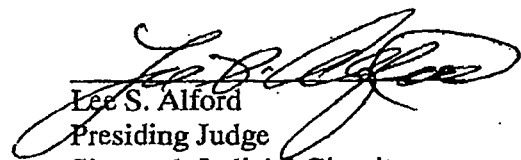
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's

behalf.

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 12<sup>th</sup> day of ~~September~~ 2011.

  
Lee S. Alford  
Presiding Judge  
Sixteenth Judicial Circuit

Yoon, South Carolina.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM YORK COUNTY  
Court of Common Pleas

The Honorable Lee S. Alford

Case No: 2010-CP-46-3809

Kevin Allison, #340643,

Appellant

v.

State of South Carolina,

Respondent

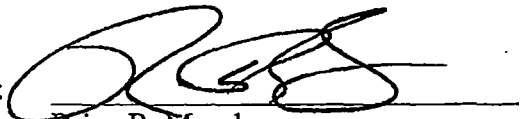
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid on September 26, 2011 addressed as follows:

Mr. Harrison D. Brant  
Assistant Attorney General  
PO Box 11549  
Columbia, SC 29211  
Attorney for Respondent

September 26, 2011

By:



Brian R. Murphy  
Law Office of Brian R. Murphy, LLC  
PO Box 805  
Fort Mill, SC 29716  
803-548-0321  
[brian@brmurphy.com](mailto:brian@brmurphy.com)  
Attorney for Appellant

WITNESSES

DEU \ Whitesides

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ARREST WARRANT NUMBER

DIRECT INDICTMENT:  
WN (In Re. J169949)

\_\_\_\_\_  
\_\_\_\_\_

ACTION OF GRAND JURY

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

representative person of Grand Jury

VERDICT

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

representative person of Petit Jury  
Name:

DOCKET NO. 2010-GS-46-01692

The State of South Carolina  
County of York

COURT OF GENERAL SESSIONS

April 22, Term 2010

THE STATE

vs.

KEVIN FRANKLIN ALLISON

Indictment for

DISTRIBUTION OF CRACK COCAINE

SC Code: 44-53-375 (B)(2)  
CDR Code: 3015

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

*[Signature]*  
Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

*[Signature]*  
Defendant

Witness:  
*[Signature]*  
C.C.C. PLS. AND G.S.

DAVID FRANKLIN  
CLERK OF COURT  
YORK COUNTY, SC  
2010 SEP 20 PM 2:19  
CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )


INDICTMENT

At a Court of General Sessions, convened on April 22, 2010, the Grand Jurors of York County present upon their oath:

DISTRIBUTION OF CRACK COCAINE

That on or about August 28, 2009, in York County, South Carolina, the Defendant, Kevin Franklin Allison, did distribute, dispense, deliver a quantity of crack cocaine, a controlled substance under provisions of Section 44-53-110, et seq., Code of Laws of South Carolina (1976), as amended, or did otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, or deliver crack cocaine, all in violation of Section 44-53-375, Code of Laws of South Carolina, (1976), as amended.

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

  
\_\_\_\_\_  
ASSISTANT SOLICITOR

\_\_\_\_\_

**WITNESSES**

*ICSP*  
JEU / Schifferle

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

dm

**ARREST WARRANT NUMBER**

-168726

**ACTION OF GRAND JURY**

**TRUE BILL**

*[Signature]*  
representative of Grand Jury 3-25-10

**VERDICT**

representative of Petit Jury  
date: \_\_\_\_\_

DOCKET NO. 2010-GS-46-01165

**The State of South Carolina**

**County of York**

**COURT OF GENERAL SESSIONS**

**March 25, Term 2010**

**THE STATE**

vs.

**KEVIN FRANKLIN ALLISON**

**Indictment for**

**POSSESSION OF COCAINE BASE (CRACK)  
WITH INTENT TO DISTRIBUTE**

SC Code: 44-53-375  
CDR Code: 3015

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

*[Signature]*  
Defendant

Witness: *[Signature]*  
C.C.C. PLS. AND G.S.

2010 SEP 9 PM 2:19  
DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC  
CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

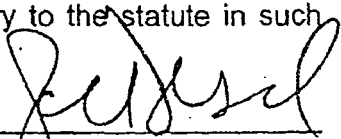
INDICTMENT

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of York County present upon their oath:

POSSESSION OF COCAINE BASE (CRACK) WITH INTENT TO DISTRIBUTE

That on or about August 28, 2009, in York County, South Carolina, the Defendant, Kevin Franklin Allison, did possess with intent to distribute, dispense, or deliver a quantity of cocaine base (crack), a controlled substance under provisions of Section 44-53-110, et seq., Code of Laws of South Carolina (1976), as amended, or did otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, or deliver cocaine base (crack), all in violation of Section 44-53-375, Code of Laws of South Carolina, (1976), as amended.

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

  
\_\_\_\_\_  
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF York
STATE VS. Kevin Allison

AKA:
Race: B Sex: M Age: 45
DOB: 04-09-1965 SS#:
Address:
City, State, Zip: Clover, SC 29710
DL#: SID#:

\*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was TO: PWID CRACK 2ND OFFENSE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS4601165
A/W#: J168726
Date of Offense: 8/28/2009
S.C. Code §: 44-53-0375 (B)(2)
CDR Code #: 3015

No Contest Plea #1

SENTENCE SHEET

CONVICTED OF or PLEADS

in violation of § 44-53-0375 (B)(2) of the S.C. Code of Laws, bearing CDR Code # 3015
NON-VIOLENT VIOLENT MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Desch, Jenny E. SC Bar# 72806 Defendant Attorney for Defendant SC Bar# 72806

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 5 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 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 (Criminal 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

Table with columns for Recipient, \*Fine, and various S.C. Code sections (e.g., § 14-1-206, § 14-1-211(A)(1)) with corresponding amounts.

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, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk David Hamilton
Court Reporter: Janet Rich

Presiding Judge John H. Hays
Judge Code: 2049
Sentence Date: 4-30-10