CAROLYN E. GALLOWAY
ATTORNEY AT LAW
Post Office Box 13
208 North Main Street
Anderson, South Carolina 29622
Phone (864) 226-7227
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RECEIVED

JAN 16 2014

S.C. Supreme Court

January 13, 2014

Honorable Daniel E. Shearouse
Clerk
The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: State vs. Reynaldo Gonzalez
2011-CP-04-395

Dear Clerk:

Enclosed for filing are the original and six (6) copies of the Appellant's Notice of Intent to Appeal, along with a copy of the Order(s) and the original Proof of Service to John Walter Whitmire, Assistant Attorney General.

I am simultaneously mailing a copy of the Notice of Intent to Appeal to the Office of Appellate Defense to request that they handle Mr. Gonzalez' appeal.

Please return the clocked copies of the documents to me in the self-addressed, stamped envelope that is provided.

Thank you for your assistance.

Sincerely,

CAROLYN E. GALLOWAY
Attorney at Law

Enclosures
cc: Reynaldo Gonzalez, #332772
Office of Appellate Defense
CEG/dr

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JAN 16 2014
S.C. Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2011-CP-04-00395

State.....Respondent,
v.
Reynaldo Gonzalez, SCDC #332772.....Appellant.

NOTICE OF INTENT TO APPEAL

Reynaldo Gonzalez, SCDC #332772, appeals the judgment of the Honorable R. Lawton McIntosh, dated November 26, 2013. Appellant received written notice of entry of this judgment on December 4, 2013. A Motion to Alter or Amend Judgment pursuant to Rule 59, SCRCP, was filed on December 6, 2013. An Order Denying that Motion was signed by Judge McIntosh, dated January 9, 2014. Appellant received written notice of the entry of that Order on January 10, 2014.

January 13, 2014

CAROLYN E. GALLOWAY
SC BAR# 2296
POST OFFICE BOX 13
ANDERSON, SOUTH CAROLINA, 29622
(864) 226-7227
Attorney for Appellant

Other Counsel of Record:
John Walter Whitmire, Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina, 29211-1549

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 16 2014
S.C. Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2011-CP-04-00395

State.....Respondent,
v.
Reynaldo Gonzalez, SCDC #332772.....Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Intent to Appeal to the Respondent by depositing a copy in the United States Mail, postage prepaid, on January 13, 2014, addressed to its attorney of record, John Walter Whitmire, Assistant Attorney General, State of South Carolina, Post Office Box 11549, Columbia, South Carolina 29211 and to the Appellant, Reynaldo Gonzalez, SCDC #332772, at Tyger River, C.I., Unit G 42-A, 200 Prison Road, Enoree, South Carolina 29335.

January 13, 2014

CAROLYN E. GALLOWAY
SC BAR# 2296
POST OFFICE BOX 13
ANDERSON, SOUTH CAROLINA 29622
(864) 226-7227
(864) 226-1179 FAX

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)
)
)
Reynaldo Gonzalez,)
S.C.D.C. No. 332772,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2011-CP-04-0395

FILED-CLERK'S OFFICE
ANDERSON SC
2014 JAN -9 A 9:45
COMMON PLEAS AND
GENERAL SESSIONS

ORDER

This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgment pursuant to Rule 59, SCRCP. The Final Order of Dismissal in this matter was signed by me on December 3, 2013. Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment. The previous order fully comports with the requirements of Rule 52(a) SCRCP.

IT IS THEREFORE ORDERED:

1. That the Applicant's motion is denied and dismissed.

AND IT IS SO ORDERED this 7 day of January, 2014.

R. Lawton McIntosh
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

A TRUE COPY
JAN - 9 2014
Richard X. Kinley
CLERK OF COURT

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011CP040395

Reynaldo Gonzalez

FILED-CLERK'S OFFICE
ANDERSON SC

State of South Carolina

2013 SEP 25 P 4:24

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	COMMON PLEAS AND GENERAL SESSIONS	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

A TRUE COPY
SEP 25 2013
CLERK OF COURT

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2155
Judge Code

9-23-13
Date

For Clerk of Court Office Use Only

This judgment was entered on the 25th day of Sept, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 26th day of Sept, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Carolyn E. Galloway	Walt Whitmire
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
Court Reporters – Renee Tollison	Richard Shirley – Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Applicant's petition for post-conviction relief is DENIED in full. A second hearing on Applicant's petition for post-conviction relief convened, and no novel, viable issues were raised based on the reading of a transcript formerly unavailable to the Applicant at his first post-conviction relief hearing. Walt Whitmire, attorney for the State, to prepare a formal order consistent with these instructions, the state's pleadings, pre-trial memoranda, and oral arguments. Mr. Whitmire is to copy Ms. Galloway with the proposed order prior to its submission to me.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) FOR THE TENTH JUDICIAL CIRCUIT
)
Reynaldo Gonzalez,) Case No. 2011-CP-04-0395
S.C.D.C. No. 332772,)
)
Applicant,)
)
v.) ORDER OF DISMISSAL
)
State of South Carolina,)
)
Respondent.)

This Matter comes to the Court by way of an Application for Post-Conviction Relief (PCR) filed February 2, 2011. Respondent filed its return on March 15, 2012. An evidentiary hearing was convened at the Anderson County Courthouse on May 8, 2013. Counsel was present and was represented by Carolyn Galloway, Esq. The Respondent was present and was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Roger Scroggins, Kurt Tavernier, Druanne White, Applicant, and Rame Campbell testified. At the conclusion of the hearing, this Court held the record open and ordered Respondent obtain the October 9, 2008 motion hearing transcript in State v. Gonzalez before the Honorable J. Cordell Maddox., Jr. The transcript was provided to Applicant and this Court in August of 2013. A limited evidentiary hearing was convened by this Court on September 18, 2013. This Court declined to take additional testimony and denied and dismissed the action.

PROCEDRUAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the January 2007 term of the Anderson County Grand Jury for conspiracy to traffic

methamphetamine (2007-GS-04-168) and trafficking methamphetamine (2007-GS-04-169). Applicant was subsequently indicted for possession of cocaine (2008-GS-04-2208). He was represented by Druanne D. White, Esq. On January 14, 2009, the Applicant pled guilty to the charges. The Honorable J.C. Nicholson, Jr., sentenced the Applicant to confinement for concurrent periods of ten (10) years for conspiracy to traffic methamphetamine, one-hundred and ninety-eight (198) months for trafficking methamphetamine, and three (3) years for possession of cocaine. The sentences were to be served concurrently. A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Reynaldo Gonzalez, 2010-UP-405 S.C. Ct. App. filed September 16, 2010).

Applicant proceeded on the following allegations that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   i. failure to move to suppress the narcotics as because an illegal wiretap;
   ii. failure to move to suppress the narcotics because of an unlawful search and seizure;
   iii. failure to move to suppress the narcotics because of an a search incident to arrest absent probable cause for the arrest;
   iv. failure to move to suppress the narcotics because of defective chain of custody and mishandling;
   v. failure to ensure the solicitor honor the terms of the alleged 2006 plea offer;
   vi. failure to advise Applicant on the terms of the Sepetember 2008 plea offer;
   vii. failure to object to discrepancies in the sentencing sheet;
2. Prosecutorial Misconduct:
   i. withdrawing the September 2008 plea offer prior to providing Applicant the opportunity to listen to the wire tapes;

SUMMARY OF TESTIMONY

At the PCR hearing, Officer Roger Scroggins of the Anderson County Sheriff's Department, Narcotics Unit, testified to his role in Applicant's arrest. Scroggins testified

Applicant was arrested pursuant to a controlled buy with an informant and Investigator Jordan, who remained undercover. The controlled buy occurred at Applicant's residence. Scroggins took part in the search incident to arrest. Scroggins collected and processed the evidence as follows: he took pictures of each item of evidence; logged the location of each item; transported the evidence to the sheriff's office; placed the controlled substances in a best kit and stored the remaining evidence in the evidence locker. Scroggins testified he did not notarize the evidence forms because the evidence never left the office when in his control and custody.

At the PCR hearing, Kurt Tavernier, former counsel, testified to his course of conduct in representing Applicant. Former counsel testified he has practiced law for twenty-four years and was a formerly a police officer. Former counsel testified he primarily handles drug cases in Anderson County. Through his years of practice, former counsel has developed a working relationship with the solicitor's office for narcotics cases. Former counsel was retained by Applicant on November 15, 2006 and immediately filed for discovery. Former counsel obtained the incident report, Applicant's statement to police, and listened to tapes from the informant's wire. Former counsel testified he discussed the above with Applicant. In the face of overwhelming evidence of guilt, former counsel testified he advised Applicant work as an informant for police to get the solicitor to come down off of the mandatory minimum twenty-five year prison sentence for the underlying charges. Applicant desired to mitigate his exposure to incarceration by aiding police as an informant. Former counsel made the arrangements and Applicant entered an informant agreement with police. Applicant was advised the solicitor would most likely make a favorable offer if Applicant's efforts proved successful. Former counsel testified "favorable" equated to a probable twelve year offer based upon his prior experience. Former counsel further testified the informant agreement with police was a goodwill gesture and

not a plea agreement. After two years of little success, the police expressed agitation with Applicant's efforts. Communications between Applicant and police broke down. Subsequently, Applicant relieved former counsel and retained counsel.

At the PCR hearing, counsel testified she represented Applicant for seven months prior to the disposition of his charges. Counsel obtained former counsel's file and independently filed for discovery. Applicant told counsel he desired to continue working for police in return for hopes of getting a lighter prison sentence. Counsel discussed the matter with the solicitor and learned that a probationary sentence was never a consideration although Applicant told her otherwise. The solicitor apprised counsel of his prior plea negotiations. In September of 2008, the solicitor made his first offer, of fifteen years, to counsel. It was conveyed in writing and included a two week expiration date. Counsel advised Applicant of the offer and Applicant decided to postpone a decision until he listened to the wire tapes. Counsel obtained the tapes and Applicant accepted the offer in October of 2008. Counsel was told the offer had expired and would not be revived. A subsequent second offer with a recommendation to exceed fifteen years was conveyed to counsel. Counsel made a motion to compel the revival of the first offer that resulted in a hearing being convened on the matter. The motion hearing judge found no basis to compel the solicitor to revive the first plea offer. Applicant accepted the second plea offer and pled guilty to trafficking. Counsel advised Applicant that there was no viable suppression defense. Counsel testified the indictments, offers, and guilty plea were for trafficking and not possession with intent to distribute.

At the PCR hearing, Applicant testified to his consultations with former counsel, counsel, and the police regarding his stint as an informant. Applicant raised numerous allegations of ineffective assistance of counsel. Applicant alleged counsel was ineffective for not pursuing any

and almost every conceivable suppression related defense. Applicant also alleged ineffective assistance of counsel for failure to ensure the solicitor honored the terms of the alleged 2006 plea offer and enforce the September 2008 plea offer after its expiration. Applicant admitted his guilt and testified he entered a confidential informant agreement with police because he was told by Officer Baxter that would receive a probationary sentence if he provided substantial assistance in major narcotics cases. Applicant testified he successfully completed a controlled buy for fifty dollars of cocaine and then botched a subsequent controlled buy for a thousand dollars of cocaine. Applicant testified he told former counsel he was upset the police were not providing him with enough work. Applicant subsequently relieved former counsel and retained counsel. Applicant was apprised of the September 2008 plea offer by counsel. Applicant testified he decided he wanted to hear the wire tapes first because he believed the tapes would show he was lied to and not read his rights at the time of arrest. Applicant listened to the tapes and accepted the offer in October of 2008. Applicant testified counsel failed to advise him the offer would expire by the middle of September of 2008. As a result, Applicant testified he accepted a second, more punitive, offer because counsel advised him the deals would only get worse.

At the PCR hearing, the solicitor testified to his involvement in Applicant's case. The solicitor was assigned to prosecute Applicant for 2006 offenses. The solicitor testified he developed a close working relationship with former counsel. The solicitor complied with former counsel's discovery motion and coordinated his actions with the police. The solicitor testified Applicant was exposed to a minimum mandatory twenty-five year sentence on the trafficking, more than 400 grams, charge and would have to "give something up" for the solicitor to make an offer to a lesser-included offense. The solicitor testified he and former counsel came to an understanding if Applicant's informant work proved liable. Applicant "jerked" the police around

for a year and completed a minor controlled buy. The potential plea bargain was "off the table" when Applicant failed to conform with the terms of his confidential informant agreement with police. The solicitor provided counsel all applicable discovery except for the wire tapes because it was an office policy to only disclose discovery from a confidential informant until ten days prior to trial. The September 2008 offer terminated after its expiration. The solicitor testified that counsel made a motion to compel the revival of the offer that was rejected.

APPLICABLE LAW

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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 668, 104 S.Ct. at 2064. 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, *supra.* 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

I.

As a matter of general impression, this Court finds Applicant's testimony not credible. The State's evidence against Applicant was substantial. This Court finds Applicant's ineffective assistance of counsel allegations that related to suppression defenses were without merit. Applicant was arrested as a result of controlled buy with an informant. The informant and Applicant engaged in lengthy negotiations for a substantial narcotics transaction that occurred in Applicant's residence. The State's evidence of Applicant's involvement in the transaction was supported by the informant's account and wire recording along with the undercover officer's observations. Applicant was arrested and confessed. This Court finds former counsel diligently advised Applicant to enter an informant agreement with police in hopes of it leading to a reduced sentence. Applicant failed to meet expectations and was discharged from the informant agreement. Applicant failed to prove the solicitor's good faith willingness to take into account Applicant's decision to work for the police constituted a formal plea offer. Applicant also failed

to prove he would have accepted the September 2008 plea offer had counsel advised him to forgo obtaining the wire tapes. Applicant failed to prove the solicitor's discovery policy for confidential informant related evidence was improper. Additionally there was no prejudice when former counsel listened to the wire tapes and advised Applicant accordingly.

This Court originally continued this matter to allow Applicant to investigate and bring forth any issues related to the 2008 preliminary motion hearing. This Court has examined the transcript and finds no additional issues of merit. Furthermore, this Court finds the testimony and evidence already before this Court regarding the allegations related to discovery to be substantially thorough. Therefore, this Court closed the record at the September 2013 hearing over Applicant's objection to present additional testimony and/or testimony.

A.

This Court finds Applicant did not meet his burden to prove counsel was ineffective for failing to make motions to suppress. "The Fourth Amendment prohibits unreasonable search and seizure, and requires that evidence seized in violation of the Amendment be excluded from trial. State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (citing Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Applicant alleged the trial counsel should have moved to suppress the methamphetamine as the fruit of an illegal search because the police failed to obtain a warrant for the wire. Trial Counsel testified she declined to make this motion because it lacked merit. This Court agrees with trial counsel and finds Applicant lacked standing because he had no expectation of privacy here. State v. Andrews, 324 S.C. 516, 479 S.E.2d 808, 811 (Ct. App. 1996) (defendant's Fourth Amendment rights were not violated by introduction of tape

recordings made by police of telephone conversations between informant and defendant, even if informant was acting at behest of police in making telephone calls). Therefore, this allegation is denied and dismissed.

Second, Applicant alleged counsel was ineffective to make a suppression motion based upon the informant and undercover officer's warrantless entry into his home. Similarly, trial counsel testified the motion based on these grounds lacked merit. This Court agrees with trial counsel and finds Applicant consented to the entry of the informant and undercover officer in his home when he took the initiative to invite them in the residence to complete the narcotics transaction. This Court finds the undercover officer was under no duty to disclose his identity and obtain informed consent. State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) (referencing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) ("like the federal standard, our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent.")); see also Hoffa v. United States, 385 U.S. 293, 302-303, 87 S.Ct. 408 (1966) ("Consent provides a constitutionally valid basis for entry even when it is obtained through misrepresentations about the officer's identity or purpose, as when an undercover operative poses as a fellow participant in criminal activity."). Therefore, this allegation is denied and dismissed.

Third, Applicant alleged the search incident to arrest was illegal because the police lacked the requisite probable cause for the arrest. Again, trial counsel testified the motion lacked merit. This Court agrees with trial counsel and finds the undercover officer's role and observations from the controlled buy more than supported the probable cause for Applicant's arrest for Trafficking. State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct. App. 1994)

"Turning to the question of probable cause, probable cause for a warrantless arrest generally exists where the facts and circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested."). Therefore, this allegation is denied and dismissed.

Last, this Court find's Applicant's allegations that counsel was ineffective for not making a suppression motion based upon chain of custody or upon the SLED expert's identification of the methamphetamine is without merit. South Carolina case law provides that the chain of custody need be established only as far as is reasonably practicable. State v. Hatcher, 392 S.C. 86, 92, 708 S.E.2d 750, 753 (2011). South Carolina courts have consistently held that all persons in the chain of custody must be identified and the manner of handling the evidence must be demonstrated. Id. Applicant alleged the police failed to produce separate forms for the best kit when the evidence was placed in the drop box. Scroggins testified this was not necessary because the evidence never left the building. This Court finds Scroggins testimony sufficiently thwarted any speculative allegation from Applicant that his actions resulted in a break in the chain of custody. Therefore this allegation is denied and dismissed.

B.

This Court finds Applicant did not meet his burden to prove counsel was infective for failing to enforce a twelve year plea agreement. A defense attorney has the duty to ensure the Stated honors its plea agreement. Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) "A defendant has no constitutional right to plea bargain. State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). "A plea bargain rests on contractual principles, and that each party should receive the benefit of the bargain." State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). "Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only

upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining." Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 39 (2007). This Court finds the solicitor and former counsel's testimonies credible while finding Applicant's testimony not credible. Former counsel reasonably advised Applicant that if he was successful in helping the officer's build cases major narcotics distributors, then he would likely receive a favorable plea offer in the range of a twelve year recommendation. This Court finds Applicant failed to prove the solicitor made a twelve year plea offer. This Court finds Applicant did not detrimentally rely on the promise of a twelve year plea agreement when he entered an agreement with police to become an informant. Therefore, this allegation is denied and dismissed.

This Court also finds Applicant failed to prove counsel was ineffective for failing to advise him to accept the solicitor's September 5, 2008 plea offer that included a fifteen year recommendation. "Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379 (2012). This Court finds the solicitor testimony credible. This Court also finds counsel's testimony more credible than Applicant's testimony. This Court finds counsel adequately advised Applicant of the terms and expiration date of the offer along with the all the benefits and detriments at issue. Applicant knowingly and intelligently made the decision to let the offer expire in order for counsel to obtain the informant's wire tapes despite the fact that former counsel had already listened to the tapes and discussed the matter with him. This Court finds Applicant failed to prove he would have accepted the September 5, 2008 offer but for counsel's performance on the matter. Applicant's posture to prolong the disposition of his charges resulted from his unreasonable desire of obtaining another informant agreement with the police in hope to avoid a prison sentence.

Applicant provided erroneous advice to counsel when he told her he would have received a probationary sentence had he fulfilled his expectation while working as an informant. Thus, this Court finds Applicant's decision on the matter was a result of wishful thinking despite counsel's advice on the matter. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). Counsel met her duty in explaining the consequences of the offer, exposure of the charges, and credibility of State's evidence. Therefore, this allegation is denied and dismissed.

C.

This Court finds Applicant's allegation that counsel was ineffective for failing to make a motion to quash a defective indictment is without merit. Applicant alleged counsel should have objected to Applicant's plea to trafficking where he pled to the lesser included offense of possession with the intent to distribute. Counsel testified the reduced charge was based upon weight and not classification of offense. This Court agrees with counsel. This Court finds Applicant pled guilty to trafficking, more than 28 grams but less than 100 grams when he was indicted for trafficking, more than 400 grams. See State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995) (It is the amount of cocaine, rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession. If the amount of cocaine, or any mixture containing cocaine, is ten grams or more, the trafficking statute is applied.). Therefore, this allegation is denied and dismissed.

D.

This Court finds Applicant failed to prove prosecutorial misconduct rendered his plea invalid. "Rule 5 permits inspection of evidence in the State's possession which [is] material to the preparation of his defense or [is] intended for use by the prosecution as evidence in chief at

the trial, or were obtained from or belong to the defendant upon request by the defendant." Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012) (citing Rule 5(a)(1)(C), SCRCrP). The Hyman Court determined the State "struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills during negotiations." Id. This Court finds Applicant failed to prove the Solicitor's actions here were inappropriate. Former counsel met with the solicitor to listen to the wire tapes and subsequently advised Applicant on the matter. Furthermore, the solicitor provided counsel a copy of the tapes in a reasonable manner. This Court finds Applicant failed to prove the alleged misconduct resulted in prejudice. An undercover officer along was present during the controlled buy. Furthermore, Applicant gave a confession. Therefore, this allegation is denied and dismissed.

This Court also finds Applicant failed to meet his burden the solicitor presented an inconsistent factual basis for the offense at the plea hearing. This Court finds the solicitor's chronology and basis for Applicant's arrest and conviction was consistent with the record. (Guilty Plea Tr. pp.15-7). Upon the plea judge's inquiry, Applicant agreed with the Solicitor's facts notwithstanding one minor deviation.). Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) ("Statements made during a guilty plea should be considered conclusively, unless an [applicant] presents valid reasons why he should be allowed to depart from the truth of his statements."). Therefore, this allegation is denied and dismissed.

II.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or

implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 26 day of Nov, 2013.

R. LAWTON MCINTOSH
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

COPY

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January 13, 2014

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

RE: Reynaldo Gonzalez, SCDC # 332772
2011-CP-04-00395

Dear Sir or Madam:

Enclosed is a copy of my file in the above-referenced Post Conviction Relief action. I did not include correspondence between my client and me, other than the enclosed letter notifying him that your office would handle his appeal. If you would prefer to have copies of any other correspondence, please let me know and I will forward it to you. The Order of Dismissal was signed by the Judge on November 26, 2013. I filed a Motion to Alter or Amend pursuant to Rule 59, SCRCP, on December 6, 2013. An Order Denying that Motion was signed on January 9, 2014 and the Notice of Intent to Appeal was filed on January 13, 2014, pursuant to Mr. Gonzalez' directions. I was **appointed** to represent Mr. Gonzalez in the PCR case. I request that your office handle the appeal since he is incarcerated and indigent.

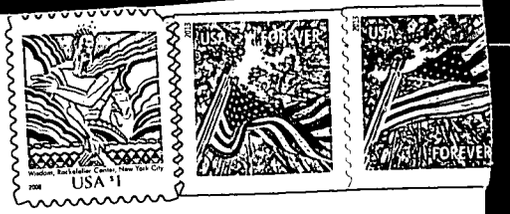
Please contact me to confirm receipt of these documents. It is my understanding that pursuant to Rule 203, that you will order the Transcript. The Court Reporter was Renee Tollison at both the May 8, 2013 PCR hearing and the September 18, 2013 Continuance of the PCR hearing. Her mailing address is Post Office Box 4321, Anderson, South Carolina, 29622.

Thank you for your assistance.

Sincerely,

CAROLYN E. GALLOWAY
Attorney at Law

Enclosures
cc: Reynaldo Gonzalez, SCDC #332772
CEG/dr



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Honorable Daniel E. Shearouse
Clerk
The South Caroiina Supreme Court
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