

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County

Michael G. Nettles, Circuit Court Judge

RECEIVED

JUL 17 2012

S.C. Supreme Court

ROBERT A. LAROCHE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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Appellate Defender

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF FLORENCE	)	
	)	2008-GS-21-278
	)	
	)	
State of South Carolina	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Robert A. Laroche	)	)
DEFENDANT	)	

September 19, 2008
Florence, South Carolina

B E F O R E:

THE HONORABLE THOMAS A. RUSSO.

COPY

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

JOHN JEPERTINGER, ASSISTANT SOLICITOR
Attorney for the State

JIM SMILEY, ESQ.
Attorney for the Defendant

KESHIA REED
Circuit Court Reporter

I N D E X

(There were no witnesses introduced.)

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1 MR. JEPERTINGER: Please the Court, Your Honor,
2 standing in front of you is Robert A. Laroche on
3 08-GS-21-278, Your Honor. He is pleading to trafficking
4 in cocaine first offense. He's pleading under the 28 to
5 100 gram section. Previously, Your Honor, it was over 500
6 grams of cocaine and also a quantity of marijuana. The
7 State in agreement for him pleading to this trafficking in
8 cocaine first 28 to 100 grams. We'll dismiss the
9 marijuana, Your Honor. And we negotiated a sentence of
10 seven years and he's pleading under the auspicious of
11 North Carolina vs. Alford, Your Honor.

12 THE COURT: All right.

13 MR. SMILEY: And represented by Mr. Smiley I believe.

14 THE COURT: All right, hello, Mr. Smiley.

15 MR. SMILEY: Good to see you, sir.

16 THE COURT: Sir, you're Robert A. Laroche?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Mr. Laroche, indictment 2008-GS-21-278 is
19 a true billed indictment for trafficking in cocaine and
20 the charge on the indictment is in an amount over 400
21 grams. However, sir, it is my understanding that you're
22 before the Court on the lesser charge of trafficking in
23 cocaine first offense in an amount 28 grams and 100 grams,
24 which carries a maximum penalty of not less than seven no
25 more than 25 years and a fine of \$50,000. And which is

1 categorize in our classification of law as a violent and a
2 serious offense. Do you understand that, sir?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And also and I realize this is the least
5 of your concerns, but it is part of the court -- part of
6 the sentence that the Court required that your privilege
7 to drive will be suspended for a period of time. Do you
8 understand that, sir?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Mr. Laroche, also count two of this
11 indictment the possession of marijuana with intent to
12 distribute the State is dismissing that charge. You
13 understand that?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Sir, understanding the nature of the
16 charges against you and possible punishment associated
17 with those offenses, it is my understanding that you're
18 here before the Court to enter a plea of guilty, but to do
19 that under the auspicious of North Carolina vs. Alford; is
20 that correct, sir?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Mr. Smiley, you represent Mr. Laroche?

23 MR. SMILEY: I have since day one.

24 THE COURT: All right, sir. Have you discuss with
25 him the charges he's pleading guilty to, the affect of

1. pleading guilty under North Carolina vs. Alford and the
2 fact that this is categorized as a serious offense?

3 MR. SMILEY: I have, Your Honor.

4 THE COURT: All right. Mr. Laroche, if I may, sir,
5 I'm just going to want to make sure that we're on the same
6 page, okay. And I'm going to tell you what my
7 understanding of an Alford plea is to see if it matches
8 your understanding. When someone pleads guilty under
9 North Carolina vs. Alford basically what they're saying is
10 this, although I'm not admitting to the allegations that
11 State has made against me, I am willing to plead guilty to
12 that offense because having reviewed the evidence that the
13 State would present to a jury if this case were to go to
14 trial, I believe that there is a substantially likelihood
15 that the jury might would find me guilty. And so
16 therefore to avoid that situation, the State has made me
17 an offer. They've reduced the charges, they reduced the
18 exposure and even though I'm not admitting to any
19 wrongdoing, I am entering a guilty plea to the lesser
20 charge because I want to take advantage of the State's
21 offer. That's what my understanding of a plea under North
22 Carolina vs. Alford; is that your understanding, sir?

23 THE DEFENDANT: Yes, Your Honor, it is.

24 THE COURT: And you talk Mr. Smiley about that?

25 THE DEFENDANT: Yes, I did.

1 silent. You have the right to a jury trial. But when you
2 enter a plea under North Carolina vs. Alford, then you
3 give up that right to remain silent. And you give up the
4 right to a jury trial. Do you understand that, sir?

5 THE DEFENDANT: Yes, sir, Your Honor.

6 THE COURT: Now, associated with your right to a jury
7 trial are other rights that you have. For example, if you
8 were to have a jury trial, then you would be presumed
9 innocent of this charge and the State would have the
10 burden of having to prove your guilt beyond a reasonable
11 doubt. The way they would do that is they select a jury.
12 You and -- through your lawyer and through the State's
13 attorney, you would select a jury. That jury would hear
14 evidence and the State would put up witnesses that would
15 testify against your best interest. Through that process
16 Mr. Smiley, as your attorney, would have the right or the
17 opportunity to cross-examine, to question those witnesses,
18 that's your constitutional right of confrontation. You
19 have the right to confront the State's witnesses. But
20 when you plead guilty, by pleading guilty under North
21 Carolina vs. Alford or whether you pled guilty straight
22 up, either way by entering a plea, you relieve the State
23 of their burden. They are no longer required to prove
24 your guilty to a jury. And so therefore, you give up or
25 you waive that right to cross-examine those State's

1 witnesses. Do you understand that, sir?

2 THE DEFENDANT: Yes, Your Honor, I do.

3 THE COURT: All right. Now, during the course of a
4 trial if you were to have one with regards to witnesses,
5 you could put up witnesses in your own defense if you
6 choose to do that. You, yourself, could take the stand
7 and testify in your own defense if you choose to do that.
8 In this country, no person who is charged with a criminal
9 offense is ever required to prove themselves innocent.
10 The State has that burden of proof. So having said that,
11 you don't have to do either one of those things. You
12 don't have to do anything. You can exercise your
13 constitutional right to remain silent. And if you did
14 that, I would explain to the jury that they could not hold
15 that against you, that is your constitutional right and
16 that you have nothing to prove. The State carries the
17 burden of proof and that if you choose to exercise your
18 right to remain silent, they could not hold that against
19 you. They could not talk about it in the jury room at
20 all. It would be improper for them to have any
21 conversation about that issue. You understand that?

22 THE DEFENDANT: Yes, I do.

23 THE COURT: Now, the State has that burden as I
24 indicated of proving guilt beyond a reasonable doubt if
25 you were to have a trial and they got to carry that

1 burden to a unanimous verdict. In other words, all 12
2 members of the jury would have to agree that you were
3 guilty or they could not convict you of this charge.
4 However, if you did go through a trial and if you were
5 convicted, then you could appeal that conviction to a
6 higher court if you felt that was appropriate. Do you
7 understand that, Mr. Laroche?

8 THE DEFENDANT: Yes, Your Honor, I do.

9 THE COURT: Also, sir, just so you'll know if for any
10 reason you wish to appeal these proceedings here today,
11 you may do that as well, but I just want you to understand
12 or to know that if you decide to appeal the decision of
13 this court today, that you need to at least file that
14 notice of appeal within ten days of today's date. You
15 understand?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Okay. Sir, all these rights you have you
18 waive or you give them up. These rights to a jury trial
19 and all those other rights I discussed with you. You give
20 them up when you enter plea under North Carolina vs.
21 Alford. Understanding that and understanding that you
22 give that up, do you still wish to go forward with your
23 plea?

24 THE DEFENDANT: Yes, Your Honor, I do.

25 THE COURT: All right, sir. Now, it is my

1 understanding that this is a negotiated plea and so what I
2 will tell you, Mr. Laroche, is this and that is that after
3 hearing the facts and hearing from both the State and your
4 attorney, if for whatever reason if I feel that I could
5 not follow that recommendation, then I would not -- in
6 other words, I would allow you to withdraw your plea. In
7 other words, you're either going to get the benefit of the
8 negotiation or I'll allow you to withdraw your plea. Do
9 you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: Okay. In other words, I guess, what I'm
12 trying to let you know and maybe try and give you some
13 comfort in understanding this, that I would not ignore the
14 negotiation and sentence you to anything greater. I would
15 either accept the negotiation or allow you to withdraw.
16 You understand?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Now, are you satisfied with
19 the representation and the advice that you receive from
20 Mr. Smiley?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Do you have any complaints against him or
23 any member of his office or his staff?

24 THE DEFENDANT: No, I have none.

25 THE COURT: Have you told him everything that you

1 THE DEFENDANT: This is my decision.

2 THE COURT: All right, sir. And have you reached
3 that decision of your own freewill?

4 THE DEFENDANT: Yes.

5 THE COURT: All right, sir. Mr. Laroche, what I'm
6 going to do is I'm going to get Mr. Jepertinger to give me
7 the facts as they would present to a jury if this case
8 were to go to trial, ask you to listen carefully and then
9 I'll be back with you in just a moment.

10 Mr. Jepertinger.

11 MR. JEPERTINGER: Please the Court, Your Honor. On
12 the late evening hours of March 28th 2007, early morning
13 hours of March 29th, Corporal Russ Brown formally of the
14 highway patrol, Your Honor, initiated a traffic stop near
15 the 156 mile marker of I-95 for -- apparently, the vehicle
16 that Mr. Laroche was traveling in crossed over both the
17 white and yellow fog line in the lanes, Your Honor.
18 Therefore, he initiated the traffic stop. When he
19 approached the vehicle, he noticed a couple things right
20 off the bat, Your Honor. He saw some small tool boxes in
21 the vehicle, two toilet boxes, Your Honor, in the vehicle,
22 a large water cooler and some small luggage in the back.
23 When he made eye contact with Mr. Laroche, he notice Mr.
24 Laroche would have what they would call general indicators
25 of nervousness. He had both arms locked on to the

1 steering wheel. After an extended period of time, during
2 that Corporal Brown motioned for the driver to roll down
3 the passenger window. At that point, Corporal Brown noted
4 in the report here that it look like he had been staring
5 right through the officer and not seeing the officer. He
6 was very wide eyed and appeared startled by the officer's
7 presence. At that time, he ask -- the officer asked to
8 see his driver's license and paperwork in terms of the
9 van. He asked some dispositive questions about where he
10 was coming from, where he was going to. The driver
11 indicated that he was coming from Palm Bay, Florida, going
12 to Rhode Island.

13 As he was handing the paperwork to the officer, the
14 officer noticed that this gentleman's hands were shaking.
15 He told the officer that he owned a house in Palm Bay,
16 Florida, been down working there on the house. And at the
17 time, Officer Brown, as another indicator, observed a
18 piece of paper in the center area of the van that showed a
19 flight confirmation from the driver from Orlando to Rhode
20 Island for March 28th that very day.

21 At that point, Corporal Brown, I believe, suspicions
22 were roused. He had the driver step to the rear of the
23 van where he could speak to him. At the rear of the van,
24 Corporal Brown saw the driver was wearing loose untucked
25 shirt and check the driver for weapons. The driver

1 appeared very nervous as he was swaying and constantly
2 crossing and uncrossing his arms. Mr. Laroche indicated
3 he worked construction. And at that point, Corporal Brown
4 was going to get his warning book. He was not going to
5 give him a ticket and he went to his squad car to retrieve
6 it. Further conversation said he been doing tile work in
7 Florida. During the entire conversation, Mr. Laroche was
8 swaying crossing and uncrossing his arms, rubbing his arms
9 and couldn't stay still. The fact that got the officer
10 thinking more and more why is this guy acting so nervous
11 when he knew he was going to get a warning. And he asked
12 him about his nervousness and Mr. Laroche said he was not
13 nervous. He asked the driver about the airline ticket.
14 The driver said I just do that and that he would be
15 credited for the flight. Corporal Brown said, well,
16 that's kind of unusual and he agreed with him. Then he
17 began asking Mr. Laroche about the items in the vehicle.
18 If they belong to the driver, he said, yes. Then corporal
19 asked about illegal items in the van such as guns, alcohol
20 or illegal drugs the gentleman said no. Then Corporal
21 Brown asked so if I wanted to search your car, I wouldn't
22 come up with anything. The driver looked away and said
23 yes.

24 At that time, two other officers from the Conway
25 police department came up, they arrived on scene. They

1 were doing a multi-jurisdictional task force type
2 intervention on the highway, Your Honor, that's why you
3 had Conway police department officers there. Once again
4 are you responsible for all the items in the vehicle,
5 after a long pause, the driver looked away and said yes.
6 They completed the warning and asked consent to search the
7 van. And at that point, Mr. Laroche said yes. They
8 patted him down before turning his back on the driver and
9 asked about the toilet. The driver said the toilet was
10 for his home in Rhode Island. They began to search the
11 van starting with the front passenger area, at the rear
12 cargo area. Corporal Brown opened the cooler and
13 immediately detected strong odor -- the smell of
14 marijuana coming from the cooler. Inside the cooler, he
15 found five packages of marijuana. He was handcuffed
16 immediately and advised he was under arrest. He was
17 advised of his Miranda warnings. Further search of the
18 van resulted in a large amount of cocaine being located
19 inside one of the toilet boxes.

20 And, Your Honor, I'll show you pictures. This
21 happened after they brought everything back to
22 headquarters of the cocaine found, marijuana found. They
23 also found about \$582 worth of cash on him. The amount of
24 cocaine equaled in the two package 251 grams exactly in
25 each package, so a total of 502 grams, Your Honor. And

1 that's pretty much it, Your Honor.

2 THE COURT: Any prior history?

3 MR. JEPERTINGER: I saw arrest in Rhode Island for
4 something, but I saw no disposition, Your Honor, so I have
5 no record on this gentleman.

6 THE COURT: Mr. Laroche, sir, you've heard those
7 facts that Mr. Jepertinger went over. Is it your
8 understanding that if this case would have gone to trial
9 that those are the facts that the State would have put
10 forth during the course of that trial that would have
11 likely led to you being convicted?

12 THE DEFENDANT: Yes, I understand.

13 THE COURT: All right, sir. I find that the State
14 has provided a substantial factual basis to support the
15 charge that Mr. Laroche has pled under North Carolina vs.
16 Alford. I find that his decision to enter that plea has
17 been done freely, voluntarily and intelligently. He's had
18 the advice and counsel of an excellent attorney in
19 Mr. Smiley and that Mr. Laroche has indicated to the Court
20 he is satisfied with the representation and the advice
21 that Mr. Smiley has provided. I've discussed with Mr.
22 Laroche his understanding about entering a plea under
23 North Carolina vs. Alford.

24 Mr. Laroche, let me ask you this and I didn't ask you
25 this and I want to make sure that you understand this.

1 When anyone enters a plea under North Carolina vs. Alford,
2 and we've already discussed our understanding of what that
3 means, do you also understand, sir, that whatever sentence
4 the Court imposes that you would serve whatever sentence
5 that is -- that in other words, it's no different than if
6 someone pleads guilty straight up. Whatever sentence the
7 Court imposes, you would serve that sentence the same as
8 if you pled guilty straight up. Do you understand that,
9 sir?

10 THE DEFENDANT: Yes, Your Honor, I do.

11 THE COURT: Okay. And that as far as your criminal
12 record goes, it will be listed on your criminal history as
13 a conviction just as if it would be if you had pled guilty
14 straight up. Do you understand that?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Okay, sir. And understanding that, you
17 still want to go forward with your plea?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: All right, sir. And I do find that
20 Mr. Laroche does understand the ramifications of pleading
21 guilty under Alford and what that means. And that again
22 his plea under that scenario has been done of his own
23 freewill and accord. And I'm going to accept his plea.

24 Mr. Smiley, I'll be happy to hear from you, sir.

25 MR. SMILEY: Yes, sir, Your Honor. As you can tell

1 from Robert, he has thoughtfully thought through this
2 whole process. I was retained by his brother. He's
3 originally from Rhode Island. His brother is a doctor
4 there. Robert has a residence along the coast. And he
5 also has a residence in Rhode Island that he worked for
6 and inherited through his family and he was going back and
7 forth to work on it. We agree with every word that the
8 prosecutor said to that. It came down to did he know it
9 was in the back of the van. Mr. Laroche and I produced a
10 witness that would have come in and testified that he
11 didn't. The problem was the witness wasn't very credible
12 and the risk was extraordinary or Mr. Laroche go to trial
13 at 25 years and we talk through the process. I think the
14 deal by the State was a very fair one. Of course, we
15 wanted better certainly very fair. And after a great deal
16 of contemplation, Robert on his own given his choices
17 choose this course. And I'm going to ask you to accept
18 the negotiations.

19 He's never been to prison, he's never been in jail
20 but the 37 days when he was arrested in this case. And I
21 ask that he get credit for that, of course, Your Honor.
22 It's going to be a hard course for him to get through
23 prison. We talked about it. He's prepared himself for
24 it. In the face of his situation, I think he's made a
25 wise choice. Not a fun one, not an easy one, but one that

1 assures that he has a future. Certainly, he will be more
2 careful with his situation which not putting himself in
3 such a position to be standing in front of, Your Honor,
4 ever again. I explain everything in great great detail
5 with him. I think Robert is a very intelligent man who
6 has been put in an extremely difficult position and is
7 doing the right thing for himself. I can go on, Your
8 Honor, but I would ask you to accept this negotiated plea
9 and sentence him to the seven years and credit for the 37
10 days he's got.

11 THE COURT: All right, sir. Mr. Laroche, is there
12 anything you want to tell the Court? You're not required
13 to, sir, but I certainly would give you that opportunity
14 if you wish to.

15 THE DEFENDANT: No, Your Honor, not at this time.

16 THE COURT: All right, sir. I'm going to accept the
17 negotiation that's been entered into. And on
18 2008-GS-21-278, the sentence of the Court is that you be
19 committed to the state department of corrections for a
20 period of seven years and pay a fine of \$50,000. You are
21 to be given credit for anytime that you have served to be
22 credited toward that seven year sentence. Good luck to
23 you, sir.

24 MR. SMILEY: Thank you very much.

25 END OF REQUESTED TRANSCRIPT

1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA

3 COUNTY OF FLORENCE

4
5 I, Keshia Reed, Court Reporter and Notary Public
6 in and for the State of South Carolina At Large, do hereby
7 certify that the above-entitled cause was heard as
8 hereinafter set out; that I was authorized to and did
9 transcribe the said proceedings; and that the foregoing
10 and annexed pages, numbered 1 through 20, inclusive,
11 constitute a true and accurate transcription of my
12 stenographic report of the said cause taken during the
13 said hearing.

14 In witness whereof, I have hereunto affixed my
15 signature this 10th day of July, 2009.

16 
17

18 Keshia Reed, Court Reporter
19 My Commission Expires: 6-5-2010
20
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County of FLOR E

IN THE COURT OF COMMON PLEAS

19

ROBERT A. LAROCHE #330647

Full name and prison number (if any) of Applicant

FILED

2009 FEB 13 PM 2:57

20 09 CP 21-26

v.

CLERK OF COURT
CCOP & GS
FLORENCE COUNTY, SC

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention TURBEVILLE CORRECTIONAL INSTITUTION
TURBEVILLE, SOUTH CAROLINA
2. Name and location of Court which imposed sentence SEVEN (7) YEARS
\$50,000 FINE FLORENCE COUNTY COURT
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2008-GS-21-278 " TRAFICKING COCAINE 28-100 GRAMS

CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

20

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

(a) SEPTEMBER 15, 2008

(b) SEVEN YEARS AND A 50,000 FINE

2009 CP 21

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty YES

(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. N/A

ii.

iii.

(b) the result in each such Court to which you appealed:

i. N/A

ii.

iii.

(c) the date of each such result:

i. N/A

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii.

iii.

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

(a) ATTORNEY FAILED TO FILE A DIRECT APPEAL

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) WILL AMEND AT A LATER DATE (LESS THAN TEN (10) ISSUES
- (b) INEFFECTIVE ASSISTANCE OF COUNSEL
- (c) VIOLATION OF DUE PROCESS / DEFECTIVE INDICTMENT
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) WILL AMEND AT A LATER DATE LESS THAN TEN (10) ISSUES
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

(c) the position thereof:

i. N/A

ii.

iii.

iv.

(d) the date of each such disposition:

i. N/A

ii.

iii.

iv.

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

i. N/A

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. N/A

ii.

iii.

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

i. N/A

ii.

iii.

... in (10) has not previously been presented to any Court, State or 23
Federal, set forth the ground and state concisely the reasons why such ground has not
previously been presented:

2009 CP 2121

- (a) N/A
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? YES
- (b) your trial, if any? _____
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications
with respect to this conviction, which you filed? N/A

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 JAMES W. SMILEY, ESQ.
3842-B LEEDS AVENUE.
 - ii NORTH CHARLESTON, S.C. 29405
 - iii _____
- (b) the proceedings at which each such attorney represented you:
 - i GUILTY PLEA
 - ii _____
 - iii _____

CONVICTION" AND SENTENCE VACATED

10 09 07 21 20

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 FLORENCE)

VERIFICATION

I, ROBERT A. LaRODIE, 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.

Robert A. LaRodie

SWORN to and subscribed before me this 11 day of February, 2009.

Suzanne H. Kivley (L.S.)
Notary Public

My Commission Expires: 09-29-2018

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

I, Robert A. LaRoche, 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.

Robert A. LaRoche
Applicant

SWORN or affirmed to and subscribed before me this

11 day of February, 2009.

Suzanne H. Kivley
Notary Public

My Commission Expires: 09-29-2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	2009-CP-21-267
	)	
Robert A. LaRoche, SCDC No. 330647,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 12, 2009, 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 Florence County Clerk of Court. The Applicant was indicted at the January 2008 term of the Florence County Grand Jury for trafficking in cocaine, more than 400 grams; and possession of marijuana with intent to distribute. (2008-GS-21-278). He was represented by James W. Smiley, Esquire. On September 15, 2008, the Applicant pled guilty to trafficking in cocaine, 28-100 grams, first offense. The Honorable Thomas A. Russo sentenced the Applicant to seven (7) years imprisonment. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the Florence County Clerk of Court regarding the subject conviction and the Applicant's records from the South Carolina Department of Corrections. The guilty plea transcript will be forwarded upon receipt.

II.

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

- a. Ineffective assistance of counsel;
- b. Violation of due process/ defective indictment.

III.

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of 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 prevailing professional norms.” Id. at 117,

386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 689). With respect to guilty plea counsel, the applicant must show 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, 59 (1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983).

IV.

The Respondent further submits that Applicant's claim that the trial court lacked subject matter jurisdiction is without merit and must be dismissed. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The indictment is a notice document and any challenges to its sufficiency must be made before the jury is sworn in accordance with S.C. Code Ann. § 17-19-90 (2003). Id. at 102, 610 S.E.2d at 499. Subject matter jurisdiction is the power of a court to hear a particular class of cases, State v. Brown, 358 S.C. 382, 387, 596

S.E.2d 39, 41 (2004), and is not controlled by the sufficiency of the indictment. Gentry, 363 S.C. at 101, 610 S.E.2d at 499.

In an action for post-conviction relief, an Applicant wishing to challenge the sufficiency of an indictment must do so in the context of ineffective assistance of counsel by alleging his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act, notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45(B) and -90 (2003).

Subject matter jurisdiction cannot be waived and can be raised at any time. Gentry, 363 S.C. at 100, 610 S.E.2d at 498. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Id. at 101, 610 S.E.2d at 499. Thus, the Applicant must present evidence his case is within a class of cases over which the circuit court does not have the authority to preside. The Applicant’s conviction involved a criminal charge in General Sessions Court; thus, the circuit court had subject matter jurisdiction. Therefore, the Applicant’s claim that the trial court lacked subject matter jurisdiction must be denied.

V.

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

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

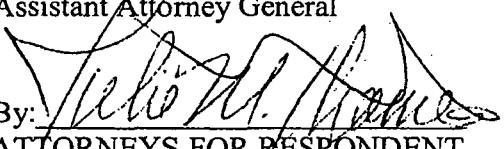
Respectfully submitted,

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

JULIE M. THAMES
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

_____, 2009.

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE }

COURT OF COMMON PLEAS

ROBERT LAROCHE)
33067

PETITIONER,)

v.)

TRANSCRIPT OF RECORD
09-CP-21-267

STATE OF SOUTH CAROLINA,)

DEFENDANT.)

July 12, 2010
Florence, South Carolina

B E F O R E :

THE HONORABLE WILLIAM H. SEALS, JR., JUDGE

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

PHILLIP B. ATKINSON, ESQ.
Attorney for the Petitioner

DAVID SPENCER, ESQ.
Attorney for Respondent

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter

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1 MR. ATKINSON: Your Honor, this is the
2 matter of Robert E. LaRoche versus State of South
3 Carolina, docket number 09-CP-21-267. Your Honor,
4 I've had the pleasure of representing Robert since
5 taking over this appointment from Karl Folkens in my
6 office. It really has been one full continuous
7 appointment through our office. And Your Honor,
8 this matter has only been continued once before in
9 that I had to make a request on a term of PCR court
10 where I had two to go out to the jail and meet with
11 so I had asked this be continued once before. I've
12 now since had a chance to meet with Mr. LaRoche. We
13 spent about four hours together at his facility.
14 And we've gone over about four different defenses, I
15 guess, or presentations he would have to the Court
16 concerning post-conviction relief against
17 Mr. Smiley, his attorney at the time.

18 In doing so, Your Honor, I have to give
19 you a little bit of background on this. One of the
20 most important cases as a lynchpin to what he would
21 hope to present is the case of Gozmel versus State
22 which was decided sometime in 2000. It deals with
23 lesser included offenses as to trafficking in
24 cocaine and ramples* and you're well aware of that,
25 Your Honor. We have come to a decision or a time or

1 crossroads, Your Honor, where we're at a
2 disagreement about what that case possibly would
3 mean applying to the facts of his own. But Your
4 Honor, since that time he has had a chance to meet
5 with a Patrick M. Killen whom I want to publicly
6 praise on the record as a fine attorney. Mr. Killen
7 called me as soon as he was aware that Mr. LaRoche's
8 brother was trying to get in contact with him to
9 hire new counsel on this, and we had reached that
10 disagreement. And Mr. Killen sent me a letter
11 June 23rd of 2010 asking would it be okay if he went
12 out and met with Robert and corresponded with him to
13 see if for some reason maybe, you know, there was a
14 reason why we're disagreeing over the application of
15 that case. Since that time my client has explained
16 to me he has had correspondence with Mr. Killen.

17 Your Honor, I'm building up all of this
18 because it's a motion from my client for a
19 continuance to have me relieved as counsel and of
20 course hire Mr. Killen. And I told him that
21 certainly wouldn't hurt my feelings. This is his
22 one chance to have the problem set straight. He
23 believes that Mr. Killen had more experience in that
24 area that could assist with him that. Certainly no
25 slight to me. I feel like I've done everything I

1 needed to do.

2 One of the other subissues, Your Honor, is
3 to present a witness who at the time of trial would
4 have stated that the drugs in the construction
5 vehicle were his own drugs, and that is where I
6 think my client and I had the best times together in
7 trying to make sure that we get this alleged witness
8 into the court because as I've informed him, PCR
9 relief of Mr. Whiteside's -- I'm sorry, the
10 Whitesides case would state that if Mr. Billing is
11 not present to testify to that, then that particular
12 issue in PCR would fail. So I am in concurrence
13 with his motion to continue and ask that I be
14 relieved as counsel, one, because I know that there
15 has already been contact between him and the new
16 alleged attorney Patrick Killen, and his brother
17 does stand ready to hire Mr. Killen.

18 In the original case there's actually been
19 a fee dispute, Your Honor, because my client paid
20 \$25,000 dollars for representation, then a few weeks
21 later pled. So his brother does stand ready to make
22 that kind of a retainer decision. And secondly,
23 Your Honor, it would just give him more time to have
24 Mr. Billing into court. And I certainly will
25 cooperate with his new counsel in providing all the

1 information that I paid for through our service of
2 accurent to locate Mr. Billing and have him here.

3 I would like for the record, Your Honor,
4 if you grant this motion to make a part of the order
5 that will come from this the original copy of
6 June 23rd letter from Mr. Killen to show the Court
7 this is certainly a valid contact that's been made.
8 In my June 19th letters to my client and also to
9 Mr. Billing indicated I made every effort to try and
10 get that witness before the court so that they can
11 continue on and be certainly ready. I've advised my
12 client as we were talking in chambers that the next
13 term of court will be in January; however, if Judge
14 Russo happens to be on the Bench for that term he
15 understands it will be even longer and he will
16 remain incarcerated until that time comes. He's
17 willing to take that chance because he wants a day
18 to fully present all of these defenses, his view of
19 the Gozmel case, and the witness that could be
20 provided to testify that the drugs belonged to him.
21 And that is his motion at this time, Your Honor.

22 THE COURT: All right. Mr. Spencer,
23 anything you'd like to put on the record?

24 MR. SPENCER: Yes, Your Honor. Just for
25 the record we would object. We have -- we've had

1 occurred expense of transporting Mr. LaRoche here
2 today. I can't say I'm -- I can't recall -- I don't
3 think we have any victims or victim's family here
4 today. Well, actually this is a drug case so we
5 wouldn't have that, I apologize. But Your Honor, we
6 would object. This is a 2009 case, not real old
7 but, you know, something that's gonna start getting
8 age soon. I think there's been enough time to sort
9 out these issues. And that would be the State's
10 position. Thank you, Your Honor.

11 THE COURT: Mr. Atkinson, I'm going to
12 grant the continuance.

13 But Mr. LaRoche, I want you to understand
14 if you're going to hire another lawyer you need to
15 go ahead and do it and do it fast.

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Your case might and very well
18 could come up in January.

19 Regarding the substitution of counsel I'm
20 gonna let him hire a lawyer before we relieve you of
21 counsel and Judge Russo can deal with that, I
22 assume, as Chief Administrative judge.

23 MR. ATKINSON: Thank you, Your Honor.

24 MR. SPENCER: Your Honor, if I may just
25 put one more thing on the record. Mr. Smiley is

1 supposed to be our witness on this. I haven't seen
2 him or -- a witness potentially in this case. I
3 haven't seen him here. I have called and left
4 messages during the week. Of course we sent a
5 subpoena to his address. I think Mr. Atkinson has
6 actually spoke with Mr. Smiley about this case so,
7 you know, I just want the record to reflect that
8 just so if we have problems next time we have a
9 record.

10 THE COURT: I understand. The record will
11 reflect that. Thank you very much. Thank you,
12 Mr. Atkinson.

13 MR. ATKINSON: Thank you, Your Honor.
14 I'll provide these exhibits to Mr. Spencer for
15 inclusion in the order if that is what you desire.

16 THE COURT: Thank you.

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18 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

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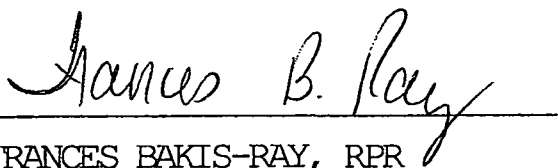
C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, FRANCES BAKIS-RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Twelfth Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 21st day of May, 2012.


FRANCES BAKIS-RAY, RPR

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2009-CP-21-267
	)	
	)	
Robert LaRoche	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina	)	September 8, 2011
<u>DEFENDANT</u>	)	Florence, South Carolina

B E F O R E:

THE HONORABLE MICHAEL G. NETTLES, JUDGE.

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

DAVID SPENCER, ASSISTANT ATTORNEY GENERAL
Attorney for the State

PHILLIP B. ATKINSON, ESQ.
Attorney for the Applicant

KESHIA REED
Official Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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James W. Smiley, IV

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Mr. Atkinson		71		
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
D-1	Letter		13

1 THE COURT: Mr. Spencer, you recognized.

2 MR. SPENCER: Thank you, Your Honor. The next
3 case would be Robert LaRoche vs. State. Your Honor,
4 Mr. LaRoche is represented today by Mr. Phillip Atkinson.
5 Mr. LaRoche was indicted in January of 2008 for
6 trafficking in cocaine more than 400 grams and also
7 possession of marijuana with intent to distribute. He
8 pled guilty to trafficking 28 to 100 grams first offense.
9 He was sentenced by Judge Russo to seven years
10 imprisonment. He did not appeal his conviction or
11 sentence. He's filed this application in 2009. And I
12 would just request that Mr. Atkinson set out the
13 allegations for the record.

14 THE COURT: Mr. Atkinson, be glad hear from you.

15 MR. ATKINSON: Yes, Your Honor. First and
16 foremost, Your Honor, I guess as a matter of housekeeping
17 the file would reflect the last we were before the Court
18 in July of last year, it was an order of continuance
19 issued there. At that time, my client made a motion to
20 have me relieved. At this juncture, I don't know if I
21 actually speak for the client in this particular instance,
22 but I continued to get notices because as far as the -- as
23 so ordered the portion of the line Judge Seals did not
24 physically relieve me in that. The client was to receive
25 counsel ---

1 THE COURT: I've taken a look at that order.
2 Essentially, the order just acknowledges that Mr. Robert
3 LaRoche move to have you relieved. However, there's
4 nothing in the body of the order or in the provision that
5 sets forth the terms of the order that relieves you; is
6 that correct?

7 MR. ATKINSON: That is correct, Your Honor.

8 THE COURT: Just mentions that he ask for it.
9 There was no order relieving you.

10 MR. ATKINSON: That is correct.

11 THE COURT: But there was an order of
12 continuance.

13 MR. ATKINSON: That is correct.

14 THE COURT: And I think Judge Seals heard that
15 matter; is that correct?

16 MR. ATKINSON: That is correct, Your Honor.

17 THE COURT: And he did from reviewing the order,
18 it appears as if he had indicated to Mr. LaRoche that the
19 matter was going forward because it had some age to it; is
20 that correct?

21 MR. ATKINSON: That is correct, Your Honor.

22 THE COURT: All right. Mr. LaRoche, if you
23 could stand please, sir, and raise your right hand as the
24 clerk administers the oath.

25 THE CLERK: Do you swear the testimony you give

1 will be the truth, the whole truth, and nothing but the
2 truth so help you God?

3 MR. LAROCHE: Yes, I do.

4 THE COURT: All right. Mr. LaRoche, is it true
5 that you move to have Mr. Atkinson relieved as counsel; is
6 that correct?

7 MR. LAROCHE: Yes, sir, at the time.

8 THE COURT: Okay. Do you still wish to have him
9 relieve as counsel?

10 MR. LAROCHE: Well, Mr. Atkinson and myself just
11 spoke about the law and I believe he's filled me in on a
12 great detail of it, but I just need to ask you some
13 questions myself.

14 THE COURT: Sure, I'll be happy to answer any
15 questions you might have.

16 MR. LAROCHE: I seem to be confused on the
17 lesser-included possession.

18 THE COURT: Okay.

19 MR. LAROCHE: I was under the assumption that
20 the lesser-included offense would be possession with
21 intent to distribute.

22 THE COURT: Now, Mr. LaRoche, one thing I need
23 to clarify. You and I can't really have a discussion
24 about the merits of your case. We can't do that. I can
25 talk to you about whether or not you want Mr. Atkinson to

1 represent you and that's really the focus of my inquiry.
2 I ask you previously if you move -- previously move to
3 have him relieved and you said you did. Is that correct?

4 MR. LAROCHE: Yes, sir.

5 THE COURT: All right. Now, we find ourselves
6 here today and we're going forward on your post-conviction
7 relief. Mr. Atkinson has assume prepared the case and is
8 ready to go forward. Do you want to proceed forward with
9 him or do you want to proceed forward on your own?

10 MR. LAROCHE: I will go forward with him because
11 I've tried to contact some other lawyers and I've had no
12 luck.

13 THE COURT: Okay. So you'll -- by default
14 Mr. Atkinson is your lawyer; is that correct?

15 MR. LAROCHE: If he would give me the honor.

16 THE COURT: Okay, very good. Well, I'm certain
17 that he's a very cable lawyer by the way and I am certain
18 that he will do a very fine job in that regard. So I
19 understand from you, Mr. LaRoche, that you have withdrawn
20 your request to have him relieved as counsel?

21 MR. LAROCHE: Yes, sir.

22 THE COURT: Very good. We will proceed forward.
23 Mr. Atkinson, you recognize.

24 MR. ATKINSON: Your Honor, to Mr. Spencer's
25 request to set out what's before you today, Your Honor.

1 First, I want to thank him. He's just been a joy to work
2 with as far as trying to timely handle this matter because
3 at one point we're going to take leave of court to amend
4 the PCR application, which I assume with the clerk's file
5 or the materials you have before you you have, but you
6 would note that my client at some juncture when asked to
7 delineated some of the complaints under the PCR
8 application had mentioned that he would do an amendment at
9 a later time to less than ten issues. And he certainly
10 did that, Your Honor. In fact, typed pretty much most of
11 it himself and though he and I may have had some
12 disagreements in the past about the merits of certain
13 issues, I was glad to present those for him. So what
14 Mr. Spencer and I decided to do on June 9th of 2010, is a
15 cover letter from me explaining some of the issues that
16 had been dropped in the remaining issues in attaching 11
17 pages from my client on his particular arguments have made
18 that now apart of the application for post-conviction
19 relief to avoid the necessity to take leave of court and
20 amend that. And Mr. Spencer has had that in his
21 possession for at least a year now since we presented it
22 to the day we were last here in July of last year. Your
23 Honor, it's my recollection that we did hand up a copy of
24 that to Judge Seals for him to follow along. I wanted to
25 make sure you have that. It's a June 9th letter.

1 THE COURT: Is this it?

2 MR. ATKINSON: That's a packet from Mr. Spencer,
3 I believe, you're holding there, Your Honor. I can't
4 speak to what's in that.

5 MR. SPENCER: I actually just -- you know, it's
6 the standard things that I did after this morning stick
7 the amendment in the packet.

8 MR. ATKINSON: Judge, you should have a June 9th
9 letter. It has 11 -- possibly even an additional page
10 that was just an extra one stuck in of typewritten notes
11 from my client about his allegations that are attached to
12 my June 9th 2010 letter, Your Honor. You have that before
13 you now.

14 THE COURT: I do have it.

15 MR. ATKINSON: Great. That would be of great
16 benefit today, Your Honor, to try to consolidate some of
17 the issues. I'll be questioning my client about some
18 particulars of that, but suffice to say the gist of his
19 arguments are recorded there in those amendments as they
20 add to very brief PCR applications. So I believe the
21 issues that will address today one very brief will just be
22 on page two number nine allegations about failure to file
23 a direct appeal. And then starting on page three
24 paragraph ten those amendments you now have before you.
25 Basically, they all deal with general arguments of

1 ineffective assistance of counsel. I think to cut right
2 to the heart of it what my client's trying to dual out
3 with you about earlier is some misunderstanding about what
4 maybe a lesser-included offense, whether or not it was
5 proper for him to have pled as he did, whether or not
6 those charges would later need to be reissued to a grand
7 jury or if it's proper to proceed in the manner that they
8 did and that's what he want to talk with you about. And
9 I'll be glad to as I question him about the allegations
10 he's made that you let him tell you more about why he
11 believes that there was some errors made there. There
12 were some allegations about violation of due process.
13 Those are going to be addressed in some of his written
14 notes there about whether or not it was proper for a
15 witness to be withheld not only by his attorney but
16 possibly by the State. I'll allow him to address that.

17 And finally, Your Honor, he did make it very
18 clear that one page of a document you have there and I'll
19 point to it when we get to it, that one time he was
20 alleging a defective indictment that he made it clear the
21 amendments that he's given to this that he said I want to
22 be clear I'm not alleging that there is a defective
23 indictment, but simply that what I was allowed to plead to
24 may not have been a lesser-included charge. And I will
25 remind him of those particular notes and let him address

1 that at length too. But, Your Honor, that kind of gives
2 us a road map of where we're going today, but you got some
3 basic ineffective assistance of counsel arguments, general
4 things like time spent as far as leading up to the plea.
5 He'll tell you more about that, whether or not it was a
6 proper plea to a lesser-included offense, and whether or
7 not there was any discussions about appeal and what should
8 have been done.

9 THE COURT: All right. Mr. Atkinson, and you
10 have done a good job at sort of summarizing this fairly
11 lengthy letter, but as I understand it, we sort of cull
12 the issues down to the issue of failure to file a direct
13 appeal number one. Number two, there's some allegations
14 with regard to due process violations and some ineffective
15 assistance of counsel, and an issue concerning a
16 lesser-included offense. Is that essentially it? We got
17 four different issues here.

18 MR. ATKINSON: Your Honor, beg the court's
19 indulgence. Let me check with my client to make sure I
20 succinctly put all that in. But I believe the letter
21 would reflect that and that's going to be the great thing
22 today that if you need additional time, you'll have that
23 before you to review word for word. We're trying not to
24 waste your time and just hit on the high points today.
25 Beg the Court's indulgence.

1 (WHEREUPON, a pause in the proceedings.)

2 MR. ATKINSON: My client indicates that I have
3 given you a good road map of where we are going. Your
4 Honor, I might just hand up if you don't have it in the
5 record a copy of -- this is a fax that I receive from
6 Mr. Spencer where the documents you have I don't believe
7 is sign, but I merely ask him to initial the bottom to
8 consent to the amendment of the above-referenced petition
9 by clarifications of the issues to be presented to conform
10 that this letter in the attached amendments, which you now
11 have. And he made one subtle amendment to that by signing
12 the bottom reserving any objections based on hybrid
13 representation and Mr. Spencer has signed that June 30th
14 of 2010. If you don't have that in your file, this is my
15 only copy, but I like to hand it up to have your file
16 complete.

17 THE COURT: And you can mark that as a defense
18 exhibit.

19 MR. ATKINSON: Thank you, Your Honor. I'll be
20 glad to approach and have that marked as Defendant's
21 Exhibit 1.

22 THE COURT: Very good.

23 MR. ATKINSON: I'll let Mr. Spencer take a look
24 at it just to make sure that is indeed his signature, if
25 he recalls that.

1 MR. SPENCER: Oh, yes, I do recall that. I came
2 across it last night. I just preserve any objections to
3 -- the way some of these issues were framed could, you
4 know, could make them direct appeal issues. I understand
5 it all kind of go to the issue of ineffective assistance
6 of counsel. I suppose possibly they might make subject
7 matter jurisdiction argument too. But to the extent, it's
8 not one of those two things I objected to it as a direct
9 appeal issue.

10 THE COURT: Okay. Well, your objection is
11 noted.

12 MR. ATKINSON: Thank you, Your Honor. And
13 without any objection to the actual signature that we were
14 making these amendments, I'll hand up Defendant's Exhibit
15 1 just ask that it be moved into evidence.

16 THE COURT: Very good. It is indeed into
17 evidence. Defendant's Exhibit 1 is into evidence.

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

20 MR. ATKINSON: Your Honor, just to clear up a
21 couple more housekeeping matters just, I guess, protection
22 for me. Since, that July 12th hearing, I continued to
23 receive notices and not being clear whether or not I been
24 relieved. I continued to stay in touch with my client,
25 send him letters, checking on his progress as to whether

1 or not he was to able to get another attorney. He has
2 today -- let me stop and state that I've not had any
3 communication from him since that time, since been about a
4 year more since we last spoke until we had a chance to
5 spend 30 minutes together today. He showed me about 25
6 letters received from attorneys either denying they could
7 help him in any manner or stating what the retainer fees
8 would be. So I'm satisfied he made attempts to try and
9 receive counsel. A little disappointed that he and I
10 haven't communicated more since then. It's been a year
11 since I fully prepared to have this case tried before you
12 and today he and I are going over a few things prior to
13 court, but I will be glad to continue if he'll have me. I
14 don't think he has any current complaint against me as far
15 as -- he's indicated by shaking his head that he does not.
16 But, you know, while we might disagree on some of the
17 finer points, he has a right to present them to you today
18 and I'll be glad to summarize that. And beg the Court's
19 indulgence in some of my questioning. If he goes on too
20 long for narratives, I'll try to stop him, but to try to
21 keep his focus on what he's complaining of today.

22 THE COURT: Very good.

23 MR. ATKINSON: Your Honor, with that in mind,
24 I'll be ready to proceed if Mr. Spencer has nothing
25 further to put on the record before we begin.

1 THE COURT: You may proceed.

2 MR. ATKINSON: Thank you, Your Honor. I call to
3 the stand Robert LaRoche.

4 THE COURT: All right. Mr. LaRoche, if you
5 could please, sir, I'm going to ask you to come around and
6 watch your step. And place your left hand on the Bible
7 and raise your right hand as the clerk administer's the
8 oath and notice that there is a step up there. We going
9 to swear him again just for good measure.

10 THE CLERK: Do you swear the testimony you give
11 in this case to be the truth, the whole truth, and nothing
12 but the truth so help you God?

13 MR. LAROCHE: Yes, I do.

14 THE COURT: Have a seat in the witness chair
15 right here, Mr. LaRoche, take your time, pull up real
16 close to that microphone. Mr. LaRoche, we're going to ask
17 you to speak loudly, clearly and slowly in order that we
18 can hearing everything that you got to say is that fair
19 enough?

20 MR. LAROCHE: Yes, sir.

21 THE COURT: And your full name?

22 MR. LAROCHE: Robert Asala (sic) LaRoche.

23 THE COURT: Very good, Mr. LaRoche.

24 Mr. Atkinson, you recognized.

25 MR. ATKINSON: Thank you, You Honor.

1 WHEREUPON,

2 Robert A. LaRoche,
3 after first having been duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. ATKINSON:

6 Q Mr. LaRoche, you were here today on your filing for
7 an application for post-conviction relief. And you've had
8 ample opportunity to meet with me prior to hearing today
9 to review your file. So I'm holding that in my hand
10 today. I'm going to be asking you some questions based on
11 that. Your original application, sir, consist of about
12 six pages and this would appear to be your signature -- is
13 that your application for post-conviction relief, sir?

14 A Yes, sir.

15 Q Okay. And you've heard me summarize to the judge
16 this morning that the time of filing this the application
17 was somewhat incomplete because you asked to make some
18 amendments to it; is that correct, sir?

19 A Yes, sir.

20 Q Okay. And since that time, sir, you heard me refer
21 to June 10, 2010, letter that I sent to the judge along
22 with 11 pages of typewritten amendments. You received a
23 copy of that and had a chance to review that, sir?

24 A Yes, sir.

25 Q Okay. Again, it's those 11 pages I referred to --

1 the judge possibly has 12, but one is a blank page. I
2 looked at his copy. Those are actually arguments that you
3 yourself and someone on your behalf helped you type up; is
4 that correct?

5 A Yes, sir.

6 Q And those are the finer to steal points of what you
7 really want to present to the judge today as far as the
8 issues of why you feel that you deserve post-conviction
9 relief?

10 A Yes, it is.

11 Q Okay. I'm going to lead you through some of that and
12 ask you some questions about the issues contained here.
13 If you can just confirm for us that initially, sir, you
14 were charged with trafficking in cocaine and I believe it
15 was 400 grams on the indictment; correct?

16 A 400 grams or more, yes, sir.

17 Q Okay. And since that time, you did appear before
18 Judge Russo as Mr. Spencer stated and entered a plea to
19 trafficking cocaine 28 to 100 grams; is that correct?

20 A Yes, sir.

21 Q All right. And that was done on or about
22 September 15th 2008?

23 A Yes, sir.

24 Q From that plea that you entered before Judge Russo,
25 you received seven years and a \$50,000?

1 A Yes, sir.

2 Q And at the time, sir, you were represented by Mr. Jim
3 Smiley who's here in the courtroom today?

4 A Yes, sir.

5 Q Yes, you were represented by him and, yes, you see
6 him present here in the courtroom today?

7 A Yes, I was represented by Mr. James Smiley.

8 Q Okay. All right. Sir, we are going a little bit out
9 of order here. But one of the first things you allege on
10 page two after that plea was entered, you mention your
11 attorney failed to file a direct appeal for you. So first
12 of all, is that an allegation you are making still today?

13 A Yes, it is.

14 Q Okay. Tell the Court what, if any, discussions were
15 had about appealing after the plea was entered, sir?

16 A There wasn't any discussion at all. I never had a
17 chance to even know about an appeal. I mean, I just -- I
18 was put in Kirkland and that was that. I mean, I didn't
19 know anything about an appeal. I didn't speak to him
20 about an appeal. I didn't even know I could do that.

21 Q You don't recall anything about the judge on the
22 record that being Judge Russo mentioning anything about
23 your opportunity to appeal, sir?

24 A Yes, I recall that.

25 Q So the judge did talk with you about it on the

1 record?

2 A Yes, Judge Russo did.

3 Q Did you make any written communication to Mr. Smiley
4 to ask him to appeal that for you?

5 A No.

6 Q And to your knowledge, he never did indeed file an
7 appeal?

8 A No.

9 Q In fact, just to cover some other things that may
10 overlap help the judge understand. Since that time,
11 you've had a complaint against Mr. Smiley for a fee
12 dispute I understand?

13 A Yes, sir.

14 Q And the Court did not rule in your favor on that they
15 ruled for Mr. Smiley?

16 A They ruled for Mr. Smiley.

17 Q So I'm going to assume the only time you seen
18 Mr. Smiley since the date of the plea was your in court
19 dealings over that fee dispute?

20 A Yes.

21 Q Okay. Anything else you want to add about the
22 grounds for failure to appeal the case?

23 A No.

24 Q All right, sir. Then on page three of your PCR
25 application which you indicated you amend at a later date.

1 You've alleged some ineffective assistance of counsel.
2 We'll cover that through the 11 pages you've asked me to
3 put into the record to define that and also violation of
4 due process and a defective indictment. So let me try to
5 cover that while I can. I had a chance to review those 11
6 pages that you asked me to submit in order to supplement
7 paragraph ten. And I do recall at some points in your
8 writings there that you were make to sure that I
9 understood, the Court also understood that you wanted to
10 be clear that you were not alleging any more that there
11 was a -- fact I believe it's page one of your document
12 entitled ineffective assistance of counsel at the very
13 bottom. I have that highlighted the very last paragraph
14 it says the petitioner submits to this court that he is
15 not claiming to have a defective or insufficient
16 indictment claim being submitted here's the circuit court
17 was divested of subject matter jurisdiction; is that
18 correct, sir?

19 A Yes, sir.

20 Q Okay. And that deals more with whether or not you
21 should have been allowed to plead guilty to the offense
22 that you have pled to; is that correct, sir?

23 A Yes, sir, it is.

24 Q Just to be very clear for the judge, he no longer
25 needs to consider ten C a defective indictment. You've

1 cleared that up for in your supplement; correct?

2 A Yes.

3 Q All right. And just to be very clear, sir, though
4 there was no direct appeal made on the particular case.
5 Did you take any further action through any other court in
6 this state to try to have this matter addressed either
7 through the sentencing board or anything of that nature?
8 Is this the only filing you made?

9 A This is the only filing I've made.

10 Q Okay. All right, sir. Let's jump into some of the
11 particulars of -- some of the allegations you set forward.
12 I'm going to refer everybody to what will be the first
13 page of the indictments that -- not the indictment, but
14 the supplement that you've made apart of the court record
15 today for paragraph ten. In that, you're alleging that
16 the Court committed some errors set forth in your Brady
17 and Freddie vs. Maryland disclosure. So let's concentrate
18 on that at this point. You understand, of course, when
19 you allege Brady vs. Maryland, you are speaking about
20 things that should have been disclosed to you prior to
21 entering the plea; is that correct?

22 A Yes, sir.

23 Q Generally, can you set out for us what allegations
24 you're making about information that may or may not have
25 not been withheld from you, sir?

1 A Could you repeat that?

2 Q Let me see if I can include you in a little bit. Let
3 me talk about Brady vs. Maryland by failing to disclose
4 exculpatory material in possession of either the State or
5 your attorney. Do you remember making that amendment,
6 sir?

7 A Yes, sir.

8 Q And alleging basically that there was some knowledge
9 of additional witness that was never interviewed by the
10 state?

11 A That's correct.

12 Q Well, tell the judge about, sir. What is your
13 allegation as to improper withholding of evidence on that
14 particular matter?

15 A Well, at the time, it was my knowledge that to
16 believe that the evidence couldn't be withheld, that's why
17 I looked into that and I wrote that. I mean, there was a
18 witness in the case who came forward and testified to
19 Mr. Smiley and signed a statement saying that I had
20 nothing to do with this crime. I felt as though with him
21 speaking to the prosecutor about it something could have
22 been done, but I don't know criminal law obviously. And I
23 thought that it shouldn't have been suppressed, but it was
24 from there. And I don't understand that from there. I
25 mean, that's why I put that in there. I didn't think

1 anything exculpatory could be suppressed.

2 Q Please don't tell what the witnesses answering this
3 question, but I'm struggling to understand what your
4 understanding of what that witness could or would have
5 presented at the hearing that you felt was important?

6 A Well, the witness at the hearing could have presented
7 that I had no knowledge of the drugs that were placed into
8 my vehicle. I mean, that is very important in the case I
9 believe.

10 Q Let's go ahead and try to identify who this witness
11 would have been. What was his name?

12 A Mike Billing.

13 MR. SPENCER: For the record, I understand that
14 just go to the allegation itself, you know. I would
15 object on hearsay, but understanding it goes to the
16 allegation itself. I mean, that's fine.

17 THE COURT: Okay.

18 MR. ATKINSON: Thank you, Your Honor.

19 BY MR. ATKINSON:

20 Q So you just identified this Mike Billings. Was
21 Mr. Billings a worker of yours?

22 A Yes, he was.

23 Q What type of business are you in, Mr. LaRoche?

24 A I've done construction for many years, many many
25 years.

1 Q What type of activities Mr. Billing's performed for
2 you, sir?

3 A He was an electrician.

4 Q And since, I have met you when I first met you -- let
5 me back up and ask about that. First time we met, I came
6 to your institution; correct?

7 A Yes, sir.

8 Q We spent about three or four hours together. We were
9 together for a long time; weren't we?

10 A Yes, sir.

11 Q And talked about the case and you shared some
12 information with me all you knew at that time about
13 Mr. Billing; didn't you?

14 A Yes, I did.

15 Q Okay. And since that time would you agree I've made
16 a diligent effort as I could with information we had to
17 look him up to try to find out about him and send letters
18 to the last known addresses we had for him?

19 A Yes, you did.

20 Q I stress to you the importance that if we make this
21 allegation that things could have been different and that
22 it's very important to have him come here and testify
23 about that. Did I tell you that?

24 A Yes, sir.

25 Q And even based on all our best efforts, to your

1 knowledge has Mr. Billings received word that we were
2 having a hearing today?

3 A I don't believe that he did because he's in prison.

4 Q Did you receive copies of all the letters I sent over
5 time asking him to come and be here?

6 A Yes, sir.

7 Q Satisfied I've done everything I could to try to get
8 him here?

9 A Yes, sir.

10 Q I think we've even talked about not having subpoena
11 power to reach across state lines and make him come here;
12 is that right?

13 A Yes, you did speak to me about that.

14 Q And then this morning you informed me that you have
15 some information that he may be in prison somewhere; is
16 that right?

17 A Yes, sir.

18 Q Can you state where for the record what state you
19 think he's in prison?

20 A Well, he was arrested in Massachusetts, that's all I
21 know. And I mean as far as the prison, I don't know the
22 exact prison he's in, but it was federal charges.

23 Q Were you ever present when Mr. Billings spoke to your
24 attorney -- you've alleged that he spoke to your attorney,
25 so let me be clear there. During those allegations were

1 you ever present to see Mr. Billings talk to Mr. Smiley?

2 A Yes, I was there.

3 Q And I believe you stated that you feel that the gist
4 of that without getting into hearsay would be some
5 exculpatory material that Mr. Billings had some
6 involvement or was responsible; is that right?

7 A Yes.

8 Q After he allegedly made these statements to your
9 attorney, what discussions, if any, you had with
10 Mr. Smiley about presenting that evidence to the Court?

11 A Well, Mr. Smiley spoke to me about it and he said
12 that he was going to present it to the prosecutor along
13 with a statement. And he said he was going to fill the
14 prosecutor in on the other person that Mike Billing had
15 mentioned. And he told me he see what he could do about
16 it.

17 Q The materials we have everyone referring to that's
18 now labeled page two of the document that you entered
19 petitioner submits under mandates that are set forth, as
20 that understand on page two, it seems to indicate that you
21 thought initially the prosecutor had suppressed this
22 evidence; is that correct? Is that why you put that into
23 the document?

24 A Yes.

25 Q Okay. Since, then you and I talked about the

1 obligation to present that witness the burden will be on
2 you to refute the State's evidence; is that correct?

3 A Yes.

4 Q You understand that there was some acknowledgment on
5 the record of the witness in the trial transcript. It was
6 you aware; right?

7 A Yes, sir, page 18.

8 Q All right. Thank you. And tell the Court more about
9 why you still feel that that was ineffective assistance of
10 counsel by your attorney even though he did mention that
11 on the record about the witness?

12 A Well, I feel it was ineffective assistance of counsel
13 because he -- Mr. Smiley weighed the credibility of the
14 witness himself. I didn't know if he could do that or
15 not. I mean, the law is very confusing, but I just didn't
16 think that he could weigh the credibility of a witness in
17 my defense. I didn't think that he could do that.

18 Q So you're referring to page 18 of the trial
19 transcript and it's your statement that it was improper
20 for him to waive that witness' credibility and fail to
21 bring him forward?

22 A Yes.

23 Q But just to be clear here you now understand, you're
24 no longer making any allegation that the prosecutor tried
25 to conceal this witness, are you?

1 A Well, he spoke to the prosecutor and according to
2 Mr. Smiley, he handed the prosecutor the statement that
3 Mr. Billing gave, so that's why I was saying that. I
4 mean, I don't understand that. How can you suppress that
5 evidence? I don't get that.

6 Q You also go on to say and what is paragraph five of
7 that page two we're still looking at for the judge's
8 reference, but it's your position that you were coerced by
9 counsel to pled guilty, explain to the judge why you
10 believe that, sir?

11 A Well, he kept telling me I was facing 25 years and
12 that I would get 25 years, if I went to trial. I mean, I
13 asked him what can we do with the evidence that, you know,
14 that's presented here. I said you have a witness, you
15 have a statement. I mean, you know, what's going on and
16 he said you need to pled guilty. You know, seven years is
17 better than 25 years. And then I believe I recall him
18 mentioning to me something about the hand of one is the
19 hand of all. And I didn't quite understand that, but he
20 just kept telling me I would get 25 years. So I felt as
21 though he coerced me because he kept scaring me into that.
22 You know, there was something, yeah, that I was afraid of
23 25 years. I mean, that's a lot of time.

24 Q And based on those discussions, what was the next
25 strategy step taken? What did you decide to do?

1 A Well, it's not what I decided. It's what he decided.
2 He decided he was going to speak to the prosecutor a
3 little bit more and see what could be done. And a long
4 time went before I heard anything about it. And then when
5 I was in his presence again and we were at court, he just
6 told me he said listen a seven year deal is the best deal
7 you're going to get.

8 Q So the choice that was presented to you was you
9 either was going to be tried on this or you plead to the
10 charge that may only have seven years of accountability?

11 A Yes.

12 Q Okay. All right. Continued on page three of the
13 amendment that you made at the top of paragraph there.
14 You were stating that you were not guilty of trafficking
15 in cocaine and that you didn't have prior knowledge of
16 that cocaine, shared just briefly with the judge your view
17 of the evidence that would have or could have been
18 presented at trial?

19 A Well, the evidence that would have been presented at
20 trial was the fact that the ex-coworker of mine purchased
21 the steal box toilet that the cocaine was placed in and I
22 had no knowledge of that. I have no knowledge of it being
23 in the box. I had no knowledge of it being in my van.
24 The statement that Mr. Billing wrote up explain that. And
25 he said that Mr. Billing stated that he had a friend AKA

1 Kevin, Kevin Diaz, who was a friend of his who was in on
2 this scam to have me transport the drugs up North without
3 my knowledge. Mr. Smiley knows all this. I mean, the
4 evidence that Mr. Billing would have presented I felt as
5 though would have cleared me of the charges.

6 Q Let me stop you there because the very next paragraph
7 you go on to state that if you were to have a trial on
8 that, you feel that the State would have failed to meet
9 their burden of showing that you knowingly and willfully
10 violated the law, is that your assessment?

11 A Yes, it is because I had no knowledge. I didn't
12 know. Mr. Billing's stated that to him that I had no
13 knowledge of those drugs in that seal box toilet that was
14 stapled and taped up. I had no knowledge they were in
15 there. None.

16 Q Just hearing you make that statement on the stand
17 today that you believe there to be a written confession, I
18 guess, from this other witness. I see that my file does
19 not have that and since I been representing you and I
20 supplied that. I'm assuming, sir, that you don't have a
21 copy of that?

22 A I don't have a copy of it. That's why I paid
23 Mr. Smiley to represent me.

24 Q But knowing that that copy -- the statement existed,
25 the decision was still made to go forward and plead to the

1 lesser amount of drugs; is that right?

2 A Well, he told me that was my best option.

3 Q Okay. But, I mean, at the time of the plea, you knew
4 that there was a written statement somewhere from that
5 allege co-defendant?

6 A Yes.

7 Q Okay. And you knew that prior to the date that you
8 entered the plea?

9 A Yes.

10 Q Okay. Continuing on -- you covered a lot of that.
11 Thank you, sir. You doing very well. Page four of that
12 same amendment just so everyone can follow along with us
13 just set out more of the facts and the judge can review
14 this more in his leisure about some of the facts you set
15 out about what the general plot was by Mr. Billing and
16 Mr. Diaz; is that correct?

17 A Yes, sir.

18 Q And that's now part of the application through
19 consent, so the judge can take a look at that. You feel
20 you set out those facts in a way that the judge will
21 understand what the allegations would have been?

22 A I believe the judge will understand it, yes, sir.

23 Q I'm sure he will. I just want to make sure that you
24 feel you been very straightforward. All right. Have you
25 had any conversations with this witness, Mr. Billings,

1 since the plea date?

2 A No, I have not.

3 Q To your knowledge has Mr. Billing spoken with
4 Mr. Smiley since the date the plea was entered?

5 A I believe not.

6 Q Okay.

7 A I don't believe that he did. I mean, I should say it
8 that way.

9 Q Just review it any further on that same amendment we
10 been looking at page five just more of the allegations
11 about what the general plot was and what you felt that
12 could have been proved. This will save the judge a lot of
13 time. He can review this at his leisure. He's probably
14 reviewing it as we speak and I appreciate that. You go on
15 to state that I think at the bottom paragraph -- beg the
16 Court's indulgence, Your Honor. Again, page five is just
17 a summary of the general plot of how you felt that those
18 two gentlemen had conspired to do this without your
19 knowledge. So again, it's your statement that you don't
20 believe the State could have proven that you had knowledge
21 of this particular event if you presented those witnesses?

22 A I don't believe they would have.

23 Q Page six this is about the middle paragraph where it
24 talks about begins Mr. James W. Smiley was fully aware.
25 You go on to speak about the fact that Mr. Smiley and the

1 prosecutor had some talks about this evidence. Were you
2 present while they were talking about this witness
3 evidence?

4 A No, I was not.

5 Q Okay. What was your understanding only from
6 Mr. Smiley's statements about what was said during this
7 conversation with the prosecutor?

8 A He told me that the prosecutor didn't believe it,
9 that's what he said. He said the prosecutor does not
10 believe what you are saying.

11 Q How much did you pay to retain Mr. Smiley in the
12 matter, sir?

13 A \$25,000.

14 Q Okay. Let's kind of go off page for a minute and
15 talk about his representation. How soon after being
16 arrested for the charges did you first meet with him?

17 A You have to be patient, that was a long time ago.

18 Q I understand.

19 A I believe my brother spoke to him and he came and see
20 me at the detention center one time and told me he was
21 going to move for a bond reduction. And it took 37 days,
22 I believe, to get the bond reduction in. And I seen him
23 one other time for a couple minutes and he told me to be
24 patient, that we were going to go before a certain judge
25 and that was it in that whole time. Now, what else are

1 you asking?

2 Q Well, I guess, maybe the easier way to answer this in
3 total face to face time you spend with Mr. Smiley in
4 helping him defend you in this case. How many hours would
5 you say that amounted to time he spent with you?

6 A How many hours?

7 Q Yes, sir.

8 A I couldn't put an exact number, but if I was just to
9 throw out an estimate, maybe 25, 30 hours tops.

10 Q I appreciate that. And then as far as a fair
11 estimate of other written correspondence and paperwork the
12 reasonable time to do that. How much time do you think
13 start to finish that Mr. Smiley spent on this case
14 assisting you?

15 A In total?

16 Q Yes, sir.

17 A Maybe 35, 40 hours.

18 Q Did you ever get a copy of where he requested and
19 sent out Rule 5 and Brady information?

20 A Yes, I did.

21 Q So you satisfied he did at least ask the State for
22 those materials?

23 A Yes.

24 Q I think even parts of these--- even on page six in
25 the current amendment we're looking at reflects that

1 obviously you receive some materials over a DVD, I think
2 that you made reference to you remember?

3 A I can't have that while being incarcerated, but I did
4 get the Brady rule.

5 Q Okay. But you are aware he did make a request for
6 any material that would be exculpatory?

7 A Yes, sir.

8 Q Okay. All right. And kind of curious on that same
9 page toward the bottom, you talk about September 15th was
10 the day of your plea hearing. So I want to be very clear
11 on that. What was your understanding of that day that you
12 plead? Was it that a jury was selected and they were
13 ready to try you if you didn't plea or did you just show
14 up on a special day for a particular judge so you could
15 enter the plea?

16 A No, there was no special judge. It was just to enter
17 a plea, I believe. I mean, I don't think there was a jury
18 ready. Nobody had mention to me anything about a jury.

19 Q So it wasn't a trial court day where you went in and
20 viewed the jury and they selected them anything like that?

21 A No.

22 Q Okay. If you wanted to that day, you were free to
23 leave the courthouse and do it another day? You didn't
24 have to enter the plea; right?

25 A I don't believe so.

1 Q Okay. All right. So just at the bottom of page six
2 and I think we cleared this up cause you had some
3 questions for me about it. I done my best to try and help
4 you. You mention that Mr. Smiley never mentioned the
5 \$50,0000 fine that would go along with pleaing to this; is
6 that correct, sir?

7 A He never mention that to me.

8 Q Did he talk with you about the supervision that would
9 go along with being an 85 percent offender that would come
10 after you are released?

11 A He never mention any of that.

12 Q You've asked me some questions about it. Have I done
13 my best to clarify some of that for you and you understand
14 it now?

15 A Yes, sir.

16 Q Okay. And you do recall that at the beginning of the
17 transcript, the judge references when he's asking what
18 you're pleading to that there is going to be a \$50,000
19 fine; isn't that correct?

20 A It was a shock to me but, yes, when the judge mention
21 that I...

22 Q So fair to say that was the first you had heard of
23 that?

24 A Yes.

25 Q And I'm sure the judge has already realized that in

1 listening to our testimony today and looking through the
2 file, but to be very clear here, you did not enter a
3 guilty, but you plead under auspicious of Alford vs. North
4 Carolina; is that correct?

5 A North vs. Alford.

6 Q Okay. And you're familiar with taking a plea under
7 Alford. Did your attorney explain that to you, sir?

8 A Somewhat.

9 Q Try if you could, I know it's been a long time, but
10 restate for the Court your understanding of how you
11 entered that plea and why you did it under Alford?

12 A Well, he basically said that I was pleading under
13 North Carolina vs. Alford and he was stating that I wasn't
14 admitting to any guilt, but that's what I would be
15 pleading under. We didn't get too in depth with that.

16 Q Because one of the complaints you had at the bottom
17 of page six there was that the judge failed to develop on
18 the record the factual basis for take the guilty plea.
19 That is what you put into your complaint; isn't it?

20 A Yes, sir.

21 Q But you would agree with me we've reviewed the
22 transcript since then. The judge does allow them to set
23 out what the facts they think they would be able to prove;
24 is that correct?

25 A Yes.

1 Q And he doesn't ask you on the record whether or not
2 you're admitting guilt to those charges; does he?

3 A No, I thought he had to, you know, ask me how the
4 drugs came about or how the charge came about. That's
5 what I thought.

6 Q But again, you were doing it under North Carolina
7 vs. Alford, so you never actually admitted guilty. You
8 just accepted the deal in order to avoid a higher criminal
9 penalty; correct?

10 A Say that again?

11 Q Because you were doing it under Alford vs. North
12 Carolina you never actually admitted guilt to the charges.
13 You did it to take advantage of a lower offer of time;
14 didn't you?

15 A That's what I thought, yes.

16 Q Beg the Court's indulgence, Your Honor. Finally, on
17 page seven of that first amendment, we been going over.
18 You note again that even though, I think, you already
19 testified that Mr. Smiley made a judgment call about
20 whether or not the client -- the witness would be
21 believed. You state that he never made any mention about
22 that on the record as to whether or not the witness would
23 lie or misdirect the Court. Is that still a complaint of
24 yours?

25 A Well, yes, it is because if he weighed the

1 credibility of the witness why wouldn't he state that he
2 felt to the Court that the witness was going to lie,
3 that's why he was weighing the credibility.

4 Q Do you happen to recall for all of our benefit in the
5 transcript where your attorney refers to the witness what
6 page it was, sir?

7 A Page 18.

8 Q On page 18. I believe that begins on or around line
9 nine and I'm just reading from that for everyone's benefit
10 as I ask you some more questions about it. It says Mr.
11 LaRoche and I produced a witness that would have come in
12 and testified that he didn't and the previous sentence was
13 talking about the drugs in the vehicle. And on line 11,
14 it continues the problem with the witness wasn't very
15 credible and the risk was extraordinary, but Mr. LaRoche
16 go to trial at 25 years and we talk through the process?

17 A We sure did and that's all we kept talking about was
18 me facing 25 years.

19 Q Okay. Well, let's focus then in on your next
20 argument about whether or not there was a denial of due
21 process by his error when it came to the plea that you
22 choose to enter. This for the court's reference is the
23 document that you've entitled trial court committed
24 reversible error and denied the petitioner his due
25 process. And actually numbered page three several of you

1 can follow along with us. You're stating that you're
2 upset because you're allowed to plead guilty to a
3 different trafficking offense that wasn't a charged
4 offense; is that correct? That's in paragraph one of that
5 statement.

6 A Yes, sir.

7 Q And just to be very clear again that particular
8 offense was trafficking 28 to 100 grams; is that correct?

9 A Yes.

10 Q That's what you pled to?

11 A Yes.

12 Q Okay. And the initial charge was 400 grams or more
13 of cocaine?

14 A Yes, sir.

15 Q That's important that language about 400 grams
16 because before meeting me, you started doing some research
17 on some similar cases; didn't you?

18 A I tried.

19 Q And you found one that you want to present to the
20 court today that you feel is pretty similar to your
21 situation in State vs. Gosnell, which you've allege in
22 that particular paragraph on page three; is that correct?

23 A State vs. Gosnell, yes, sir.

24 Q Okay. I was talking with Mr. Spencer earlier. He
25 indicates to me he had a copy of that, but just for the

1 judge's reference ask you a few questions about it. On
2 your behalf, would you like to hand up a copy so the judge
3 can look at that?

4 A Yes, sir.

5 Q As I'm doing so and make sure Mr. Spencer has a copy,
6 fair to say you and I have gone over this case several
7 times and we may have some differing opinions about what
8 it holds?

9 A Yes.

10 Q Okay. But in all fairness to do a good job for you
11 today and help you present your case to the Court, you
12 want to talk a little bit about this case with the judge
13 and let him consider it if it does apply to the case?

14 A Yes, sir.

15 Q Okay.

16 MR. ATKINSON: Your Honor, if it please the
17 Court, I like to approach and just hand up a copy to State
18 vs. Gosnell.

19 THE COURT: Very good.

20 MR. ATKINSON: Thank you, sir.

21 BY MR. ATKINSON:

22 Q Paragraph two of that amendment, that we're currently
23 on got a page three at the bottom. You're submitting that
24 your case has the exact same issues is that asserted in
25 State vs. Gosnell; aren't you, sir?

1 A Yes, sir.

2 Q You are also indicted for trafficking 400 grams of
3 cocaine or more?

4 A Yes, sir.

5 Q And by your statements in this particular document,
6 you feel that the Gosnell case stands for the proposition
7 that what you're allowed to plea to is not a
8 lesser-included offense of the original charge; is that
9 right?

10 A Yes, it is. Yes, sir.

11 Q You feel that as just in the Gosnell case that would
12 be reversible error because it was not a lesser-included
13 charge?

14 A Yes, sir.

15 Q And we've had some talks about the fact that the
16 Gosnell case, there was also a side issue of the
17 conspiracy that Gosnell was charged with. But still after
18 reviewing that and again as you stated, you're not an
19 expert in the law. You just want the judge to hear your
20 concerns. You feel that that case applies and it was
21 improper to allow you to plead to the charge; is that
22 right?

23 A Yes, sir.

24 Q Okay. Finally, sir, this is pretty quick argument
25 cause the judge will need time to review that case and

1 then review your arguments on page three and four of your
2 documents entitled trial court committed reversible error.
3 But you also close out by noting that there's another case
4 Matthews vs. State where you're citing the proposition
5 that the legislature intended possession with intent to
6 distribute to be the lesser-included offense of
7 trafficking; is that right, sir?

8 A Based upon possession, yes, sir.

9 Q Since the time you've pled to this, you done some
10 research and feel that you should have been allowed to
11 plead to possession with intent to distribute?

12 A Yes, sir.

13 Q All right. But just to be very clear for the record,
14 to your knowledge that was never offered by the
15 prosecutor; was it?

16 A Not to my knowledge.

17 Q Okay. To your knowledge, the choice was as your
18 attorney presented it to you either we'll have a trial or
19 you're subjected to these particular penalties or you can
20 plead to this today and there's a minimum cap of seven
21 years; correct?

22 A Yes.

23 Q Your position is that that was an improper lesser
24 offense to be considered and would then need to be
25 submitted to the grand jury I'm assuming?

1 A Yes.

2 Q Finally, sir, wrapping up your arguments in the final
3 memorandum that you gave to the Court. It's two pages of
4 consistency that talks about just ineffective assistance
5 of counsel. That's the title that you gave to it for the
6 amendment in paragraph ten. And you're submitting again
7 that there was ineffective assistance of counsel because
8 you were allowed to plead guilty to the offense that you
9 feel was not a lesser-included offense?

10 A Yes, sir.

11 Q Okay. Why don't you just to make sure I'm giving you
12 a chance to share everything you want to tell the judge,
13 why don't you explain why you feel that possession with
14 intent to distribute is a fitting charge and your
15 experiences with people that you've witnessed have those
16 same charges. I know you've spoken to me about that just
17 share that briefly with the judge?

18 A Well, sharing what I thought was the law is in
19 Massachusetts vs. State, Supreme Court ruling 1990, it
20 says that what you just stated possession with intent to
21 distribute is a lesser-included offense of trafficking.
22 In case of State vs. Gosnell, it says that trafficking is
23 not a lesser-included offense of trafficking. I mean,
24 maybe I have something confused here, but maybe you could
25 fill me in on that or maybe the judge could answer that

1 for me?

2 Q And that was the intent of your questions that you're
3 initiating with the judge before we got into trying your
4 case today; correct? You wanted some clarification about
5 that?

6 A Yes, sir.

7 Q This is something you and I have talked about that if
8 you were to prevail on a PCR case, I've informed you that
9 the only remedy is to go back to start and be tried again
10 on these charges where you would factor that additional
11 amount of time. You're aware of that?

12 A You've told me that.

13 Q Okay. And you basically have said I just don't want
14 to waive the right to have this opportunity to speak to
15 the judge and find out what he says about whether or not
16 something improper was done. Is that your feelings on it?

17 A Well, the judge knows the law, I don't. So the judge
18 can tell me if it's correct or if it's not?

19 Q And again, that is the general complaint against
20 Mr. Smiley is that you were allowed to plead to a not
21 lesser-included offense that should have been recharged to
22 the grand jury?

23 A Yes.

24 Q Finally, in that memo just some very general
25 ineffective assistance of counsel arguments, I think you

1 number one through six and you stated that Mr. Smiley was
2 ineffective for failing to adequately investigate your
3 case. Can you elaborate some on that for us? What did he
4 fail to do that he should have done, sir?

5 A Well, he never located the other witnesses. He never
6 did anything as far as what Mike Billing said. He never
7 looked into anything. He just talked to the prosecutor
8 about Mike Billing in the statement, but he never move to
9 interview or to try to follow up on Kevin Diaz and other
10 people that were involved in the case. I mean -- or in
11 the crime I should say. I mean, when you pay somebody to
12 represent you, you think they would go to full depths to,
13 you know, give you the best defense that they could, but
14 he didn't. That's what I feel.

15 Q Understanding that the charges against you, you could
16 have ranged up to 25 years and possibly more. I know
17 there was a marijuana charge dropped; correct?

18 A Yes, sir.

19 Q Whether or not it is a proper lesser-included
20 offense, would you agree that there was some benefit in
21 pleaing to the charge that you received because it was
22 lesser time than the charge you were charged with?

23 A Yes.

24 Q Did you receive some benefit by having less time?

25 A Yes.

1 Q Okay. Number two of that states that counsel was
2 ineffective for failing to subject the State's case to
3 proper judicial testing. I'm assuming that's the same
4 thing you just summarized in one that if he had developed
5 these witnesses in the case, you still had a case at a
6 trial?

7 A Yes.

8 Q Is there anything else you needed to add for number
9 two for me?

10 A No.

11 Q Okay. Number three said counsel was ineffective for
12 failure to inform the petitioner of the trafficking coke
13 is not a lesser-included offense. So that just goes back
14 to your Gosnell argument; right?

15 A Yes, sir.

16 Q Okay. And that's what you're basing that on?

17 A Yes, sir.

18 Q I believe prior to coming into the courtroom today
19 you had referenced look like a pocket part to one of our
20 code sections. Did you need that for any particular
21 reference or was that the Matthews case you just mentioned
22 a moment ago?

23 A The little book I showed you in the room?

24 Q Yes, sir.

25 A The little book just stated the correct

1 lesser-included offense of trafficking as far as what I
2 read and what I believed it to be.

3 Q Just to give you a chance to fully litigate your
4 case, sir, cause I'm kind of just asking you questions
5 letting you explain it to the judge today. Could I hand
6 up the packet to you and let you refer to that and we can
7 read into the record why you believe that to be and the
8 judge could take reference to it?

9 A Sure.

10 MR. ATKINSON: Judge, I'm going to pass up a
11 package to him. I believe it contains a pocket part to a
12 South Carolina Code Section and it's probably a blurb at
13 some of the notes there referencing to the statute in the
14 case that refers to that. If he can just read that into
15 record for you.

16 THE COURT: Very good.

17 MR. ATKINSON: Thank you, Your Honor.

18 BY MR. ATKINSON:

19 Q Mr. LaRoche, just take a look through those two
20 envelopes that you brought with you. If you can quickly
21 refer to that code section and possibly the case that you
22 read to me. I just want to give you a chance to fully
23 litigate your case today.

24 A Well, it's not a case. It's actually what they show
25 in the book right here.

1 MR. ATKINSON: Your Honor, if I could before he
2 reads it, going to identify for the record what he is
3 reading from. This is the 2010 Cumulative Supplement to
4 the Code of Laws of South Carolina volume 15A. And he's
5 just going to briefly read to you from 44-53-370 at the
6 top of page 201.

7 A It states the offense of possession with intent to
8 distribute described in section 44-53-378(a) is a
9 lesser-included offense to the offenses of trafficking
10 based upon possession described in this subsection.

11 Q Sir, I will return these materials to your desk.
12 Thank you, Your Honor. So it's your position that that
13 would have been the proper reduced charge that you should
14 have been allowed to plead to?

15 A Yes, sir.

16 Q In fact, I think that one of the complaints you had
17 when we talked was that the judge on the record refers to
18 the charge you pled to as a ---

19 A Lesser charge and reduced exposure.

20 Q Yes, sir.

21 A It states that on page five on my transcript and page
22 three.

23 MR. ATKINSON: Your Honor, I just ask that you
24 take note of page three and five of the transcript that
25 the Court had indicated to him that it was a

1 lesser-included offense.

2 BY MR. ATKINSON:

3 Q I believe you said, sir, of least what ---

4 A Say that again?

5 Q You said the Court indicated it was of at least what?
6 Least exposure is what you said?

7 A No, the transcript on page five states the lesser
8 charge and lesser exposure, reduced charge and reduced
9 exposure, that's what it states transcript page five.

10 MR. ATKINSON: I believe you're reading from
11 5-17, Your Honor.

12 A 17 through 21.

13 Q So we're clear on the questions I'm asking. It says
14 they reduced the charges. They reduced the exposure and
15 even though I'm not admitting to any wrongdoing, I'm
16 entering a guilty plea to the lesser charge because I want
17 to take advantage of the State's offer, that's actually
18 your statement; isn't it, sir?

19 A That's from the Court.

20 Q Okay. I understand. The Court summarizing your
21 statement that you wanted to go forward on the Alford
22 plea; is that correct?

23 A Yes.

24 Q Okay. Cause that's an actual statement from Judge
25 Russo?

1 A Yes, sir.

2 Q Thank you. Number four back to our ineffective
3 assistance page one in article number four. You say that
4 Mr. Smiley was ineffective because he did not operate in
5 the range competence required by an attorney in any
6 criminal proceeding. Anything else you want to add to
7 what you already explained today?

8 A I don't believe he did everything he could have. I
9 believe there's a lot more he could have done in my case.
10 I truly believe that. I truly believe if he did, I
11 wouldn't be sitting here talking to you right now.

12 Q Yes, sir. Paragraph five seems to refer again back
13 to the Gosnell complaint that you have about pleading
14 guilty to an offense that is not a lesser-included
15 offense; is that correct, sir?

16 A It goes back to Gosnell, yes, sir.

17 Q And finally, in number six, you say he was
18 ineffective for preparing an inadequate defense for the
19 petitioner?

20 A I felt as though he never prepared a defense for me
21 at all.

22 Q Finally, at the bottom of that just to summarize
23 again, I already indicated that these are your writings
24 that you state the petitioner submits to the Court that he
25 is not claiming to have a defective or an insufficient

1 indictment. What you are claiming is that you're allowed
2 to plead guilty to a crime you were not indicted for;
3 correct?

4 A Yes, sir.

5 Q Just to be clear, the judge does not have to take
6 that into consideration as far as -- I think he initially
7 made that complaint in the actual PCR filing. And finally
8 that relates to your subject matter jurisdiction argument
9 that you felt the Court didn't have any jurisdiction over
10 you if you were pleading to a charge you were not indicted
11 with?

12 A Yes, sir.

13 Q Mr. LaRoche, as far as the PCR application and the
14 amendments you ask me to make on your behalf, that's all I
15 have. So I want to give you a chance if you could briefly
16 if there is anything else that you need to explain to the
17 judge. This is your time to talk with him and explain why
18 you feel Mr. Smiley was ineffective in assisting you.
19 I'll ask that you do that at this time?

20 A I don't have anything else to add to the record.

21 Q Thank you, sir. Satisfied with my representation in
22 the matter?

23 A Very much, yes.

24 Q You feel I done a good job in assisting you in
25 putting these arguments before the Court today?

1 A Well, with the limited time you had this morning,
2 yeah, you did a very good job. Thank you.

3 MR. ATKINSON: Answer any questions Mr. Spencer
4 may have of you, sir.

5 THE COURT: Mr. Spencer, cross-examination.

6 MR. SPENCER: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. SPENCER:

9 Q Mr. LaRoche, sitting through your -- listening to
10 your testimony, it's my understanding basically the reason
11 you plead guilty is your attorney was telling you you
12 could get 25 years if you went to trial?

13 A Yes, sir.

14 Q And you decided you didn't want to risk a trial and
15 get 25 years. You rather plead guilty under Alford and
16 get seven years?

17 A That was his advice.

18 Q And you decided to follow his advice?

19 A Yes, sir.

20 Q All right. This Mr. Billings you talked about were
21 you present when Mr. Smiley interviewed Mr. Billings?

22 A Yes, I was.

23 Q Oh, okay. So you knew about it. You knew about
24 Mr. Billings?

25 A Yes, sir.

1 Q And what he would say?

2 A Yes, sir.

3 Q And Mr. Smiley knew about Billings and what he would
4 say?

5 A Yes, sir.

6 Q Did -- and you said Mr. Smiley told the prosecution
7 about Mr. Billings?

8 A Yes, he did.

9 Q Okay.

10 A Yes, he did. He had a conversation with the
11 prosecutor and Mr. Billing. Yes, he said he had an in
12 depth conversation with the prosecutor about the statement
13 and Mr. Billing.

14 Q And the prosecutor wouldn't drop the charges?

15 A Well, he told me the prosecutor didn't believe it.

16 Q Okay. Do you remember Judge Russo asking you if you
17 were satisfied with Mr. Smiley's services?

18 A Yes, I remember that.

19 Q And you told him you were; right?

20 A Yes, I believe I said that. Because I didn't feel as
21 though there was anything else I could do myself.

22 Q Right.

23 A That's what I paid that man to do represent me.

24 Q And you told Judge Russo you were satisfied with
25 Mr. Smiley; is that right?

1 A Yes, sir.

2 Q And so is it fair to say at the time you were
3 satisfied that Mr. Smiley had done his job?

4 A At the time because I didn't know anything else could
5 be done or what else should have been done.

6 MR. SPENCER: Beg the Court's indulgence. Your
7 Honor, no further questions.

8 THE COURT: Very good.

9 Any redirect?

10 MR. ATKINSON: Your Honor, only one. I just ask
11 that you take judicial notice of the order for trial
12 signed by Howard P. King, the Honorable Howard P. King
13 on June 23rd 2008, indicating that it was indeed set for a
14 trial certain on September 15th 2008. And I have no
15 further questions for the witness.

16 THE COURT: Very good.

17 Thank you, Mr. LaRoche. You may step down.

18 (WHEREUPON, the witness leaves the witness
19 stand.)

20 THE COURT: Might counsel approach the bench for
21 one moment.

22 (WHEREUPON, a bench conference was held in the
23 presence of the jury, but out of the hearing of the
24 jury.)

25 THE COURT: Mr. Atkinson, you had an opportunity

1 to take a look at this Gosnell case. And I have not had
2 an opportunity to review it in its entirety, but I
3 certainly will do so. Just briefly glancing at it, it
4 appears to me as if this was a case where Gosnell actually
5 went to trial. And there was an undisputed amount of
6 drugs testified to and established in the state's case.
7 And therefore, it was inappropriate to charge a
8 lesser-included offense because there was not a dispute
9 about the amount of drugs.

10 MR. ATKINSON: That is correct, Your Honor. And
11 also to the Court, I would state that the -- I do believe
12 it would be distinguishable from this particular case
13 because of the fact that in that case it went to trial and
14 it was a conspiracy charge for 400 grams. There was
15 clearly proof of only about 252 grams. And it wasn't
16 proper for the judge in that case to go back and charge to
17 the jury a lesser-included offense and I believe ---

18 THE COURT: Which presents a very interesting, I
19 don't know the answer to it. But if the defendant would
20 have agreed to a lesser-included offense, do you think it
21 would have been reversible error for him to do so.

22 MR. ATKINSON: Your Honor, just having to
23 speculate, I don't believe it would be. And I think that
24 is the distinction between -- again, as an officer of the
25 Court, I have to zealously represent my client. And I'm

1 allowed to present that on the record today, but I must be
2 honest about my assessment of the case. And I feel that
3 that's the difference here is that it was a conspiracy
4 charge. The State clearly had ---

5 THE COURT: I'm not real sure exactly how the
6 Supreme Court would take that. There might be a law on
7 that affect, but to that effect. But I'm of the -- you
8 know, just my gut reaction would be that if the defendant
9 was willing to agree to a lesser-included offense even if
10 there was not really a dispute about the amount of drugs,
11 if the State was willing to have a compromise and defense
12 was, I think, probably as a practical matter it probably
13 would have gone through. But I do understand the Gosnell
14 case to stand for the proposition when there is an
15 undisputed amount of drugs, you can't just on the Court's
16 own volition charge a lesser amount. And to take that to
17 it's logical conclusion, it would seem to me that if we
18 were to take Mr. LaRoche, and I know he's spent a lot of
19 time studying and preparing this, I know this is a very
20 important case to him, but I think he does miss the point
21 a little bit because if we were to take his logic to its
22 conclusion and he would not be allowed to plead to
23 anything less than a 25-year sentence according to his
24 theory with regard to this Gosnell, which wouldn't be good
25 for him; would it?

1 MR. ATKINSON: No, sir, Your Honor. I do agree
2 with you. It sounds like an issue they just merely did
3 not reach in that case and it's not on all fours.

4 THE COURT: But I'm saying in this case if you
5 take it to it's logical conclusion that he could not plead
6 to a lesser-included amount of trafficking, his only
7 option would be to go to trial and it would be 25 years
8 or nothing.

9 MR. ATKINSON: And or have it re-presented to
10 the grand jury I think as he has indicated, Your Honor.
11 But the Court's logic is sound.

12 THE COURT: It seems like that's kind of my
13 understanding of the law.

14 MR. ATKINSON: Yes, sir.

15 THE COURT: All right. Mr. Spencer, anything
16 more with regard to Gosnell?

17 MR. SPENCER: Yes, Your Honor. I handed up to
18 Your Honor and I've given a copy of this to opposing
19 counsel Rollingson vs. State, kind of does answer the
20 question posed or at least cites the case that answers the
21 question, which is cite Anderson vs. State, which is a
22 case where an individual pled guilty to voluntary
23 manslaughter as a lesser of murder. And the argument, I
24 believe, was something along the lines is there wasn't a
25 factual basis cause there's no evidence of heat of passion

1 and provocation. And the Court said, you know, that's
2 fine. This is ---

3 THE COURT: As a matter of compromise, you can
4 do that in plea negotiations. However, I think there's a
5 case that came out in the advance sheets this year that
6 said it would be reversible to charge -- it was not
7 reversible error to refuse a charge for involuntary
8 manslaughter where there was no evidence that would
9 establish heat of passion, which essentially says the same
10 thing.

11 MR. SPENCER: Right. The reason it's
12 differentiated is because pleas are govern by contract
13 principles and you can certainly agree to Rollingson
14 itself says you can plead guilty to something you're not
15 guilty of as a matter of contract and I think in
16 Rollingson ---

17 THE COURT: And particularly in view of the fact
18 that it's a North Carolina vs. Alford?

19 MR. SPENCER: And particularly in North Carolina
20 vs. Alford.

21 THE COURT: All right, very good. Anything
22 further with regard to that point of law?

23 MR. ATKINSON: Nothing further on that point of
24 law, Your Honor. And if it saves sometime, that would --
25 the petitioner's case is now ended. And I believe you

1 mention probably a break for lunch and then they will call
2 their witness.

3 THE COURT: Okay. Very good. One other minor
4 point, Mr. Atkinson, of course, there was an allegation --
5 I know this was an allegation that was actually put
6 forward by Mr. LaRoche, but the exculpatory information
7 that he's talking about pursuant to Brady vs. Maryland was
8 actually discovered by him and given to the State, which
9 is really not what Brady is all about. You understand
10 that, but, I believe, Mr. LaRoche does not.

11 MR. ATKINSON: Yes, sir, and I appreciate you
12 explaining to him on the record. I tried to explain that
13 and that's why I was asking questions about at the time he
14 had indicated that the prosecutor may have acted in an
15 inappropriate manner. I think he cleared that up. He now
16 understand that's not the case and that it was the
17 responsibility of his attorney to present that if that's a
18 part of their trial strategy. But thank you for
19 clarifying that on the record.

20 THE COURT: Very good. We will stand at ease
21 until two o'clock.

22 Mr. Smiley, I understand your testimony is not
23 going to take that long, but I do have to be somewhere
24 right at 12 and I apologize for the inconvenience.

25 MR. SMILEY: I apologize for being delayed this

1 morning, Your Honor.

2 THE COURT: That's all right. So we will be
3 back at two o'clock sharp.

4 And, Mr. LaRoche, we will see you at two.

5 (WHEREUPON, a lunch break was taken.)

6 THE COURT: Mr. Spencer, you recognize.

7 MR. SPENCER: Thank you, Your Honor. I would
8 call Mr. Smiley to the stand.

9 THE COURT: I understand we have a civil matter
10 that emulates out of Sumter County and we are about to
11 conclude this matter. Is there anybody here from the
12 Sumter County case? Very good. We will be with you
13 momentarily. We running a little bit behind. After this,
14 we will have the luxury of all afternoon.

15 Mr. Spencer, you recognize.

16 Yes, sir, if you could please place your left
17 hand on the Bible and raise your right hand as the clerk
18 administers the oath.

19 THE CLERK: Do you swear the testimony you give
20 in this case will be the truth, the whole truth, and
21 nothing but the truth so help you God?

22 MR. SMILEY: I do.

23 THE CLERK: Be seated and state your name for
24 the record.

25 THE COURT: All right. Mr. Smiley, please pull

1 up a seat, ask you to pull up close to that microphone,
2 speak, loudly, clearly and slowly in order that we can
3 hear everything that you got to say. And let's start with
4 your full name, Mr. Smiley.

5 MR. SMILEY: James Watson Smiley, IV.
6 S-M-I-L-E-Y.

7 THE COURT: Very good. Mr. Spencer, you
8 recognize.

9 MR. SPENCER: Thank you, Your Honor.
10 WHEREUPON,

11 James W. Smiley, IV
12 after first having been duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. SPENCER:

15 Q Mr. Smiley, I'm going to lead off with, I think, the
16 first issue that was raised before hand, which is the
17 issue of whether Mr. LaRoche asked you to file an appeal?

18 A He did not ask me to file an appeal. It was
19 explained on the record. I briefly went over his rights
20 before we entered the plea. But since, it was a
21 negotiated, a plea that I had already worked out with the
22 prosecutor that we're asking the judge to accept, I didn't
23 see -- and everything went smoothly, I didn't see any
24 reason to go back to him afterwards and ask if he wanted
25 to appeal because we were asking the Court to accept what

1 we had worked out, so no. No reason to.

2 Q Just be overly explicit, there was no extraordinary
3 circumstance would have made you think that an appeal was
4 warranted?

5 A No, the plea went exactly as planned.

6 Q In terms of their sort of what, I guess, would be
7 called an indictment issue or lesser-included offense
8 issue, is that something you would have considered
9 objecting to?

10 A No, we wanted a lesser offense. He was -- he was
11 found to be in of possession 502 grams of cocaine. He was
12 indicted under the greater than 400 statute. We entered a
13 plea to the 28 to 100 statute because it had a lesser
14 sentence. All of the elements are the same. The only
15 difference is the punishment in the weight, so I didn't
16 believe that there was any issue. On the sentencing
17 sheet, we checked lesser-included and it was agreed by all
18 parties and signed off by the judge.

19 Q And what was the exposure on the higher charge, the
20 over 400 charge?

21 A A mandatory minimum 25 years at 85 percent.

22 THE COURT: And a violent offense.

23 A Yes, sir. Most serious versus a serious and it was a
24 no parole offense also.

25 Q Trying not to beat a dead horse. But Mr. Billings --

1 actually, can you tell us about did you interview
2 Mr. Billings?

3 A Yes, I never knew his last name. I knew him as Mike.
4 After I had gotten, Mr. LaRoche out of jail he was on
5 bond, allowed to leave the state. He became a long haul
6 truck driver. He would stop in and visit with me. And he
7 kept telling me that there's somebody I needed to meet
8 that could help exonerate him because I said if you can
9 reach him bring him to me cause this fellow was -- he knew
10 him. So he brought the gentleman to me -- gentleman
11 loosely as I knew as Mike. And Mike came to my office.
12 The three of us sat down and spoke for about an hour a
13 little over. And Mike said he had been working for
14 Mr. LaRoche for sometime as his handyman down in Florida
15 and up in Rhode Island from time to time. And his story
16 was that two Cubans had paid him a couple hundred bucks to
17 let them put the cocaine and the marijuana in back of
18 Mr. LaRoche's truck. Now, of course, by Mike telling me
19 that, he admits to being part of a conspiracy for half a
20 kilo. There was no written statement. I purposely didn't
21 take a written statement in the case. I thought first as
22 an officer of the court, I thought if I started doing
23 that, I might need to tell him to go get a lawyer because
24 he's admitting to 25 years. And second of all, I didn't
25 want to lock my guy in because he's a little wishy washy

1 on some of the points. And so if I have a prior statement
2 that I have to turn over once he testifies, there's going
3 to be a prior inconsistent statement to be impeached with.
4 So as my general practice, I try not to take statements
5 unless I'm afraid I'm going to lose the fellow. And
6 since, Mr. LaRoche brought the gentleman to me, he worked
7 for Mr. LaRoche. And Mr. LaRoche assured me that the
8 fellow would be available, which he was. I didn't take a
9 statement.

10 Q Okay. Had you gone to trial would you have
11 potentially called Mr. Billings as a witness?

12 A Well, we would have had to. We would have had to.
13 Our case would have been around Mr. Billings and
14 Mr. LaRoche. We would have -- my defense built on two
15 prongs. The first would be to challenge the stop. I
16 didn't know we would be successful there, but be one place
17 to challenge. It was the highway patrolman pulled him
18 over for crossing two yellow lines. And he said he got
19 him out of the car and brought him to the back of the
20 truck over general nervousness. I don't think we would
21 have succeeded there because there was more than general
22 nervous. He saw a plane ticket for the same day that he
23 was pulled from Florida to Rhode Island. And I think that
24 piece of evidence hurt us because if in fact our theory of
25 defense on the other prong would have been that he didn't

1 know about it somebody else had put it in there, why at
2 the last second that he not fly number one. And how would
3 the Cubans had known he wasn't going to fly to put it in
4 there. And lastly, on our defense that I considered a
5 weakness assuming that our witness came across credible,
6 which I had grave concerns about, but how are they going
7 to recover the drugs from the van. I just didn't have a
8 answer to that and I felt like a jury for our defense to
9 work was going to have to be pretty airtight. I always
10 tell my clients when the State presents a case and if a
11 police officer or bystander gets something wrong, the jury
12 will tend to forgive small things. But when we put up a
13 defense, it better work because you get the littlest thing
14 wrong and they tend to discount the entire defense that
15 was my concern. Also from the very beginning, we were
16 working for a lesser-included or a lesser offense and what
17 we were able to work out.

18 Q All right. Whose decision was it to plead guilty?

19 A Certainly Mr. LaRoche's. He didn't want to go to
20 trial. I was prepared as I don't blame him. I think he
21 made the right decision given his facts. I believe him to
22 a certain extent that he didn't exactly know what was in
23 the back. I was with him -- one of the reasons that we
24 worked out an Alford plea because I didn't think he would
25 make it through a straight guilty plea in this case, but I

1 wanted to make sure he got the benefit.

2 MR. SPENCER: Beg the Court's indulgence.

3 BY MR. SPENCER:

4 Q Did you coerce Mr. LaRoche to plead guilty?

5 A No, absolutely not. We came up here to discuss
6 pleading on four different occasions where we didn't work
7 out the plea that we wanted and so we left. Now, we were
8 running out of time. Technically, Mr. Jepertinger, I
9 always say it wrong, had pulled the offer because we were
10 getting close to trial. But that day I went back and
11 talked with him and was able to get that back on the table
12 if we accepted it then in which we did.

13 Q There was some testimony about Mr. Diaz. Is that a
14 name that ---

15 A I never heard the name Kevin Diaz. I heard of two
16 Cubans that talk Mike into putting it in the back of the
17 van. It was five pounds of marijuana, it was found in a
18 water cooler. And then there was half kilo of cocaine
19 found inside a box, toilet box. And so when the -- when
20 they got the consent to search and open the van, and that
21 was on video, is they smelled the marijuana immediately,
22 went to the water cooler and opened it, found the
23 marijuana, put him under arrest, which then expanded the
24 search cause one of my prongs attacking a search would
25 have been that the toilet box wasn't open. It was sealed

1 and so they had to actually open it, but I think it was
2 discounted of the fact that he was already placed under
3 arrest at that point in time with the marijuana. I think
4 it would have been a stronger argument if they hadn't
5 found any drugs at that point in time about whether they
6 could open the next container. I think there's case law
7 that says they could anyway, but at least it would have
8 been a stronger argument.

9 Q If you had -- Mr. LaRoche had decided to go to trial,
10 could you guarantee him an acquittal?

11 A No, certainly not. I mean, I been doing it for 18
12 years and probably tried 75 felony cases during that time
13 and I never guaranteed anybody anything as far as a trial
14 goes.

15 Q And if he was convicted, he have at least 25 years?

16 A Exactly. You know, you got to make tough decisions
17 when you're arrested and looking at that kind of charge.
18 And, you know, if they been offering 15 or 20 years as a
19 plea offer, we probably would have gone to trial. But at
20 some point, my client makes the decision that he doesn't
21 want to risk that kind of time. And I -- we wanted
22 better, there's no doubt about that. At his age, he had
23 no criminal record. He had a plausible story that I had
24 used to my best ability in negotiations with the
25 prosecutor, but you couldn't get around the fact it was a

1 large amount of cocaine, large amount of marijuana in the
2 van of Mr. LaRoche.

3 Q One more thing you had hinted at it, but I just kind
4 of wanted to make it clear for the record. You were not
5 too sure about Mr. Billing's credibility, is that a fair
6 statement?

7 A Mr. Billings presented at my office and he was --
8 look like a skateboarder fellow. He had lots of tattoos
9 and piercings. And I ask him about his criminal record.
10 Well, he couldn't detail that he had one. When I ask him
11 about his background, he wasn't terribly forthcoming. And
12 also putting him on the stand when you start talking about
13 making admission about I was involved with an offense that
14 carries 25 years, he was subject to being arrested. And I
15 think would have had to been advised of his Miranda. When
16 you put all that together, I wasn't confident that first
17 the jury would buy it or second that he would tell the
18 same story on the stand. And while you don't want to
19 impeach that kind of witness, is one of the reasons I
20 didn't take a statement from him the first time. If you
21 start impeaching your own witness, you are done.

22 MR. SPENCER: Thank you. I appreciate it.

23 THE COURT: I've got just a couple questions.
24 The applicant indicated that you spoke with him for about
25 25 to 30 hours. Is that an accurate estimate as to how

1 much time you spend with him?

2 MR. SMILEY: It actually might be a little high,
3 Judge.

4 THE COURT: The fact situation is not that
5 complex, but doesn't -- I feel like I've got a pretty good
6 grasp of what the facts are. Of course, we haven't been
7 20 or 30 hours. Do you feel as though you understood the
8 facts and the law that applies?

9 MR. SMILEY: Absolutely.

10 THE COURT: Do you feel like you were prepared
11 as you could be to try the case?

12 MR. SMILEY: I was ready to go. Yes, sir.

13 THE COURT: And you ready to try it?

14 MR. SMILEY: Yes, sir. I've tried -- it's not
15 like this was as you know, Your Honor, it wasn't like it
16 was something new to me. I mean, all I do is criminal
17 defense. It's not that I do a little bit of this, a
18 little bit of that. So I handle cases like this on a very
19 very regular basis, so I certainly know the law. I know
20 the search and seizure issues fairly inside and out. The
21 only thing that was unique in this case was handling a
22 witness that was produced -- that was dubious in some
23 respects and I wanted to make sure I handled it correctly.
24 I think I did.

25 THE COURT: All right. Cross-examination,

1 Mr. Atkinson.

2 MR. ATKINSON: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. ATKINSON:

5 Q Mr. Smiley, Phillip Atkinson for Robert LaRoche. I
6 had a chance to meet you just briefly this morning. I
7 believe, at some point, I wrote to your office to indicate
8 that I was representing him and you provided to me, I
9 believe, some of your Rule 5 and Brady material, which is
10 why I have that in the file. So I appreciate your
11 cooperation with that. I'm going to ask you a few
12 questions about your testimony today, try to follow the
13 same order that counsel followed. As far as the appeal
14 goes and I understand your reasons for stating the plea
15 went as you expected it to, but after the plea was over
16 just to be very clear, you didn't write to my client to
17 remind him that he had an opportunity to appeal; did you?

18 A Not my standard practice, no.

19 Q And fair to say you went through some of the
20 materials that you sent over. The day this plea took
21 place y'all were actually under an order from, I guess, it
22 was the Honorable Howard P. King for a trial set certain
23 on that day; isn't that correct?

24 A That's true, but that was at the first one of those
25 orders. I had already received a couple of others. And

1 we were going to go to trial if not -- I don't believe it
2 was going to be that day. We were expecting it to be
3 shortly. I was prepared for trial.

4 Q All right. But as far as from what I got in the file
5 unless you have anything that shows otherwise, the last
6 order for trial I have indicates that you either going to
7 plea or be tried on September 15th 2008?

8 A I'm not disagreeing with you.

9 Q You mention about weighing credibility of the witness
10 that was in the transcript. What standards were you using
11 for that? I've already heard some testimony about him
12 having some tattoos and piercings?

13 A Eighteen years of experience in the courtroom, 75
14 felony cases. And I was able to give him my best
15 estimation on how a jury would receive him. I didn't make
16 the decision to go to trial or to plea. As I have but two
17 jobs, I'm a counselor and an advocate. As a counselor, I
18 give him his options. As an advocate, I follow through on
19 the one he chooses.

20 Q Being experienced in criminal law as you are though,
21 that's not the way the jury had to see that witness
22 certainly piercings could be removed, tattoos covered, he
23 could be dressed properly for court; couldn't he, sir?

24 A Certainly. But at the same time, you can't change a
25 leopard's spot. He is what he is.

1 Q You said you did an interview with litigant -- in
2 fact, you said -- you mention on the stand that's why I
3 didn't take his statement the first time. How many times
4 did you meet with Mr. Billings?

5 A I believe I met with him for an hour and a half. I
6 met with him a second time up here outside this courtroom
7 downstairs, but that was a very brief time. But either
8 way, I wasn't going to take a statement off a fellow whose
9 story -- I don't want to impeach my own fellow. If he's
10 gone come help us, he's gone come help us. Also, I had
11 some concerns about him making an admission without
12 counsel to a 25 year offense. No, I didn't send him to
13 another attorney. I explain to him that he would be
14 admitting to an offense if he were to testify and he told
15 me he was fine with it.

16 Q Follow right into my next question. Again, he
17 offered to write it and you refused ---

18 A No, he didn't offer to write it. I didn't take a
19 written statement.

20 Q You mention he was fine with that?

21 A He was fine with making an admission in open court to
22 a 25 year offense.

23 Q So again, your concern was more about the criminal
24 rights of Mr. Billings and than it was your obligations to
25 advocate to your client?

1 A No, you are misstating it.

2 Q But you mention about why you choose not to take it,
3 so I'm just trying to make sure I understand.

4 A I choose not to take it because when you put him on
5 the stand, as I have a prior statement, I would have had
6 to give it to the prosecutor who would have had
7 impeachment material. If he hadn't testified consistent
8 with his first statement, I wasn't going to impeach my own
9 witness. He was either going to testify with us or he
10 wasn't.

11 Q You came on his freewill to your office; didn't he,
12 sir?

13 A He certainly did.

14 Q That was about a year and at least two months after
15 your client had been released on bond?

16 A That's correct.

17 Q In fact, I'll acknowledge this at the close. There's
18 no conflict being alleged, but just to be clear here, your
19 client did appear before Judge Nettles for a bond
20 reduction hearing?

21 A Judge Nettles set the bond in this case.

22 Q And certainly it was favorable and y'all were pleased
23 with that result?

24 A Yeah, he got out of jail and was allowed to leave the
25 state.

1 Q Okay. You mention that you really wanted to try this
2 case. You thought it would be fun with the two issues of
3 search and seizure and the witnesses that we were just
4 talking about. Tell me a little bit more about that?
5 What came into your decision not to try it based on the
6 strength of those two?

7 A My client's decision. My personal feelings about a
8 case and my professional conduct are two different things.
9 I thought it would be a great case to try, but I'm not the
10 guy at the end of the day either goes home or goes to
11 prison. So as counselor, I told him what the risk were.
12 I thought the risk were pretty great when you're facing a
13 25 year charge. The fact that he were the sole occupant
14 of the van which the drugs were found in the quantity, in
15 the amount of the drugs that were found.

16 Q Mr. Spencer ask you a few questions just to kind of
17 restate what it was you thought the State would prove, but
18 just so the judge gets both sides of that. The plane
19 ticket evidence you talked about, was it your client's
20 position whether the jury believe him or not that he was
21 using that plane ticket to go spend time with his daughter
22 so they could switch out a vehicle?

23 A No.

24 Q Okay. So his statement states that in the record,
25 which is already apart of the PCR application. You

1 disagree and say that's not what he said?

2 A It's actually -- it's recorded in both the police
3 report. Otherwise, he said he did that all the time. And
4 that he changes his mind because he had a toilet and a
5 water cooler to bring up to Rhode Island, so I disagree
6 with you, sir.

7 Q You certainly could have had his daughter come to
8 trial to testify if that had been his position, which I'm
9 asserting to you it is because it's in the petition that
10 he filed?

11 A What he put in his petition and what the facts were
12 when I was dealing with him maybe two different things.
13 I'm just telling you what I was dealing with with him. He
14 did mention that he could bring his daughter to testify
15 that's what that was for, but it still doesn't explain
16 that he was driving that day with a toilet and what have
17 you. And he had a plane ticket sitting on the console for
18 the same exact time. Whether that was case or not, it was
19 add into the fact that you got an officer that stopped him
20 on the side of the road driving. You got a plane ticket
21 for the same day flying to the same destination and his
22 explanation to the officer was, oh, I do that all the
23 time. It raises the level of criminal activity a foot
24 coupled with the nervousness cause that would have been
25 towards the fact that whether they could in fact get him

1 out, detain him or not for crossing the white line. He
2 then consented to the search, but we would have been going
3 after the stop itself.

4 Q Don't let me assume you can follow up. You mention
5 there was going to be some type of attack on the search
6 and seizure was that because the cocaine was actually in a
7 sealed toilet box we talked about earlier?

8 A Right.

9 Q You didn't feel they had -- I guess, maybe there be a
10 question whether or not they had probable cause to go
11 through a sealed toilet based on what they knew of the
12 smell of marijuana?

13 A Yes, sir, but there's also case law that says when
14 you give consent, it's not limited unless you later limit
15 it. I just had a federal appeal about that same issue.

16 Q So the problem with that was if he gave consent to
17 the search you didn't feel that was going to be a very
18 viable search and argument?

19 A Would have made it certainly. I wouldn't have hinged
20 25 years on that issue.

21 Q Let me clear up one thing. You mention y'all
22 probably came up here four or five times I think was your
23 statement?

24 A Sure.

25 Q My client disagrees and that's fine. He had

1 testified earlier that y'all had come up here two times.
2 Could it be that you came up here times without him to
3 discuss the plea with Mr. Jepertinger or do you recall him
4 being with you every one of the four times?

5 A It's possible that he wasn't with me on some of those
6 times. And if I misstated, I apologize. It wasn't
7 intentionally.

8 Q That's quite all right. In trying to get the history
9 of the plea offers as they came in, isn't it true that
10 prior to this plea there actually was a plea offer when he
11 was somewhat hesitant that would have been a better offer
12 than what he eventually pled to?

13 A That is true.

14 Q Tell us about that?

15 A Mr. LaRoche was present. I met with Mr. Jepertinger
16 and we went back and forth and back and forth that day
17 trying to work out a plea. I was asking for three under a
18 ten to 28. He was asking for what we ended up pleading to
19 seven at 85 percent. At one point, he said if he'll plea
20 right now, I'll give him seven to the ten to 28, which
21 would have been max about half. The difference being the
22 parole more than anything else. My client wasn't ready to
23 plea. And I couldn't advise him right then and there to
24 jump up and grab it. So there was an offer that floated
25 out there not very long. We didn't accept anything that

1 day.

2 Q When that offer came in, he wasn't actually present
3 at that courthouse that day?

4 A No, he was here. We had it right out there in the
5 hallway cause he got real upset that he's being put on the
6 spot to plea right then. And I said I understand
7 completely, you know. He was here for that.

8 Q Did y'all ever have any discussions about once the
9 plea was to be entered whether or not that would be done
10 in front of Judge Nettles or Judge Russo based on the
11 backgrounds ---

12 A It didn't matter because it was going to be
13 negotiated.

14 Q I see. You mention the criminal report. I just want
15 to make sure I wasn't misunderstanding. The cocaine
16 itself was not found in a cooler at all; was it?

17 A No.

18 Q The cocaine was inside of the seal box?

19 A Seal toilet box, five pounds of marijuana was found
20 inside of a white water cooler.

21 Q You had provided to us your Rule 5 and Brady
22 information a Florence County Sheriff's Department report
23 says page two at the bottom of that it just goes on to
24 state at the rear car door area Corporal Brown open the
25 cooler and immediately detected a strong odor of what he

1 knew from training experience to be marijuana?

2 A Yeah.

3 Q There wasn't any indication by the officers that they
4 smelled cocaine?

5 A No.

6 Q The smelled what they said was marijuana?

7 A They smelled marijuana, opened the cooler, which they
8 had been given consent to search, found the marijuana,
9 placed him immediately in cuffs and then expanded their
10 search and then upon opening the toilet box found a half
11 kilo of cocaine.

12 Q You mention about Mr. Billings having a previous
13 criminal record. Did you do a background search on that?

14 A No, I didn't even know his last name cause he didn't
15 tell me his last name.

16 Q Where did you receive information then that he had a
17 criminal record?

18 A He told me.

19 MR. ATKINSON: And beg the Court's indulgence.
20 I believe that might be all, Your Honor.

21 THE COURT: Okay.

22 BY MR. ATKINSON:

23 Q Mr. Smiley, also in the Rule 5 information that was
24 handed over, there is at least one ordered here from, I
25 believe, it also is from Judge King where the matter was

1 continued. You had some problems scheduling some
2 witnesses to be here, that was dated June 9th of 2008. Do
3 you remember that?

4 A No, I don't.

5 Q Okay.

6 A I don't know if that was on my side or the
7 prosecution side.

8 MR. ATKINSON: Judge, I just ask that maybe you
9 take judicial notice of that particular order order for
10 trial dated of June 9th 2008, from Honorable Howard P.
11 King.

12 BY MR. ATKINSON:

13 Q And I believe you're right, Mr. Smiley, I don't think
14 it really reflects exactly who was responsible for it. At
15 any time did early on in the process as far as scheduling
16 these trials, did you indicate to Mr. Jepertinger that you
17 may have some witnesses that would need to be secured so
18 that you can get ready for trial?

19 A Not until later.

20 Q You ever send a subpoena for Mr. Billing or any other
21 witness?

22 A No, I didn't.

23 MR. ATKINSON: Your Honor, just to close for the
24 record, I inquired of my client if there's anything
25 further that he wanted me to ask him. The questions he

1 would seem to indicate would just be to contradict
2 something he might have stated in his amendments that we
3 already thoroughly covered as oppose to Mr. Smiley's
4 recollection. That being the case, I have no further
5 questions for Mr. Smiley.

6 THE COURT: Any redirect?

7 MR. SPENCER: No, Your Honor.

8 THE COURT: Thank you.

9 You may step down.

10 (WHEREUPON, the witness leaves the witness
11 stand.)

12 THE COURT: Any objection to Mr. Smiley being
13 excused?

14 MR. ATKINSON: None, Your Honor.

15 THE COURT: You free to leave. Thank you.

16 MR. ATKINSON: Your Honor, before we close, if I
17 make one point I mention during questioning of Mr. Smiley
18 about the possibility of any conflict. I don't see that
19 there is. I just want to note that for the record that I
20 have had a chance to discuss with my client that he
21 appeared before you for a bond reduction hearing. He was
22 very happy with the outcome of that. You probably didn't
23 hear much of the facts of the case. You certainly weren't
24 the trial judge or the plea judge and we just wanted to
25 acknowledge that that did occur. We don't see it as any

1 type of conflict. And if there were one anyway, he would
2 waive it. And glad to have you consider this matter
3 today. Third, I need to just mention that I made several
4 attempts to contact Mr. Billings as you heard with the
5 questioning of my client. I called for him in the hallway
6 today. We even come back at two o'clock. He's still not
7 here, so certainly he has not appeared and I just wanted
8 that noted for the record. Thank you, Your Honor.

9 THE COURT: All right. Mr. Atkinson, sometimes
10 it's hard for me to remember what I did last week and I
11 certainly don't remember the bond hearing. I acknowledge
12 the fact that he waives any potential conflict.

13 All right. Anything further from the State?

14 MR. SPENCER: Your Honor, if you wish, I can
15 make a short closing.

16 THE COURT: I'll be glad to hear anything that
17 you got to say. Yes, sir.

18 MR. SPENCER: Your Honor, just briefly, we
19 already talked about the issue as raised that cited
20 Gosnell. And I think Rollingson is actually more on
21 point. You can plead to something even if the factual
22 basis isn't quite on point. And all the time people plea
23 to voluntary manslaughter as a lesser of murder.

24 Moving on from that, the general rule is absent
25 in an extraordinary circumstance. There's no requirement

1 that counsel even advised his client of the right to
2 appeal a guilty plea in this case. Judge Russo had
3 advised him of that. Of course, this was negotiated.
4 Everybody walked away with what they intended to have that
5 day. There was no reason to appeal. There's no testimony
6 there Mr. LaRoche ever asked for an appeal. In terms of,
7 you know, Mr. Smiley said, you know, there's no way I can
8 guarantee ---

9 THE COURT: Isn't there a South Carolina Supreme
10 Court that came out this year that says that you have an
11 obligation to advise client of his right to appeal?

12 MR. SPENCER: There's federal case I'm familiar
13 with. I'm not aware of them coming out and saying you
14 have to advise the right to appeal from a guilty plea.
15 Federal case is slightly different than State vs.
16 Weathers.

17 THE COURT: Might have been -- I think it was
18 the right to appeal a post-conviction relief. But at any
19 rate, you very well might be right. But nonetheless in
20 this case, clearly the Court explained to him that he had
21 a right to an appeal. And according to Mr. Smiley, he
22 advised him he had a right to appeal.

23 MR. SPENCER: That's right, Your Honor.

24 THE COURT: Very good. All right. Very good.

25 MR. SPENCER: Thank you, Your Honor.

1 THE COURT: Anything, Mr. Atkinson?

2 MR. ATKINSON: Your Honor, I guess to reply to
3 that. I feel compelled on behalf of my client just to
4 reiterate what he has stated from the beginning and the
5 amendments that he had to fully hear the point. But he
6 would still maintain that he was encouraged to plead
7 guilty to improper charge under his view of the Gosnell
8 the case, that the lawyer was ineffective in representing
9 him to secure that witness. You heard some testimony
10 today that when you have the chance to -- I understand
11 that there's a case that states in order for him to be
12 successful on a PCR relief that he has to have that
13 witness take the stand and state what would have been said
14 that that came in through Mr. Smiley's testimony about
15 what would have been offered and the fact that he was more
16 concerned about somebody else's criminal rights than he
17 was about the rights of his own client. That he take that
18 statement, he didn't preserve it whether it was believed
19 or not. He had a criminal record, did you look it up.
20 No, I didn't look it up. And for those reasons and
21 everything stated in the amendments, we would just
22 reassert that that it was ineffective assistance of
23 counsel. And that would be my client's position. I don't
24 know if he had anything further to add to that. I can
25 inquire of him. But I believe his amendments state very

1 clearly what his position is. I've tried my best to give
2 him the chance to advocate for that before you. Thank
3 you, Your Honor.

4 THE COURT: All right. Mr. LaRoche, I'm going
5 to take all these matter under advisement. These are very
6 important matters. I know you have a very substantial
7 sentence. I want to have an opportunity to review all the
8 written material that you have provided to me. I want to
9 take a look again at these cases. And I will notify your
10 lawyer and Mr. Spencer give them memorandum of my
11 decision. And you will receive an order eventually from
12 your lawyer. And you have 30 days from the date you
13 receive it to appeal any ruling that I might have.

14 MR. LAROCHE: Thank you, Your Honor.

15 THE COURT: Good luck to you.

16 END OF REQUESTED TRANSCRIPT

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 87, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Florence
County, South Carolina, on the 8th day of September, 2011.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 4th day
of April 2011.

Keshia Reed, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
Robert A. LaRoche, SCDC No. 330647,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
2009-CP-21-267

ORDER OF DISMISSAL

2011 SEP 29 PM 3:48
CONNIE REEL SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

FILED

This matter is before this Court by way of an application for post-conviction relief (PCR) filed February 12, 2009. The State made its return on June 2, 2009. A hearing was held on September 8, 2011 at the Florence County Courthouse. Applicant was present and represented by Phillip B. Atkinson, Esquire. The State was represented by David Spencer of the South Carolina Office of the Attorney General.

Applicant testified at his hearing. Also testifying was his plea counsel, James W. Smiley, Esquire. This Court also had before it the Clerk of Court's records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the transcript of Applicant's guilty plea hearing, the Application for PCR, and the State's return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. The Applicant was indicted at the January 2008 term of the Florence County Grand Jury for trafficking in cocaine, more than 400 grams; and possession of marijuana with intent to distribute. (2008-GS-21-278). He was represented by James W. Smiley, Esquire. On September

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FLORENCE COUNTY, S.C.

15, 2008, Applicant pled, pursuant to North Carolina v. Alford¹, to trafficking in cocaine, 28-100 grams, first offense. The Honorable Thomas A. Russo sentenced Applicant to seven years imprisonment. The Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

- a. Ineffective assistance of counsel;
- b. Violation of due process/ defective indictment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1985).

Ineffective Assistance of Counsel and Involuntary Plea

Applicant allegations his plea was rendered involuntary by ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's

¹ 400 U.S. 25 (1970).

ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). 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); Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009); Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (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 PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

This Court will now address each allegation of ineffective assistance of counsel:

Failure to investigate

Applicant alleges his plea counsel failed to adequately investigate the charges. This contention is without merit. Counsel testified that he was prepared for trial and ready to go forward. Counsel testified that he would have moved to suppress the

evidence seized from the search and that there was an issue of consent that he would have challenged. However, he noted that the risks of going to trial were great and Applicant was given the opportunity to plead to a lesser offense to minimize his exposure. Applicant admitted on cross-examination that he pled guilty to avoid a harsher punishment.

The charges stem from a traffic stop in which Applicant was driving the vehicle and pulling a trailer. Marijuana and cocaine were found in the trailer. Applicant was traveling between Florida and Rhode Island.

This Court notes that Applicant testified that his Counsel spent twenty-five to thirty hours with Applicant preparing his defense. Counsel testified that Applicant may have overestimated the amount of time, but that Counsel did not need more time with Applicant or to prepare Applicant's defense if Applicant chose to go to trial.

Counsel testified that he spoke to a potential witness, provided by Applicant, who would not give his last name, but claimed the drugs seized were his and Applicant was unaware the drugs were in the trailer when Applicant was stopped by law enforcement. Counsel testified he had doubts about whether a jury would find this individual credible, based in part on his appearance. From Applicant's testimony, it appears that this individual named was Billings. Counsel testified that Billings indicated he was willing to testify and if Applicant went to trial, Counsel would have likely presented Billings as a witness. But Counsel noted the risks of going to trial, and leaving Applicant exposed to a mandatory twenty-five year sentence remained significant and that Applicant instead chose to mitigate his exposure by accepting the negotiated sentence. Counsel testified it was Applicant's choice to plead under Alford in lieu of trial.

Applicant also complains that other witnesses would have been beneficial and that Counsel should have interviewed these witnesses. None of these witnesses testified at the PCR hearing. Applicant claimed his daughter and an individual by the name of Diaz would have presented beneficial testimony. Counsel testified that Applicant never advised him that Applicant's daughter could provide helpful testimony. Further, Counsel was never even advised of Diaz's name or that Mr. Diaz would provide helpful information. Applicant contends that Mr. Diaz was one of two "Cubans" who convinced Mr. Billings to store the contraband in the trailer that Applicant drove from Florida to Rhode Island.

This Court finds this allegation without merit. This Court finds Counsel's testimony in this regard highly credible and gives it great weight. In contrast, this Court does not find Applicant's testimony credible. This Court finds that Counsel adequately investigated the case, interviewed all available and relevant witnesses, and was prepared for trial. This Court finds credible Counsel's testimony that he was not provided the names of witnesses Applicant alleges should have been interviewed and therefore, Counsel's performance was not deficient in that regard. This Court finds that Counsel's investigation and preparation was well within the scope of competent representation.

Further, Applicant has failed to meet his burden of proving prejudice. Applicant was aware of the content of Counsel's interview with Mr. Billings and still chose to plead guilty. Further, Billings did not testify at the PCR hearing and so this Court has no evidence of prejudice. Further, no other witnesses which Applicant alleges should have been interviewed were presented, and this Court finds Applicant has not met his burden of proof in that regard. This allegation is denied.

Failed to file an appeal

Applicant alleges counsel should have appealed his guilty plea. Counsel testified that he advised Applicant of the right to appeal and that Applicant did not request an appeal. Further, the record reflects that the plea court also advised Applicant of the right to appeal. This Court finds counsel's testimony credible and finds Applicant's testimony to the contrary to lack credibility. This allegation is denied.

Pleading to a lesser offense

Applicant alleges that the plea court lacked jurisdiction to accept his plea and that the plea should not have been accepted because of the lack of a factual basis for the charge. His contention is based on his misunderstanding of State v. Gosnell, 341 S.C. 627, 535 S.E.2d 453 (Ct. App. 2000). In that case, the defendant proceeded to trial for the charge of conspiracy to traffic over 400 grams of cocaine, and over defense objections, the trial court charged the jury on a lesser charge of conspiracy to traffic 200 to 400 grams of cocaine. The Court of Appeals reversed because the indictment charged 400 grams or more and there was no evidence that a lesser amount of cocaine was the object of the conspiracy. In doing so, the Court of Appeals noted that a lesser charge might be appropriate where the amount involved in the conspiracy is in controversy.

The instant case differs, because Applicant did not proceed to trial, but instead pled pursuant to Alford. This Court finds Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001) is the more applicable case in this context. In that case, the Supreme Court reversed the circuit court's grant of relief on the grounds that counsel was ineffective for allowing Rollinson to plead guilty to two drug charges as a first and second offense when he had no prior drug convictions. The Supreme Court held in Rollinson that a defendant may, as part of a plea bargain, plead guilty to offense for which he is not guilty. Id., 346

S.C. at 510, 552 S.E.2d at 292. The Rollinson Court noted that in Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000), “we held that an individual could plead guilty to voluntary manslaughter under an indictment charging him with murder even though the acts would not support such a lesser charge.” Id., 346 S.C. at 511, 552 S.E.2d at 292.

As in Anderson, Applicant was offered and agreed to plead guilty to a reduced charge so as to reduce his exposure. Counsel is not ineffective for failing to object, since this was a bargained for advantage that the Applicant received in order to avoid a harsher minimum sentence in the event of conviction. Under Anderson, Applicant’s plea is not rendered involuntary merely because the acts and evidence would not support the lesser weight range as opposed to the higher weight range of cocaine. Applicant knowingly and intelligently chose this alternative to trial and the risk of a mandatory twenty-five year sentence.

Further, Applicant’s allegation that the plea court lacked subject matter jurisdiction in this regard is without merit. The Court of General Sessions has subject matter jurisdiction over all levels of drug trafficking cases. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (subject matter is merely the power to hear a certain class of cases).

Counsel was not ineffective for allowing Applicant to plead guilty to a lesser offense and the plea court had jurisdiction over the charges. These allegations are denied.

Failure to negotiate for a lesser offense of Possession with Intent to Distribute

Applicant alleges, in contrast to the previous issue, that Counsel was ineffective for failing to negotiate a lesser charge of Possession with Intent to Distribute Cocaine. First, Applicant fails to meet his burden of prejudice. Given the apparent strength of the

State's case, there is no indication that the prosecution would be willing to reduce the charges to this degree. Second, this Court finds Applicant has failed to prove Counsel's performance was deficient in this regard. Without a doubt, Counsel was able to negotiate an extremely favorable plea agreement that avoided a mandatory twenty-five year sentence if Applicant was convicted as charged. Instead, Applicant was able to plead, pursuant to negotiations, to seven years imprisonment. This Court finds that Counsel's representation was well within the scope of competent representation and was very effective in securing a beneficial plea bargain for Applicant.

Brady violation

Applicant alleges a violation of Brady v. Maryland, 373 U.S. 83 (1963), based on Counsel's interview of Billings. This Court finds the allegation difficult to understand, but it appears Applicant is contending that when Counsel made the prosecution aware that Billings was claiming responsibility for the cocaine and marijuana, the State should have dismissed the charges against Applicant. Clearly, the evidence was in the hands of Applicant and his plea counsel, not the State, and therefore, Brady is not implicated.

Further, the State was not required to accept Applicant's view of the evidence and had sufficient evidence to pursue prosecution. This allegation is wholly without merit and is denied.

Coerced by Counsel

Applicant alleges Counsel coerced him into pleading guilty by telling him he would be convicted and have to serve a twenty-five year sentence. This allegation is without merit. Applicant admitted he pled to evade greater punishment. A plea is not rendered involuntary merely because it is made to evade greater punishment. Wicker v. State, 310 S.C. 8, 12, 425 S.E.2d 25, 27 (1992) (finding guilty plea resulting in a life

sentence was not rendered involuntary where counsel correctly advised the applicant that the death penalty was in the range of possible punishments if convicted at trial).

Counsel testified that he advised Applicant that the State could be able to prove its case and if convicted, Applicant would receive a twenty-five year sentence. This Court finds that Counsel's advice was reasonable and within professional norms. This Court finds that Applicant knowingly and voluntarily elected to accept the negotiated sentence in lieu of a trial to reduce his exposure. This Court finds Counsel's testimony credible and gives it great weight, and finds that Applicant has not met his burden of showing counsel's performance was deficient. Further, this Court finds that Applicant has failed to meet his burden of showing prejudice. Applicant has failed to present any evidence that objectively would have resulted in Applicant to not plead under Alford and instead to proceed to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

CONCLUSION

Based on the foregoing, 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. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

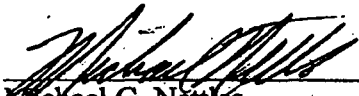
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that 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), SCRPC, 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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 29 day of Sept, 2011.


 Michael G. Nettles
 Presiding Judge
 12th Judicial Circuit

, South Carolina

FILED
 2011 SEP 29 PM 3:48
 GONNIE REEL-SHEARIN
 CCCP & GS
 FLORENCE COUNTY, SC

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 FLORENCE COUNTY, S.C.

INDICTMENT FOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

TRAFFICKING IN COCAINE AND POSSESSION OF
COCAINE WITH INTENT TO DISTRIBUTE

At a Court of General Sessions, convened on JANUARY 10, 2008, the Grand Jurors of FLORENCE
County present upon their oath:

COUNT ONE - TRAFFICKING IN COCAINE

That ROBERT A. LAROCHE did in FLORENCE County on or about March 29, 2007, violate Section 44-53-0370(e)(2)(e) of the Code of Laws of South Carolina (1976), as amended, in that he was knowingly in actual or constructive possession of 400 grams or more of Cocaine.

COUNT TWO - POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

That ROBERT A. LAROCHE did in FLORENCE County on or about March 29, 2007, violate Section 44-53-0370(b)(2) of the Code of Laws of South Carolina (1976), as amended, in that he did knowingly and intentionally possess with intent to distribute a quantity of Marijuana, a controlled substance; such possession not having been authorized by law.

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



SOLICITOR