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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

R. Lawton McIntosh, Circuit Court Judge

ZACHARY PHILLIPS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000646

APPENDIX

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State of South Carolina)
) Court of Common Pleas
 County of Greenwood) 2010-GS-24-0407

State of South Carolina)
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 Zachery Phillips)
) DEFENDANT

May 9, 2011
 Greenwood, South Carolina

B E F O R E:

Honorable Eugene C. Griffith, Judge.

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

Elizabeth White, Assistant Solicitor
 Attorney for the State

Caroline Horlbeck, Esq.
 Attorney for the Defendant

Joy E. Holston
 Official Court Reporter

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EXHIBITS

(No exhibits introduced.)

1 MS. WHITE: May it please the Court?

2 THE COURT: Yes, ma'am.

3 MS. WHITE: Your Honor, standing before you is
4 Zachery Phillips. He is charged in a number of warrants,
5 1827286, 284, 285, 287 with trafficking crack cocaine,
6 proximity and a number of other charges, Your Honor. He
7 is currently in jail on a bench warrant. This is his
8 attorney, Ms. Caroline Horlbeck's motion to lift that
9 bench warrant. Procedurally, Your Honor, he was before
10 you before with Ms. Nelson on another motion to lift these
11 bench warrants. And I believe during that motion he asked
12 to have Ms. Nelson relieved and there is some more history
13 I can give the Court at the appropriate time.

14 THE COURT: All right, Ms. Horlbeck, I will be glad
15 to hear from you.

16 MS. HORLBECK: Your Honor, this is a motion to lift
17 the bench warrant. I just want to let the Court know a
18 little bit of background. In talking to Mr. Phillips he,
19 and I didn't notice in Greenwood but I don't believe bond
20 cards are issued. I think it is up to the defense
21 attorney to call the client and get them into court. At
22 that point Mr. Phillips was having an issue with his
23 fiance and that is the contact number that his attorney
24 had. And apparently when the fiance, now ex-fiance, was
25 contacted she didn't relay any of the information that he

1 needed to be in court so he wasn't in court and a bench
2 warrant was issued and he was picked up. He is
3 respectfully requesting that the Court lift that bench
4 warrant today. He and I have discussed a plea to occur
5 next week. He would like to be out long enough to see his
6 99-year-old grandmother and his children. He does have a
7 stable address, he would be living at [REDACTED]
8 which is in Greenwood. Your Honor, he does have plenty of
9 family in the area. His grandmother who is 99, his
10 parents do live in Edgefield and Saluda but he has got his
11 children and one of his children in the area, uncles,
12 cousins, aunts. This is a case where it is based on a
13 traffic stop and Mr. Phillips stopped the car, got out,
14 did not run, was not a threat and also cooperated and gave
15 the police some information in this case. And we just ask
16 the Court to consider this.

17 MS. WHITE: Your Honor, this case was up for trial on
18 January the 24th of this year. Mr. Phillips was, it was
19 kind of a little bit of a confused situation but his
20 attorney and it is my understanding actually conveyed to
21 Mr. Phillips that he would have been, and to him
22 personally, that he would be up for trial that Monday
23 morning, this was the week before that they were talking.
24 That Monday morning he did not appear for trial. The
25 Judge who was Judge Addy issued a bench warrant, he was

1 picked up on the bench warrant around about the end of
2 February, the beginning of March, he came before Your
3 Honor on March the 3rd and Your Honor declined to lift the
4 bench warrant. He then asked to have Ms. Nelson relieved
5 and Stephen Geoly appointed and then Mr. Geoly came and
6 asked to be relieved and that is how Ms. Horlbeck was
7 appointed. But, Your Honor, he definitely over the course
8 of the week prior to trial there had been numerous
9 discussions between him and his attorney that was conveyed
10 to me by his attorney about him coming in to discuss with
11 her a potential plea offer or the fact that the trial was
12 Monday morning and he kept telling her I will be there at
13 1:00 o'clock and then he wouldn't show up at 1:00 o'clock,
14 the next day I will be there at 2:00 o'clock, he didn't
15 show up at 2:00 o'clock. So, Your Honor, I think there
16 was a definite attempt to avoid coming to court and
17 obviously he was not here when we were ready to pick a
18 jury on his case that Monday morning.

19 THE COURT: When is it set for trial now?

20 MS. WHITE: Your Honor, this case, it was originally
21 set for trial this term however when he fired, when he
22 asked to have Ms. Nelson relieved Ms. Horlbeck was
23 appointed and only has had the case for a few short weeks.
24 The State can be ready to try it in May, June.

25 THE COURT: Ms. Horlbeck, understanding that motion

1 is pending do you want to come back when the bondsman can
2 be notified and argue that then and the Solicitor is going
3 to be here either way?

4 MS. HORLBECK: I can if that suits the Court.

5 THE COURT: I think that would be the easy thing to
6 do. If I grant that and they are going to come back,
7 let's get them here also and see if we can all get it
8 together. There was a motion to come off of the bond
9 pending that we weren't aware of, now we are. So we can
10 get the bondsman in here. Since the bondsman made the
11 motion they ought to be ready to come in, I will let you
12 contact them and any day this week you can get them in
13 here except tomorrow, nobody is holding court tomorrow.
14 You track them down.

15 MS. HORLBECK: All right.

16 (Whereupon, there was a break in the case.)

17 MS. WHITE: May it please the Court?

18 THE COURT: Yes, ma'am.

19 MS. WHITE: Your Honor, standing before you is
20 Zachery Phillips. He is pleading guilty on indictments
21 2010-403, 404 and 407 to trafficking 10 to 28 grams of
22 crack cocaine, second offense; possession with intent to
23 distribute marijuana, third offense; and possession with
24 intent to distribute crack within a half mile of a school
25 or playground. He is represented by Ms. Horlbeck of the

pled

1 Greenville Bar. We have a recommended sentence of 15
2 years and I believe Mr. Phillips is going to ask to report
3 next Tuesday at 2:30 and that sentencing be deferred until
4 that date.

5 THE COURT: All right, you are Zachery Phillips?

6 MR. PHILLIPS: Yes, sir.

7 THE COURT: I have three indictments. First of which
8 is indictment 10-GS-24-403, trafficking in crack cocaine.
9 That indictment reads in part that you while in Greenwood
10 County on or about the 4th day of December of 2009 did
11 knowingly traffic in crack cocaine. In that you did
12 manufacture, deliver or purchase or provide financial
13 assistance or conspire to deliver or purchase or in actual
14 constructive possession of more than 10 grams but less
15 than 28 grams of crack cocaine in violation of section
16 44-53-375. Upon presentment it is my understanding that
17 you wish to plead guilty to that offense as indicted. Is
18 he pleading to a lesser included?

19 MS. WHITE: It is a lesser included, Your Honor. I
20 am sorry.

21 THE COURT: This is actually a third.

22 MS. WHITE: This is actually a third.

23 THE COURT: You are pleading down to 28.

24 MS. WHITE: Yes, sir.

25 THE COURT: All right. Lesser included offense to

1 which you are pleading to, trafficking in 10 to 28 second
2 offense.

3 MS. WHITE: Yes, sir.

4 THE COURT: That reduces the range a little bit. And
5 indictment number 10-GS-24-407 and that indictment reads
6 in part that you while in Greenwood County on or about the
7 4th day of December of 2009 did knowingly possess with
8 intent to distribute a quantity of marijuana in violation
9 of 44-53-370. It is my understanding upon presentment
10 that you wish to plead guilty to the offense of possession
11 with intent to distribute marijuana, third offense which
12 carries between 5 and 20 years. Is that correct?

13 MR. PHILLIPS: Yes, sir.

14 THE COURT: And lastly, indictment number
15 2010-GS-24-404 and that is for proximity. And that
16 indictment reads that you while in Greenwood County on or
17 about the 4th day of December of 2009 did knowingly
18 distribute a quantity of crack cocaine or being in
19 possession with intent to distribute a quantity of crack
20 cocaine within one-half mile of the radius of the grounds
21 of a public or private elementary school or park in
22 violation of 44-53-445. And upon presentment it is my
23 understanding you wish to plead guilty to possession with
24 intent to distribute within proximity of a school or park.
25 Is that correct?

1 MR. PHILLIPS: Yes, sir.

2 THE COURT: Ms. Horlbeck, do you represent Mr.
3 Zachery Phillips?

4 MS. HORLBECK: Yes sir, I do.

5 THE COURT: And you have had the opportunity to
6 explain to him the elements of these three offenses as
7 well as the potential punishment?

8 MS. HORLBECK: I have.

9 THE COURT: Do you believe the State possesses
10 sufficient evidence in any of these that if he were to
11 stand trial on any of these indictments individually that
12 he would more probably than not receive a conviction?

13 MS. HORLBECK: Yes sir, I do believe that.

14 THE COURT: And understanding your negotiations and
15 your understanding of the file and the State's
16 recommendation do you think it is in your client's best
17 interest to enter this plea?

18 MS. HORLBECK: Yes sir, I do.

19 THE COURT: All right. Ms. Sheek, place him under
20 oath.

21 ZACHERY PHILLIPS, being
22 first duly sworn, testified as follows:

23 THE COURT: Mr. Phillips, in the last twenty-four
24 hours have you taken any drugs or alcohol or any types of
25 medication?

1 MR. PHILLIPS: No, sir.

2 THE COURT: Are you clearheaded right now?

3 MR. PHILLIPS: Yes, sir.

4 THE COURT: Do you have any disabilities, whether
5 mental or physical or emotional ones which would affect
6 your hearing or understanding of what I am saying or what
7 is going on here today?

8 MR. PHILLIPS: No, sir.

9 THE COURT: Have you ever been treated for mental
10 illness?

11 MR. PHILLIPS: No, sir.

12 THE COURT: Have you ever taken any medications
13 prescribed for mental illness?

14 MR. PHILLIPS: No, sir.

15 THE COURT: Do you understand what a jury trial is?

16 MR. PHILLIPS: Yes, sir.

17 THE COURT: Do you understand by virtue of these
18 offenses occurring on different days you would have the
19 opportunity to have more than one trial, you perhaps could
20 have two. During each trial your rights are the same.
21 The State bears the burden of proving your guilt, to meet
22 the burden of proof they would have to call witnesses and
23 present evidence sufficient to convince all twelve jurors
24 unanimously of your guilt. During that presentation,
25 calling each witness your attorney could cross-examine the

1 witness, challenge any evidence the State attempted to
2 introduce and even present defenses you may have available
3 to you. Do you understand your right of confrontation?

4 MR. PHILLIPS: Yes, sir.

5 THE COURT: You would also have the right to remain
6 silent throughout the trials. You have no responsibility
7 for testifying in your own defense. The Solicitor could
8 not call you as a witness. The Solicitor could not
9 comment on or argue to the jury that your silence is proof
10 that you are guilty. In fact if you did not testify I
11 would instruct the jury that they could not even discuss
12 your failure to testify in their deliberations, that they
13 would have to reach their verdict unanimously based upon
14 what the State presented, not on your not testifying. Do
15 you understand that right?

16 MR. PHILLIPS: Yes, sir.

17 THE COURT: Understanding all of these rights I have
18 explained to you do you wish to waive them here today in
19 order to enter a plea of guilt to these three charges?

20 MR. PHILLIPS: Yes, sir.

21 THE COURT: And are you waiving all of your rights
22 freely and voluntarily?

23 MR. PHILLIPS: Yes, sir.

24 THE COURT: Tell me what happened.

25 MS. WHITE: Your Honor, this incident occurred on or

1 about December the 4th of 2009 here in Greenwood county.
2 Agents with the Greenwood Drug Enforcement Unit observed
3 Mr. Phillips driving a silver Chevy Cobalt, they had prior
4 knowledge that he would be driving that vehicle. They
5 also had active arrest warrants for Mr. Phillips. They
6 pulled, initiated the traffic stop on the vehicle and
7 stopped Mr. Phillips. Once they placed him under arrest
8 for the warrants they searched him incident to arrest and
9 found six bags in his possession that contained marijuana.
10 They also searched, when they searched the vehicle, well
11 when he exited the vehicle they could see in plain sight a
12 set of scales inside of the pocket of the driver's door.
13 They searched the vehicle and found an additional quantity
14 of marijuana in bags that matched the bags that were on
15 his person. They took Mr. Phillips to the, to City Hall
16 to be booked and when they were talking to him at City
17 Hall Mr. Phillips indicated to the agents that there was a
18 quantity of crack cocaine hidden inside the vehicle which
19 had already been towed. They went back and obtained
20 consent from the vehicle's owner to get back inside the
21 vehicle and found crack cocaine in a compartment beside
22 the steering wheel, a total amount of crack was
23 approximately twelve grams as it was tested at SLED. And
24 he does have a criminal history that I can share at the
25 appropriate time. And this happened within a half mile of

1 Seaboard Recreation Center.

2 THE COURT: Mr. Phillips, are those facts accurate as
3 to your recollection for these three indictments?

4 MR. PHILLIPS: Yes, sir.

5 THE COURT: The marijuana was yours, the crack
6 cocaine was in a compartment in the car and the whole
7 thing happened close to that Seaboard Park, is that right?

8 MR. PHILLIPS: Yes, sir.

9 THE COURT: Is anybody making you plead guilty here
10 today?

11 MR. PHILLIPS: No, sir.

12 THE COURT: Are you entering this plea freely and
13 voluntarily?

14 MR. PHILLIPS: Yes, sir.

15 THE COURT: Now the last time I spoke with you we
16 appointed new counsel and you got Ms. Horlbeck from up in
17 Greenville County. Have you had an opportunity to speak
18 with her at length about your charges?

19 MR. PHILLIPS: Yes sir, she came to see me.

20 THE COURT: Has she gone over the State's discovery,
21 copies of their file and that sort of thing with you?

22 MR. PHILLIPS: Yes, sir.

23 THE COURT: She has explained to you your rights to
24 trial?

25 MR. PHILLIPS: Yes, sir.

1 THE COURT: And you understand that if I accept this
2 plea you are going to have a conviction for trafficking in
3 crack cocaine on your record which is a serious and
4 violent offense. Do you understand that?

5 MR. PHILLIPS: Yes, sir.

6 THE COURT: Also the proximity charge is a serious
7 conviction and in the eyes of the law there are not
8 serious cases and serious and most serious. On the two
9 strikes out or three strikes out rule these serious
10 offenses and convictions by virtue of this plea will count
11 as a serious conviction. So you will have one strike on
12 your record as a result of this plea. Do you understand
13 that?

14 MR. PHILLIPS: Yes, sir.

15 THE COURT: Any prior record, does he have any other
16 serious offenses?

17 MS. WHITE: I do not believe so, Your Honor.

18 Actually, yes sir, yes he does. He has a proximity from
19 2006.

20 THE COURT: All right. That is what I want to know.
21 You have got one serious, this is one more. These two
22 will count as one. You get another proximity charge and
23 that is not hard to do. You have marijuana in your pocket
24 near anywhere in the town limits of Greenwood, proximity
25 will be a third serious charge and the State can seek and

1 try to convict you of that proximity and ask for a life
2 without parole sentence. This will be a second serious
3 conviction so you will have two strikes on the two
4 strikes, three strikes you are out. So next time through
5 whether it is a most serious or serious they can seek life
6 without parole if they so choose. And the easiest crime
7 for me to describe to you is a serious offense is the
8 proximity charge. You got dope on you anywhere near a
9 school or park and that is virtually every square inch of
10 the town of Greenwood, it is near some park or some school
11 and you know that, you live here. You get caught with
12 dope in the town of Greenwood ever again, they charge you
13 with proximity they can go with life without parole. Do
14 you understand that?

15 MR. PHILLIPS: Yes, sir.

16 THE COURT: This is some important convictions on
17 your record because you are getting into the exposure and
18 never see the light of day again. Do you understand that?

19 MR. PHILLIPS: Yes, sir.

20 THE COURT: All right. Do you understand what a
21 serious conviction is, you have got two of them.

22 MR. PHILLIPS: Yes, sir.

23 THE COURT: If I accept this plea it will be your
24 second.

25 MR. PHILLIPS: Yes, sir.

1 THE COURT: Now, have you been promised anything
2 other than a dismissal of the related charges, pleading to
3 these three, possession with intent to distribute
4 marijuana, third; trafficking in crack between 10 and 28
5 grams and proximity to the Seaboard park, have you been
6 promised anything other than the State is making a
7 recommendation of 15 years at eighty-five percent
8 understanding your attorney can argue for less. Have you
9 been promised anything else?

10 MR. PHILLIPS: No, sir.

11 THE COURT: Now, it was presented to me in chambers
12 that you wish to defer the imposition of the sentence
13 until next Tuesday. You will be released on bond for
14 reporting date some time Tuesday at 11:00?

15 MS. WHITE: Tuesday I believe at 2:30.

16 THE COURT: Tuesday at 2:30. Do you understand what
17 you are asking for?

18 MR. PHILLIPS: Yes, sir.

19 THE COURT: To be released some time this afternoon,
20 first thing in the morning, I don't know how quickly
21 Greenwood can get you out. The plea is accepted, the
22 sentence is the only thing that will be yet left to be
23 determined next Tuesday at 2:30. If you report the State
24 makes a recommendation, Judge we agreed to recommend 15
25 years concurrent on all three. Your attorney would have

1 the opportunity to argue for less than 15. But the State
2 is not going to argue for more than 15 if you come back.
3 If for some odd chance you don't come back do you
4 understand what exposure you have to jail time?

5 MR. PHILLIPS: Yes, sir.

6 THE COURT: Do you understand we can stack these
7 sentences on top of each other. Just like this, 20, that
8 is 30 plus 10 more, that is 60. Is that right, calculated
9 right?

10 MS. HORLBECK: Yes, sir.

11 THE COURT: You get 60 at eighty-five percent, that
12 is 51 years before you are eligible for community
13 supervision, day for day by my math. You understand that
14 exposure?

15 MR. PHILLIPS: Yes, sir.

16 THE COURT: Are you going to come back next Tuesday?

17 MR. PHILLIPS: Yes, sir.

18 THE COURT: And you understand what is going to
19 happen if you don't?

20 MR. PHILLIPS: Yes, sir.

21 THE COURT: You won't get another proximity. Do you
22 understand what I mean by that?

23 MR. PHILLIPS: Yes, sir.

24 THE COURT: You won't have a chance to make another
25 one, you will be in a wheelchair when you come out of the

1 Department of Corrections? How old are you?

2 MR. PHILLIPS: 28.

3 THE COURT: 28 plus 51 is 79. You will be using a
4 walker by then so you won't have no dope near a proximity
5 charge, will you.

6 MR. PHILLIPS: No, sir.

7 THE COURT: Okay. Now you come back next Tuesday at
8 2:30 I will listen to the State's recommendation, no more
9 than 15 and I will listen to your attorney's argument.
10 Are you okay with that?

11 MR. PHILLIPS: Yes, sir.

12 THE COURT: Now, do you have any complaints against
13 the Eighth Circuit Solicitors Office, Greenwood City, the
14 narcotics unit in the handling of this case?

15 MR. PHILLIPS: No, sir.

16 THE COURT: Are you entering this plea freely and
17 voluntarily?

18 MR. PHILLIPS: Yes, sir.

19 THE COURT: And you are entering this plea because
20 you did in fact commit the offense of trafficking in
21 crack, trafficking in crack and proximity of the Seaboard
22 Park and possession with intent to distribute marijuana?

23 MR. PHILLIPS: Yes, sir.

24 THE COURT: Do you understand, I don't know if I have
25 asked you this. You are going to lose your drivers

1 license as the result of this plea. Do you understand
2 that?

3 MR. PHILLIPS: Yes, sir.

4 THE COURT: And these convictions can be used to
5 enhance future convictions for drugs but particularly the
6 serious convictions is your biggest worry. You will have
7 two serious convictions as the result of this plea. Do
8 you understand that?

9 MR. PHILLIPS: Yes, sir.

10 THE COURT: Understanding all of those things, you
11 are not going to have a trial but you are going to have
12 these convictions imposed and an undetermined sentence
13 depending on when you report next week. Do you understand
14 that?

15 MR. PHILLIPS: Yes, sir.

16 THE COURT: Understanding all of that do you still
17 want to plead guilty?

18 MR. PHILLIPS: Yes, sir.

19 THE COURT: Have you had enough time with your
20 lawyer?

21 MR. PHILLIPS: Yes, sir.

22 THE COURT: Has she answered all of your questions?

23 MR. PHILLIPS: Yes, sir.

24 THE COURT: Are you satisfied with her representation
25 of you?

1 MR. PHILLIPS: Yes, sir.

2 THE COURT: Do you understand you are going to have
3 limited time upon which to file an appeal if you believe
4 something has been done according to our procedures wrong.
5 If something has been done wrong you have got a limited
6 time in which to file an appeal. Do you understand that?

7 MR. PHILLIPS: Yes, sir.

8 THE COURT: Now, if you don't report you understand
9 the sentence that I am going to give you is going to be
10 more than 15 years, do you not?

11 MR. PHILLIPS: Yes, sir.

12 THE COURT: Have I explained that to you clearly?

13 MR. PHILLIPS: Yes, sir.

14 THE COURT: Any question about how heavy it could be?

15 MR. PHILLIPS: No, sir.

16 THE COURT: Are you going to come back?

17 MR. PHILLIPS: Yes, sir.

18 THE COURT: Here is the thing, if you don't come back
19 they are finally going to find you and you will get your
20 sentence one day. Whatever I give you it will be put in
21 an envelope and kept in the Clerk's office until they find
22 you. It is not going to go away, it is just, you are not
23 going to get any credit for any time until you come in and
24 pick it up. Do you understand how that works?

25 MR. PHILLIPS: Yes, sir.

1 THE COURT: If you take off and you are gone for ten
2 years you are still going to do that time I am going to
3 give you Tuesday. The reason I am telling you all of
4 this, when I hang the time on you on Tuesday and you don't
5 show up you are not going to be there for me to explain it
6 to you. I don't want you to say, I wish he had told me
7 that. I want you to be clear on what could happen if you
8 don't show up because you are not going to be here for me
9 to say, do you understand. That is why I am going
10 overboard with this. Have you got it?

11 MR. PHILLIPS: Yes, sir.

12 THE COURT: Tell me why you want out, why do you want
13 to come back next Tuesday.

14 MR. PHILLIPS: Basically to see my grandmother, she
15 is 99 and I want to see her and I want to get this behind
16 me.

17 THE COURT: Did she raise you up?

18 MR. PHILLIPS: Yes, sir.

19 THE COURT: How is she doing right now at 99?

20 MR. PHILLIPS: She has got Alzheimer's and she tends
21 to forget.

22 THE COURT: Does she know who you are?

23 MR. PHILLIPS: Yes, sir.

24 THE COURT: All right. I just want to make certain
25 you don't get out and something happen and you not come

1 back and you catch a heavier sentence than 15. I want to
2 make sure of that. Now, you might want to think about
3 this. You go say your goodbyes to your grandmother and
4 come in before Tuesday you might get a little credit for
5 that. You might get, your argument is less than 15 might
6 sound a little better to me if you come in Monday rather
7 than Tuesday. Do you understand?

8 MR. PHILLIPS: Yes, sir.

9 THE COURT: Okay. Regarding indictment 10-GS-24-403,
10 404 and 407, I find the defendant, Zachery Fitzgerald
11 Phillips made a free, knowing and intelligent plea of
12 guilt to one count of trafficking crack, more than 10 but
13 less than 29 grams; possession of marijuana second offense
14 and possession of marijuana with intent to distribute
15 third offense and possession of marijuana with intent to
16 distribute within proximity of a school or park. He has
17 entered these three pleas with the advice of counsel, a
18 competent attorney of whom he states while under oath that
19 he is very satisfied with. Since Mr. Phillips has asked
20 the Court defer sentencing until next Tuesday and the
21 State has made a recommendation of 15 years that
22 recommendation would be received by the Court next Tuesday
23 at 2:30. If you are here at 2:30 and I can't get you
24 until 3:00 you are not going to be penalized, you are
25 here. Okay. So don't think because I don't get you done

1 by, if you walk in the door at 2:00 o'clock and I don't
2 hear it until 3:00 it is not going to hurt you a bit. I
3 will know you are here. Okay.

4 MR. PHILLIPS: Yes, sir.

5 THE COURT: All right. Now, the Court will receive
6 the recommendation from the State. If Mr. Phillips fails
7 to show Tuesday which is May the 17th by 2:30 p.m. then
8 the State will be under no duty or obligation to make any
9 recommendation and will be free to argue for any time
10 including consecutive time to be imposed. If he shows by
11 2:30 on the 17th I will also receive any arguments from
12 his counsel or any mitigating witnesses to appear on
13 behalf of Mr. Phillips behalf and Mr. Phillips himself at
14 that time. If he fails to show at 2:30 the sentence will
15 be, Ms. Horlbeck, I will assume you will be here either
16 way, I will seal the sentence at that time and it will be
17 read upon Mr. Phillips presenting himself. Are there any
18 questions about the term. Now, you are under the terms of
19 your bond when I let you out. Do you understand?

20 MR. PHILLIPS: Yes, sir.

21 THE COURT: What kind of bond have you got?

22 MR. PHILLIPS: A surety bond.

23 THE COURT: You are under the same terms of the bond.
24 Any questions?

25 MS. WHITE: Not from the State, Your Honor.

1 THE COURT: Now, let me tell you something. This
2 happened week before last, actually three weeks ago and
3 two weeks ago. A gentleman about your age over in
4 Newberry County, the same charge, asked for the same type
5 of deal, I will come back Friday. It was Monday and he
6 came back Friday but he was high. The lawyer said, Judge,
7 he is high, can't do anything with him. I took him into
8 custody and the following Tuesday I dealt with him. Don't
9 do that.

10 MR. PHILLIPS: Yes, sir.

11 THE COURT: All right. I expect to see you on the
12 17th at 2:30 or before. If you come in before it might be
13 to your benefit. Make sure you listen to your lawyer,
14 take her advice. You get in trouble while you are out,
15 get picked up no recommendation. Do you understand that?

16 MR. PHILLIPS: Yes, sir.

17 THE COURT: You go out and get up with the boys and
18 y'all get picked up for public drunk or something like
19 that no recommendation. They will just bring you over
20 here next Tuesday at 2:30 and I will do what I have got to
21 do. Okay. You better be tending to your grandmother and
22 saying goodbye to your family, tend to this so you can get
23 your life going. Okay.

24 MR. PHILLIPS: Yes, sir.

25 THE COURT: All right, I will see you next Tuesday.

1 MR. PHILLIPS: Thank you, sir.

2 THE COURT: For the record I accept the plea. I
3 think I said that.

4 MS. HORLBECK: Judge, I have got general sessions in
5 Greenville on Monday but he can turn himself in at the law
6 enforcement center?

7 THE COURT: Absolutely. If he comes in early he gets
8 credit for it whether you are here or not. We will do the
9 sentence after that.

10 MS. HORLBECK: But I plan to be here on Tuesday at
11 2:30 either way.

12 THE COURT: You come in Monday I am going to give you
13 credit for doing what you said you were going to do.

14 MS. HORLBECK: Does he turn himself in early to the
15 law enforcement center or this court?

16 THE COURT: If he comes into the courtroom I will
17 give him to the law enforcement center and then we will
18 impose the sentence as soon as you can be here. Why don't
19 you come on over here because I will have the sentencing
20 sheets here and we will just hold you until then. That
21 won't be an issue, it will be easy to deal with. You will
22 get an appropriate sentence for coming in early. It won't
23 hurt you to come in early, I promise.

24 MAY 17, 2011

25 MS. WHITE: Your Honor, this is the State of South

1 Carolina versus Zachery Phillips, indictment 2010-403,
2 404, and 407. Mr. Phillips plead last week to trafficking
3 10 to 28 grams second offense, possession with intent to
4 distribute marijuana and a proximity charge. The State
5 had agreed to a recommended 15 year sentence and he was to
6 report today at 2:30 and as you can see he is here.

7 THE COURT: All right, Ms. Horlbeck, I will be glad
8 to hear from you.

9 MS. HORLBECK: Your Honor, this is Zachery Phillips
10 and of course we have appeared before you a week ago to
11 enter a guilty plea. Things weren't as smooth as I wanted
12 them to be, not on Zachery's part, he was wonderful. But
13 it does appear that they had a hold on him in Saluda. So
14 instead of getting right out he was transported to Saluda.
15 We were able to get in touch with his attorney there. He
16 took care of his charge there and was released this past
17 Friday and was able to go and see his family members, kind
18 of touch base with them and wrap up some loose ends.
19 Judge, he is 28 years old. With him today is his
20 girlfriend, Christy Washington. He has, is it five
21 children and one on the way. Christy is expecting. He
22 was able to touch base with his mother as well, found out
23 she has bone cancer and they are hoping she will be around
24 quite some time but they are, the doctors are kind of
25 being realistic about it. So he is very concerned about

1 that. He was able to line up some employment for himself,
2 he has got employment available at Amick Farms and also at
3 Sterilite. Judge, I believe Saluda County is running
4 their sentence and I don't know that he has been sentenced
5 yet. Have you been sentenced, Mr. Phillips, in Saluda?

6 MR. PHILLIPS: No, ma'am.

7 MS. HORLBECK: He has not been sentenced yet in
8 Saluda. His attorney told me that Saluda's plan was to
9 run their sentence on a distribution case concurrent to
10 Greenwood's sentence. So that is the plan. I believe he
11 has served 81 days in the Greenwood jail. I have
12 explained the potential sentence to Mr. Phillips and I
13 don't believe that the crime act provides a lot of relief.
14 Something may have changed, I know the laws change all the
15 time. If there has been some kind of a change and if the
16 Court is able to give him house arrest which I don't think
17 the Court is but he asked me to ask so I am going to. I
18 explained to him that I don't know if that is a
19 possibility at all. I have told him that is probably not
20 going to happen. But, you know, I am impressed that he
21 showed up today. I was frankly worried. I think everyone
22 in this courtroom was frankly worried, not that Mr.
23 Phillips can't do it, we all knew he could do it. But the
24 temptation is just so great when you get out there but he
25 overcame that and got himself here today especially after

1 all of the frustration and worry and upset of not being
2 released last Tuesday and going directly to Saluda. But
3 he has done it, he is here. I think he showed up just a
4 few minutes before 2:30. So he was a little bit early.
5 Judge, we are asking you to just show as much leniency as
6 you can in this case.

7 THE COURT: Mr. Phillips, you did good, you didn't
8 want that 51 years, did you?

9 MR. PHILLIPS: No, sir.

10 THE COURT: I didn't want to give it to you either.
11 You got 81 days accumulated?

12 MS. HORLBECK: Yes, sir.

13 THE COURT: Is that including the extra days he did?

14 MS. HORLBECK: I don't think so, he probably has
15 about 85 in that case. He tells me he served 15 months on
16 his Saluda charge. Of course he would love Your Honor to
17 give him credit for that as well. I am just putting that
18 on the record, putting his request on the record.

19 THE COURT: 15 months?

20 MS. HORLBECK: On his Saluda charge, is that correct,
21 Mr. Phillips?

22 MR. PHILLIPS: Yes, sir.

23 THE COURT: How did that work, how did you get 15
24 months on your Saluda charge?

25 MR. PHILLIPS: Because they picked me up on December

1 the 4th of '09 and I got released November the 2nd of '10.
2 Greenwood originally picked me up, they picked me up in
3 Saluda County.

4 THE COURT: This offense occurred after you got
5 released from Saluda?

6 MR. PHILLIPS: It was before Greenwood had charges on
7 me. Greenwood was picking me up in Saluda County. By
8 them picking me up is when the other charges happened.

9 MS. WHITE: Your Honor, I know that there was a hold
10 on him and I can't remember if it was, was it in SCDC at
11 that time?

12 MR. PHILLIPS: Yes, they said the probation and
13 everything.

14 MS. WHITE: I know we had a hold on him while he was
15 in SCDC. But the offense date here was December 4th.

16 THE COURT: Of '09. When did y'all put the hold on
17 him?

18 MS. WHITE: After he made, he was already in the
19 detention center when he was charged so it would had to
20 have been after he made bond when he was charged. I think
21 SCDC picked him up directly from the detention center.

22 MR. PHILLIPS: Yes, ma'am.

23 MS. WHITE: So he went to SCDC fairly quickly after
24 he was picked up on this.

25 THE COURT: How long were you at SCDC?

1 MR. PHILLIPS: I stayed down there 8 months.

2 THE COURT: Is there any reason he is not allowed
3 that 8 months?

4 MS. WHITE: I don't think so, I think he made bond
5 once he came back from SCDC so he should be entitled
6 credit for that 8 months.

7 THE COURT: That is exclusive of the 85 days?

8 MS. HORLBECK: Yes, sir.

9 MR. PHILLIPS: Then they picked me back up and I
10 stayed up here from February the 16th until May the 9th.

11 THE COURT: That is the 85 days.

12 MS. HORLBECK: Yes, sir.

13 MS. WHITE: That is what he was in on a bench
14 warrant.

15 THE COURT: I am going to give him credit for 325
16 days credit. I have already accepted the plea so the only
17 thing I told you I was going to do today was read the
18 sentence. All right, 15 years at the Department of
19 Corrections on all three, I am sorry, one of them is not
20 but 10, is it.

21 MS. WHITE: Yes, sir.

22 THE COURT: 10 on that one. 15 years on the
23 trafficking, 15 on the possession with intent and 10 all
24 to run concurrently, credit on all three for 325 days. Is
25 that the right calculations as far as you think?

1 MS. HORLBECK: Yes, sir.

2 THE COURT: All right. So that gives you roughly a
3 year already on a head start on that. All right?
4 Anything else?

5 MS. HORLBECK: No, Your Honor.

6 THE COURT: All right. Good luck.

7 MR. PHILLIPS: So I got 15 years?

8 THE COURT: Yes.

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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FORM 5

STATE OF SOUTH CAROLINA)

County of GREENWOOD)

ZACHARY PHILLIPS # 269602)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

11CP2401428

APPLICATION FOR
POST-CONVICTION RELIEF

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
2011 DEC 16 AM 11 39

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention TREHON CORRECTIONAL INSTITUTION
84 GREGG HOUSE RD, TREHON SC. 29847
2. Name and location of Court which imposed sentence GREENWOOD COUNTY
COURT OF GENERAL SESSIONS
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 106924-0403
 - (b) 106924-0407

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) may, 17, 11
- (b) 15 years each
- (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?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. GREENWOOD COUNTY GENERAL SESSIONS, MOTION OF RECONSIDER
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. MOTION TO RECONSIDER GRANTED ON 7-13-11
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. JULY, 13, 2011
- 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 "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

(c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) INEFFECTIVE ASSISTANCE OF COUNSEL
- (b) _____
- (c) _____

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

- (a) my counsel fail to let me know they never had possess of the car
- (b) THE CAR WAS NEVER IMPOUND INTO POLICE EVIDENCE ROOM.
- (c) my counsel fail to let the court know the officer in my case had to resign

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

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

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

- (a) the specific nature thereof:
 - i. MOTION TO RECONSIDER
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. GREENWOOD COUNTY COURT OF GENERAL SESSIONS
 - ii. _____
 - iii. _____
 - iv. _____

(c) the disposition thereof:

- i. MOTION RECONSIDERED WAS GRANTED
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. JULY 13, 2011
- ii. _____
- iii. _____
- iv. _____

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

- i. NO
- 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. _____

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

- (a) NO
- (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? N/A
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

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

- (a) the name and address of each attorney who represented you:
 - i. CARDINE M. HORLBECK - of Greenville Bar
101 WHITBETH STREET, SOUTH CAROLINA, 29601
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. PLEA SENTENCING and motion to reconsider
 - ii. _____
 - iii. _____

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

I'm SEEKING A FIVE YEARS REDUCTION

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 GREENWOOD)

VERIFICATION

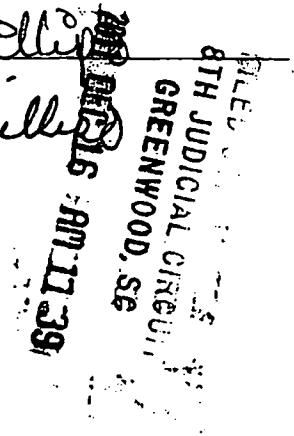
I, ZACHARY F. PHILLIPS, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Zachary B. Phillips
Zachary B. Phillips

SWORN to and subscribed before me this 12th day of December, 2011.

Blenda L. Williams (L.S.)
Notary Public

My Commission Expires: 3/3/2014



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

I, ZACHARY F. PHILLIPS, 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.

Zachary B. Phillips
Applicant
Zachary B. Phillips

SWORN or affirmed to and subscribed before me this
12th day of December, 2011.

Stunde L. William
Notary Public

My Commission Expires: 3/3/2014

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
2011 DEC 16 AM 11 39

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD)	EIGHTH JUDICIAL CIRCUIT
)	
Zachary Phillips, #269602,)	2011-CP-24-1428
)	
Applicant,)	
)	
v.)	RETURN
)	
State of South Carolina,)	
)	
Respondent.)	
)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed on December 16, 2011¹, 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 Greenwood County Clerk of Court. The Applicant was indicted at the March 2010 term of the Greenwood County Grand Jury for Trafficking in Cocaine Base (2010-GS-24-0403) and Possession of Marijuana with Intent to Distribute (PWID) (2010-GS-24-0407). The Applicant was represented by Caroline Horlbeck, Esquire. On May 9, 2011, the Applicant pled guilty to Trafficking Crack Cocaine, 2nd offense and PWID Marijuana, 3rd offense. On May 17, 2011, the Honorable Eugene C. Griffith sentenced the Applicant to confinement for fifteen (15) years for each charge to run concurrently. The Applicant filed a Motion to Reconsider his sentence, which was granted. On July 13, 2011, Judge Griffith re-

¹ This application was not received by the Respondent until July 20, 2012

sentenced the Applicant to twelve (12) years for each charge to run concurrently. The Applicant did not appeal his conviction and sentence.

Attached herewith and incorporated herein are the records of the Greenwood County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Ineffective Assistance of Counsel"
 - a. "My counsel fail(sic) to let me know they never had possess(sic) of the car. The car was never impound(sic) into police evidence room."
 - b. "My counsel fail(sic) to let the court know the officer in my case had to resign."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

For purposes of this Return, Respondent interprets Applicant's allegations to be allegations of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a

ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel 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, 305 S.E.2d 247 (1983).

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 
~~ATTORNEYS FOR RESPONDENT~~

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Sept 26, 2012.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENWOOD)

2011-CP-24-1428

ZACHARY PHILLIPS, 269602)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

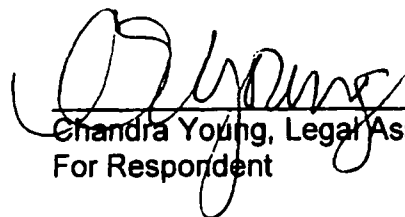
STATE OF SOUTH CAROLINA,)

Respondent.)

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

Tommy L. Stanford, Esquire
 Post Office Box 3321
 Greenwood, South Carolina 29648

DATED this 26th day of September 2012.


 Chandra Young, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF LAURENS)

COURT OF COMMON PLEAS

Zachery Phillips,)
)
Plaintiff,)

ORIGINAL

v.)

Case No.
2011-CP-24-1428,

State of South Carolina)
)
Defendant.)

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on November 28, 2012, before The Honorable R. Lawton McIntosh in the Laurens County Courthouse, 100 Hillcrest Square, Laurens, South Carolina; attended by counsel as follows:

APPEARANCES:

Tommy Lee Stanford, Esq.,
Appearing for The Applicant.

J. Rutledge Johnson, Esq.,
Appearing for The State.

Vivian H. Cross
Circuit Court Reporter – 10th Judicial Circuit
P O Box 704
Belton, South Carolina 29627
vcross@sccourts.org

Zachery Phillips versus State of South Carolina
 Case No. 2011-CP-24-1428
 PCR Hearing of November 28, 2012
 Before The Honorable R. Lawton McIntosh

2

I-N-D-E-X

November 28, 2012
ZACHERY PHILLIPS
versus
THE STATE OF SOUTH CAROLINA
(PCR HEARING)
(2011-CP-24-1428)

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CROSS-EXAMINATION BY MR. JOHNSON	20
<u>CAROLINE HORLBECK:</u>	
DIRECT EXAMINATION BY MR. JOHNSON	24
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REPORTER'S CERTIFICATE:	39

E-X-H-I-B-I-T-S

IDENTIFICATION ENTERED

*****NO EXHIBITS OFFERED*****

P R O C E E D I N G S

(10:32 A.M.)

1
2
3 **MR. JOHNSON:** May it please The Court, Your Honor?

4 **THE COURT:** Yes, sir.

5 **MR. JOHNSON:** This is the case of *Zachery Phillips*
6 *versus The State of South Carolina*, case number 2011-CP-
7 24-1428. Mr. Phillips was indicted at the March 2010
8 term of the Greenwood County Grand Jury, trafficking in
9 cocaine base and possession of marijuana with intent to
10 distribute. He plead guilty on May 9th 2011, uh, to
11 trafficking co- -- uh, crack cocaine second offense and
12 PWID marijuana third offense. It was before The
13 Honorable Eugene C. Griffith. Uh, he was sentenced on
14 May 17th 2011. He was -- by -- pursuant to a
15 recommendation by The State, he was, uh, concurrently
16 sentenced to fifteen years for each charge. Uh, he was
17 represented by Ms. Caroline Horlbeck; she filed a Motion
18 to Reconsider the sentence, which Judge Griffith granted
19 on July 13th 2011 and resentenced him to twelve years
20 each, concurrent. Uh, there's no direct appeal filed;
21 there is a timely PCR application filed December 16th
22 2011. It wasn't received by our office until July 16th
23 2012. Uh, the return was filed September 26th 2012 and
24 he's represented here today by Mr. Tommy Stanford.

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

Zachery Phillips versus State of South Carolina
Case No. 2011-CP-24-1428
PCR Hearing of November 28, 2012
Before The Honorable R. Lawton McIntosh

4

1 **MR. STANFORD:** Uh, thank you, Your Honor; may it
2 please The Court. Your Honor, I have a motion I'd like
3 to make before The Court to ask for a continuance.

4 **THE COURT:** For a continuance?

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

6 **THE COURT:** Why wasn't that motion made before
7 today?

8 **MR. STANFORD:** Uh, Your Honor, because when I met
9 with, um, my client on this past Wednesday, I talked to
10 Mr. Johnson and I -- I advised him that I had a meeting
11 with my client. I had received a letter around November
12 16th/17th. Well, the letter was dated the 16th or 17th. So
13 I spoke to Mr. Johnson and I said to him that there was a
14 issue as relates to another transcript from a
15 reconsideration hearing that I did not have in my
16 possession, and my client said that there was some things
17 at that second hearing that directly impact this
18 particular hearing. So, when I spoke with Mr. Johnson
19 last week, on Monday, I advised him of that and I told
20 him that I was going to meet with Mr. Phillips and after
21 talking with him I would get back with him and see
22 whether or not that second hearing actually impact (sic)
23 the hearing for today.

24 So, on Wednesday, when I went down to The Department
25 of Correction (sic) and met with him, upon my return I

Zachery Phillips versus State of South Carolina
Case No. 2011-CP-24-1428
PCR Hearing of November 28, 2012
Before The Honorable R. Lawton McIntosh

1 immediately called counsel and I advised him, based on
2 what my client was telling me, from the second hearing --
3 the reconsideration hearing -- there is a question as it
4 relates to the amount of time that he's serving, and he
5 tells me that in that hearing, where Judge Griffin (sic)
6 at reconsideration and reduced the hearing -- reduced the
7 time from fifteen years down to twelve years -- that
8 there were discussions as relates to the initial
9 sentence. Uh, so I think that if what he says is
10 correct, if that information is actually in that
11 transcript, then that would directly impact the hearing
12 today.

13 **THE COURT:** Well, give me more specific information
14 so I can consider it please, sir.

15 **MR. STANFORD:** Yes, sir, Your Honor, uh, it's my
16 understanding that when my client plead there was a
17 negotiated sentence of fifteen years.

18 **THE COURT:** The note -- I thought it -- I was --
19 when I was going through my notes, I thought it came to
20 him on a -- on a recommendation. Is it negotiated or
21 recom- -- recommended?

22 **MR. JOHNSON:** I believe it was recommended, Your
23 Honor; let me pull the transcript.

24 **MR. STANFORD:** (After pause) Recommended, Your
25 Honor.

Zachery Phillips versus State of South Carolina
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1 **THE COURT:** Okay.

2 **MR. STANFORD:** Recommended; I apologize.

3 **THE COURT:** That's okay. So---

4 **MR. STANFORD:** And -- and, Your Honor, uh, based on
5 the recommended sentence of fifteen years, uh, Judge
6 Griffin (sic) stated in the initial plea that his lawyer
7 would be able to argue for something less than fifteen.
8 And my client was under the impression, even though there
9 was a recommended sentence of fifteen years, that she
10 still would argue for a sentence from five to ten years.

11 And so, it is my understanding that he plead with a
12 recommended sentence of fifteen years, but specifically,
13 I understand from his lawyer, that she still could ask
14 the Judge for something less than fifteen years.

15 And then Judge Griffin (sic) -- in the transcript
16 Judge Griffin (sic) actually talks about the fact that
17 she would ask for something -- that she could argue for
18 something less than fifteen years.

19 So, when we did the Motion -- when the Motion to
20 Reconsider was done, he reduced the sentence from fifteen
21 down to twelve. But, it was still his understanding that
22 it was gonna be that she would argue five to ten and that
23 he would actually get five to ten.

24 So, apparently there is something in that second
25 hearing that addresses that -- that supports his argument

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1 that that's why he plead initially.

2 And then secondly, Your Honor, we have a witness
3 that we want to call. Uh, I think it's his mother-in-
4 law. I found out yesterday that she had an aneurism;
5 that she's in the hospital or just out of the hospital,
6 that she can't come testify. And, her daughter that
7 wants to come testify. And those two people are
8 important. I just found out yesterday, when I went to
9 see him, I -- I talked to him about it. And when I was
10 able to track them down, I found out from, uh, his wife
11 as well as her mother that she was present when the
12 discussion was going on about the five-to-ten-year
13 sentence, even though it was a recommended fifteen. And
14 they're not available; she's wor- -- she's working and
15 can't get off and the mother just had an aneurism and, of
16 course, can't come testify today.

17 **THE COURT:** Well, Mr. Stanford, I'm -- quite
18 frankly, I'm not very inclined to continue the case. I
19 don't know what -- what -- especially from the basis of
20 these witnesses, irregardless of, you know, what they
21 felt they heard from his attorney.

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

23 **THE COURT:** I mean, you understand as well as
24 anybody recommended is simply that.

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

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1 **THE COURT:** Now, in the transcript, I'm gonna ask
2 The State, did, uh, The Court inform the Defendant that
3 regardless of the recommendation The Court is free to do
4 what -- sentence him to whatever The Court wanted to do
5 as far as it -- as far as allowed by the statute?

6 **MR. JOHNSON:** Repeat that question, Your Honor?

7 **THE COURT:** I'm sorry, that was very poorly worded.
8 Um, typically in a plea -- plea colloquy, when you --
9 when you say you're looking at 'x' number of years, this
10 comes to The Court on a -- a recommended sentence, do you
11 understand I don't have to accept that and I can sentence
12 you to the full amount provided by law? Um, does that
13 appear in the transcript are you -- are you aware of?

14 **MR. JOHNSON:** I do believe, Your Honor; if you give
15 me one second?

16 **MR. STANFORD:** That -- that -- Your Honor---

17 **MR. JOHNSON:** Page sixteen, Your Honor.

18 **THE COURT:** Page sixteen?

19 **MR. JOHNSON:** The Court asked, have you been
20 promised anything other than dismissal of a related
21 charge, possession with intent to distribute marijuana
22 third and crack being -- crack cocaine ten to eight --
23 twenty-eight grams in proximity to Seaboard Park. Have
24 you been promised anything other than The State is making
25 a recommendation of fifteen years at eighty-five percent,

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1 understanding your attorney can argue for less? Have you
2 been promised anything else?

3 Whereupon, Mr. Phillips answered, no, sir.

4 **THE COURT:** Okay, sir. All right, Mr. Stanford,
5 I'll be glad to hear you real quick.

6 **MR. STANFORD:** Yes, sir, Your Honor; and as it
7 relates to that, again it was his understanding, because
8 if you go to -- if you go to the last page of the
9 transcript, page thirty-one, uh, it was his understanding
10 that even after he got the fifteen years he appeared to
11 be somewhere in shock because he questioned the Judge.
12 He asked the Judge, uh, on page thirty-one in Court, all
13 right, so that gives you roughly a year or bit on a -- on
14 a head start of -- and then his lawyer speaks briefly and
15 then my client says, so I got fifteen years -- question
16 mark. And he says, yes.

17 So all along, even though it was recommended
18 fifteen, in his mind he was thinking five to ten and that
19 his lawyer would at least argue for five to ten and
20 there's nothing in the transcript to show where she even
21 said anything as related to five to ten years.

22 **THE COURT:** All right, sir. I'm gonna deny your
23 motion for a continuance on -- on, uh -- on both grounds,
24 and I'm gonna proceed with the hearing. You ready with
25 your testimony, Mr. Stanford?

1 A Trafficking crack cocaine and PWID marijuana the
2 third offense.

3 Q All right; and did you have a trial or did you plea?

4 A I plead, sir.

5 Q You plead? And what was the sentence of The Court,
6 sir?

7 A It was recommended by the Solicitor for fifteen
8 years but the Judge stated that my lawyer could-a argue
9 for anything less than fifteen.

10 Q All right. And The Court initially gave you fifteen
11 years; is that correct?

12 A Yes, sir.

13 Q And I believe you had a reconsideration hearing?

14 **THE COURT:** Just one second; ma'am?

15 **COURT REPORTER:** He's close -- so close he's
16 echoing.

17 **THE COURT:** All right. Do you mind? Thank you,
18 sir. I'm sorry.

19 **MR. STANFORD:** Yes, sir.

20 Q And you had a reconsideration hearing, is that
21 right?

22 A Yes, sir.

23 Q And was your sentence changed?

24 A Yes, sir.

25 Q And what was, uh, the resentence?

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1 A Uh, they reset -- they reduced it to, uh, twelve
2 years.

3 Q To twelve years? Okay. Now, I believe now -- you
4 had other pending charges with another county other than
5 Greenwood; is that correct?

6 A Yes, sir; those charges were taken care of.

7 Q And those charges were in where -- what county?

8 A Saluda.

9 Q And how were they taken care of, sir?

10 A Uh, they ran concurrent with the one in Greenwood,
11 uh, sentencing.

12 Q All right. Now, I believe you filed, back in
13 December of last year, for ineffective assistant (sic) of
14 counsel, is that correct?

15 A Yes, sir.

16 Q Now your first lawyer was who?

17 A The very first one I had was Ms. Jane Merrill, and
18 me and her never got along so I asked the Judge to
19 relieve her from my case. And then I had had Ms.
20 Caroline Horlbeck.

21 Q All right. Now, was she appointed or retained?

22 A Well it was more in the retained but it was kind-a
23 like it was at the last minute because they was telling
24 me that I had to go ahead with the trial which it ain't
25 give us enough amount of time to do what we would-a had

1 to do to retain.

2 Q You paid her to represent you, is that right?

3 A I wanted to pay her, it-a -- but she told me The
4 Court had appointed her, there wasn't no need to be.

5 Q Okay. All right, and you are saying this morning
6 that your lawyer was ineffective; is that right?

7 A Yes, sir.

8 Q Now, I believe that the first thing that you said
9 she was ineffective on is the amount of time you got; is
10 that right?

11 A Yes, sir.

12 Q Explain to The Court your understanding of the
13 fifteen-year recommended sentence.

14 A Okay. Well, when I -- when we talked about it, like
15 the Judge stated in my transcript, that she could-a
16 argued for anything less, where upon going for a Judge
17 she never argued for nothing, she just sit there and let
18 the Judge give me fifteen. And then, when I went back
19 for my Motion of Reconsideration, in that transcript you
20 can see where she argued with the Judge and asked for
21 seven years whereas the -- the sit -- I mean, the
22 Solicitor, Ms. White; she said it wasn't no ATU, so the
23 Judge denied seven years and took three years off.

24 **THE COURT:** Sir, let me ask you, you're saying in
25 the Motion for Reconsideration that your attorney did

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1 argue for seven years?

2 A She argued for the seven years then.

3 **THE COURT:** Okay, sir.

4 Q So she did argue for the seven years at the second
5 hearing?

6 A At the second hearing, but Mr. White stated that
7 there was no ATU in Department of Corrections, which was
8 a lie because it is ATU still here.

9 Q So did your lawyer challenge whether or not, um, the
10 ATU program was still in effect?

11 A No, sir; she just went on what the Solicitor said.

12 Q Do you think that was ineffective because she did
13 not challenge the fact that ATU was not, um -- had not
14 been, uh, debac- -- demolished?

15 A Yes, sir; I think -- I think it's very ineffective.
16 Because, if you represent someone you supposed to
17 represent them to your best ability.

18 Q Okay. Now, prior to going to Court with the Judge
19 to do the plea, you had a discussion with her about the
20 fifteen?

21 A Uh-huh.

22 Q And who was present?

23 A Me and my fiancé and them -- my family members.

24 Q Was -- was -- was your fiancé mother (sic) present
25 also?

1 A Yes, sir.

2 Q So they actually heard the conversation?

3 A Yes, sir.

4 Q Between you and your lawyer?

5 A Yes, sir.

6 Q And the initial discussion, was it seven years or
7 five to ten years?

8 A Well, on the piece of paper there -- well, I -- I --
9 I have not got the paper, but it was recommended on that
10 paper ten years---

11 Q Yes, sir.

12 A ---and when we came back, Ms. White said she was
13 gonna recommend fifteen years. So, they went with the
14 recommendation and when Mr. Griffith asked her, well was
15 it a negotiated plea or recommenda- -- recommended by The
16 State; I -- if I'm remembering correctly, I think she
17 tell the Judge, in my motion to re- -- on reconsideration
18 hearing that it was a negotiated fifteen. But, when he
19 read the paper he seen it been recommended.

20 Q Uh-huh.

21 A And that's why he granted my Motion of
22 Reconsideration.

23 Q So in the -- in the motion to the reconsideration,
24 you're saying that there's discussion as relates to a
25 recommendation versus a negotiation?

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1 A Yes, sir.

2 Q Now, were you surprised when The Court actually
3 sentenced you to fifteen years when you plead?

4 A Yes, sir. If they stated -- I -- that's why I asked
5 you did -- do I have fifteen.

6 Q And that's on page thirty-one of the transcript?

7 A Yes, sir.

8 Q Now, did you talk to your lawyer about going to
9 trial?

10 A Yes, sir; she advised me it'd be best if I go ahead
11 and plea. And I'm thinking, well, that could be the best
12 possible way if I plea, but upon me getting to Department
13 of Correction, doing my own research and reading and
14 understanding the law a lot better, that she never did
15 once question the detective in the case, she never did
16 see that they had a physical evidence. The only thing
17 she went by is what the picture that they had in my
18 motion. And my fingerprints, none of that was never
19 found on the car. The car had been tampered with; the
20 car had been searched twice on the scene. She never
21 questioned none of their motives behind none of it.

22 **MR. JOHNSON:** Your Honor, I'd move to strike that;
23 that's not in the allegations.

24 **THE COURT:** I'll sustain that objection.

25 Q But as it relates to the ineffective assistant of

1 counsel, you talked to her about, um, strategy and
2 evidence if you go to trial?

3 A Yes, sir.

4 Q And did that affect -- your -- your discussions with
5 her as it relates to Court strategy and evidence -- based
6 on your conversations with her, did that affect whether
7 or not you were going to plea also?

8 A Yes, sir; because I believe---

9 **MR. JOHNSON:** Your Honor, he's not alleging
10 effect -- I mean, uh, involuntary guilty plea. I would
11 move to strike that; that's not in the allegations
12 either.

13 **MR. STANFORD:** Your Honor---

14 **THE COURT:** I -- I'll allow it; go ahead and answer.

15 **MR. JOHNSON:** Thank you, Your Honor.

16 **THE COURT:** Yes, sir.

17 A Yes, sir; it -- it had a big impact, because I think
18 if she would-a did a full investigation and went through
19 and we would-a just went through with everything else, I
20 really think I could-a walked away from the case or had
21 more -- lesser time.

22 Q And as it relates to you going before the Judge and
23 pleaing, in your discussions with your lawyer about the
24 evidence did you-all talk about a motion to suppress any
25 evidence that she had -- that The State had on you?

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1 A No, sir; she never -- I -- I never knew about none
2 of this until I went and did my own research. When I got
3 locked up, I did my own research and then that's when I
4 found out about the motion to suppress. She never did
5 once bring that up to me. And then, she just kept
6 telling me it'll be best to plea and gone with the case
7 behind because I been dealing with the case since
8 December the 4th of 2009.

9 Q Now, Mr. Phillips, in the transcript, The Court
10 asked you were you pleaing freely and voluntarily; is
11 that right?

12 A Yes, sir. That's -- those were the things she told
13 me to go ahead and say and everything would come out all
14 right.

15 Q Well The Court asked you had you discussed
16 everything with your lawyer and were you satisfied with
17 your lawyer; is that right?

18 A Yes, sir; at that time I thought it was the right
19 decision. Yes, sir, I did state it.

20 Q So you stated to The Court that you were, uh,
21 satisfied with your lawyer and she had discussed
22 everything with you?

23 A Yes, sir.

24 Q And did the impact of your conversation about the
25 five to ten years, uh, had (sic) any impact on your

1 thinking when you were standing before the Judge?

2 A Yes, sir; because five/ten years, I mean that's a
3 lot of time which you can do that. But when -- whereas
4 you're talking fifteen years, your grandmamma ninety-nine
5 and your mother sick at home and you -- you never know
6 whether they're gonna make it, so yeah, that's why I was
7 ready to get it over with. And even the Solicitor stated
8 to Ms. Horlbeck that I'd been dealing with this case for
9 a very long time.

10 Q But you knew you had a recommended sentence of
11 fifteen years standing before the Judge; is that right?

12 A Yes, sir.

13 Q Uh, but nevertheless you still pleaded, is that
14 correct?

15 A Yes, sir; because he states in there that my
16 attorney would have a chance to argue anything less than
17 fifteen. And if you read the whole, uh, transcript, she
18 never argued the fifteen or nothing.

19 Q So there's nothing in the first transcript where she
20 asked for anything less than fifteen years?

21 A No, sir; there's nothing in there.

22 Q It was only at the reconsideration hearing that a
23 discussion came up about less than fifteen years; is that
24 right?

25 A Yes, sir; that's when she argued for the seven.

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1 Q And then there's some questions at that hearing
2 negotiated plea versus recommended plea?

3 A Yes, sir.

4 Q And you think that your lawyer was ineffective?

5 A Yes, sir.

6 **MR. STANFORD:** That's all I have, Judge.

7 **THE COURT:** Any cross-examination?

8 **MR. JOHNSON:** Just briefly, Your Honor.

9 **ZACHERY PHILLIPS, CROSS-EXAMINATION BY MR. JOHNSON:**

10 Q Mr. Phillips, are you aware that this -- this, uh,
11 trafficking crack cocaine was plead down from a third
12 offense to a second offense?

13 A No, sir, I wasn't aware of it.

14 Q That was in your plea transcript, wasn't it?

15 A No, sir.

16 **MR. JOHNSON:** Your Honor, on page seven, line
17 twenty-two, it's actually a third that's plead down to a
18 second degree. If you'd take notice of that?

19 Q Um, do you realize that you face a minimum of
20 twenty-five years just on the trafficking crack cocaine
21 case if he were to grant this PCR?

22 A Yes, sir.

23 Q And you would also face five to twenty on the PWID
24 marijuana?

25 A Yes, sir.

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1 Q So it's twenty-five to thirty years -- you're
2 looking fifty years if you are successful here today---

3 A Yes, sir.

4 Q ---if they'd run that consecutively?

5 A Yes, sir.

6 Q Are you aware of that? And a proximity, so that
7 would be -- actually, it would be sixty years.

8 A Yes, sir.

9 Q Okay; and you're still wanting to go forward?

10 A Yes, sir.

11 Q Okay. At the, uh, hearing, the Judge went over your
12 constitutional rights; right to a jury trial, right to
13 confront, bring witnesses on your behalf, right to
14 confront witnesses that The State has against you?

15 A Yes, sir.

16 Q And you waived those rights, didn't you?

17 A Yes, sir.

18 Q Okay. And you did that freely and voluntarily?

19 A Yes, sir; based on what she told me.

20 Q But it's your decision, isn't it?

21 A Yeah, it's my decision.

22 Q And you agreed with the facts in the case?

23 A Yes.

24 Q And nobody made to plea, did they?

25 A No anybody made me plea, sir; it was the point in

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1 talking to my lawyer I thought that would be in my best
2 interest.

3 Q So it was your decision based on your best interest;
4 correct?

5 A Yeah, from what she was telling me.

6 Q And you told The Court that, um, Ms. Horlbeck had
7 gone over all discovery and explained your rights to
8 you---

9 A Yes, sir.

10 Q ---is that right? And you understand that if you
11 get one more serious offense you can face life without
12 parole?

13 A Yes, sir.

14 Q And no other promises other than the fifteen years,
15 eighty-five percent; isn't that correct?

16 A Yes, sir; besides the Judge telling me that my
17 argue -- my lawyer can argue less than fifteen.

18 Q But that's what you told the Judge; there were no
19 other promises than that; correct?

20 A Yes, sir.

21 Q And, Ms. Horlbeck actually argued -- argued for you
22 to be able to be released that day and go see your
23 grandmother, isn't that correct?

24 A Yes, sir.

25 Q In fact it happened, right? And you turned yourself

1 back in?

2 A Yes, sir.

3 Q Okay. And you're, in fact, guilty of these charges;
4 isn't that right?

5 A Is (sic) I'm guilty of these charges?

6 Q That's what you told The Court, didn't you?

7 A Yeah, that's what I told The Court, yes.

8 Q And you were under oath at that time?

9 A Yes, sir.

10 Q Are you saying that you lied to The Court then?

11 A Well, you---

12 Q Are you guilty of the charges?

13 A Sir, it's not whether you're -- I'm guilty of the
14 charges, it's the burden of proof -- proof of what The
15 State can provide or prove.

16 Q And you waived that burden, didn't you, when you
17 plead guilty?

18 A Yes, sir, I waived those burden due to the fact that
19 she telling me that would be best for me.

20 Q But you told The Court, under oath, that you were,
21 in fact, guilty of these charges; isn't that correct?

22 A That's right; yes, sir.

23 Q And that you had enough time with your lawyer and
24 she'd answered all the questions you wanted---

25 A Yeah.

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1 Q ---isn't that what you told The Court?

2 A Yes, sir.

3 Q And that you were satisfied with these -- with --
4 with Ms. Horlbeck's services; isn't that right?

5 A Yes, sir.

6 **MR. JOHNSON:** No further questions, Your Honor.

7 **THE COURT:** Any re- -- redirect?

8 **MR. STANFORD:** Uh, no, Your Honor.

9 **THE COURT:** All right; thank you, sir, you may step
10 down.

11 (WITNESS STEPPED DOWN.)

12 **MR. STANFORD:** That's all we have, Your Honor.

13 **THE COURT:** Is that the Plaintiff's case?

14 **MR. STANFORD:** Yes, sir.

15 **THE COURT:** All right.

16 **MR. JOHNSON:** We'd call Ms. Horlbeck to the stand,
17 Your Honor.

18 **THE COURT:** Come around.

19 (WITNESS FORWARD.)

20 **THE COURT:** Place you hand on the Bible and raise
21 your right hand.

22 (WHEREUPON, **CAROLINE HORLBECK** WAS DULY SWORN AND
23 TESTIFIED AS FOLLOWS:)

24 **THE COURT:** Thank you, ma'am.

25 **CAROLINE HORLBECK, DIRECT EXAMINATION BY MR. JOHNSON:**

1 Q Good morning.

2 A Good morning.

3 Q Do you remember becoming involved in this case?

4 A I do.

5 Q And can you please explain that to The Court?

6 A I -- I was appointed to represent Mr. Phillips, um,
7 I believe in March of 2011 and I met with Mr. Phillips at
8 the jail in April. Uh, two days after I met with him, I
9 mailed discovery to him and I believe I discussed the
10 case with him again, um, at the end -- yes, I had an
11 additional conference with him at the end of, um, April.

12 I -- I was appointed -- I -- I was the second
13 attorney appointed to represent him. Uh, at the point
14 that I became involved, Mr. Phillips had already been
15 scheduled for trial. Uh, he did not show for his trial,
16 a bench warrant was issued. Um, he requested a hearing;
17 during that hearing he fired his public defender and
18 that's when I was appointed.

19 Um, at the time of my appointment, The State was --
20 the -- the case was old and they were frankly ready to
21 either schedule the case for trial or plead guilty. Or
22 that -- or -- or let him plead guilty if that's what he
23 wanted to do; and that's what he wanted to do, which is
24 plead guilty.

25 Q You just testified that you met with him at least

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1 twice. Did you -- did you meet with him on any other
2 occasions?

3 A Um -- I believe I met with him several times at the
4 jail and then I met with him on at least two occasions at
5 the courthouse.

6 Q Do you recall what discussions you would have had
7 with him concerning this case?

8 A I would -- I reviewed discovery with him, I reviewed
9 all of his rights with him, I reviewed the potential
10 penalty, um, with him, I reviewed everything that he
11 would waive if he plead guilty, and, uh, everything
12 that -- that we could pursue if he wanted to go to trial.

13 Q Were there any recommendations or negotiations in
14 this case?

15 A I believe the recommendation, uh, from The State was
16 a -- was a, uh, fifteen-year sentence. And I -- I had
17 several discussions with the Solicitor's Office about
18 trying to get a better recommendation.

19 Um, the -- there was an offer for ten years back
20 when Mr. Phillips' first attorney represented him; um,
21 however, he did not show for trial that week and that
22 ten-year offer fell off the table. And at the time I got
23 involved, that ten-year offer was -- was no longer
24 available.

25 Q So the only recommendation you got was the fifteen

1 years?

2 A That's the only recommendation; yes.

3 Q Okay.

4 A Now, we were able to, uh -- Mr. -- we were able to
5 convince Judge Griffith to allow Mr. Phillips to, uh --
6 well, sentencing was actually deferred to give
7 Mr. Phillips some time to say goodbye to his family, and
8 on -- I believe it's page -- well, it's for -- for page
9 twenty-one and -- and part of page twenty-two, The Court
10 discusses, uh, that the -- especially page twenty-two,
11 lines three through seven -- The Court discusses that,
12 um, Mr. Phillips might get a little credit, um -- uh,
13 towards his argument that a -- it -- a sentence less than
14 fifteen years would be more appropriate if Mr. Sentence
15 (sic) -- if Mr. Phillips came and turned himself in
16 Monday rather than Tuesday, um, which would have been May
17 the 17th I believe.

18 And my understanding of that was that the Judge was
19 trying to encourage Mr. Phillips to turn himself in, um,
20 on that Monday, which would have been May 16th rather than
21 just come on into Court on the 17th. Although, the 17th
22 would have -- would have been fine.

23 Q Let's go into his allegations here today. Uh,
24 Mr. Phillips testified that you told him to answer yes to
25 all the Judge's questions. Did -- did you ever ask --

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1 did you ever advise Mr. Phillips to answer in a certain
2 way?

3 A No, I don't; I don't ever do that to my clients.

4 Q Do you advise them anything with the plea, uh, to
5 do?

6 A What I do is, I review their rights with them, but
7 I -- I do not tell them how to answer the questions that
8 The Court poses to them.

9 Q (After pause) He also testifies about this five to
10 ten years. Do you have any knowledge of that?

11 A I don't re- -- I don't recall if we discussed a
12 specific time that he wanted me to ask for. Uh, we -- we
13 obviously must have discussed it after he got his
14 sentence, because I then filed a motion to reconsider.

15 Um, that was -- I -- I don't -- I just don't have
16 any independent recollection. Maybe -- maybe I -- I
17 don't recall. I certainly didn't promise that he would
18 get a certain sentence.

19 Um, during the plea I believe I asked The Court for
20 as much leniency as possible.

21 Um, I would like to point out that a -- a couple
22 things happened, um, in-between the acceptance of the
23 plea and the actual sentencing. One thing that happened
24 that I think, uh, hurt Mr. Phillips' chances, um, was the
25 fact that he had actually been picked up, um, on a Saluda

1 drug charge. And in the week between the sent- -- the --
2 the acceptance---

3 **MR. STANFORD:** Your Honor, I would object to that;
4 that's just speculation on her part as relates to what
5 sentence he got versus some things that happened he got
6 hit with.

7 **THE COURT:** I'll note your objection; go ahead
8 please.

9 A And I -- I bring it up because it was -- it was
10 actually discussed during the sentencing, which is why
11 I'm afraid it may have affected the sentencing.

12 Um, he plead guilty to another drug charge from
13 Saluda, and I -- I think it probably happened after
14 the -- the Greenwood County charge. But -- but I'm
15 afraid that may have hurt his chances.

16 Um, and the other factor is that he didn't -- he was
17 not able to -- for whatever reason, he did not turn
18 himself in Monday as The Court encouraged him to do, but
19 did show up in time -- in plenty of time on Tuesday,
20 which I thought was wonderful and I did my best to
21 highlight to The Court.

22 Um, I -- that is probably why I asked The Court for
23 as much leniency as The Court could go.

24 Q And would you agree with me that he does, in fact,
25 face sixty years if he's successful here today?

Zachery Phillips versus State of South Carolina
Case No. 2011-CP-24-1428
PCR Hearing of November 28, 2012
Before The Honorable R. Lawton McIntosh

30

1 A Yes.

2 Q And you filed a -- a -- a resentencing motion --
3 motion for resentencing on his behalf?

4 A I did, yes.

5 Q Was it successful?

6 A Well, it was successful in that, um, we -- we were
7 certainly granted the chance to make the argument. I
8 don't -- I -- I just don't recall what -- I don't recall
9 what happened at the resentencing or the motion to
10 reconsider. Um, I just don't have any independent
11 recollection. I -- it -- it may have been -- hang on,
12 let me -- let me see.

13 Q But his sentence was, in fact, reduced from fifteen
14 to twelve years?

15 A Yes, sir; I mean, you're correct in that res- --
16 yes, yes. So yes, it -- it was successful in that
17 regard; I'm sorry.

18 **MR. JOHNSON:** No further questions at this time,
19 Your Honor.

20 **THE COURT:** Cross-examination?

21 **MR. STANFORD:** Thank you, Your Honor; if it please
22 The Court?

23 **THE COURT:** Yes, sir.

24 **CAROLINE HORLBECK, CROSS-EXAMINATION BY MR. STANFORD:**

25 Q Now, isn't it true, uh, counselor, that you asked

1 for seven years only because you recalled that he was
2 told that ATU was not available anymore?

3 A I don't -- I don't recall, um, the discussion
4 about ATU. I just don't -- I don't have any independent
5 rec- -- recollection. And I don't recall why. I -- I
6 assume I must have asked for the seven years because
7 Mr. Phillips wanted me to. I -- I may have asked for the
8 seven years because of the ATU situation; I just don't
9 recall.

10 Q So you're not disputing, uh, Mr. Phillips' testimony
11 along those lines?

12 A I -- I'm trying to say I don't rec- -- I just don't
13 recall.

14 Q You don't recall?

15 A I don't recall what the situation was with ATU at --
16 at that point and I don't recall the discussions with
17 ATU---

18 Q Now, you---

19 A ---or regarding ATU. That's what I'm trying to tell
20 you.

21 Q ---now -- now you talked about the Saluda charges,
22 uh, just a second ago. Isn't it true though that those
23 charges were like seven to eight years old and that they
24 were gonna be running concurrent so it did not impact
25 this sentence whether it was twelve years or fifteen

Zachery Phillips versus State of South Carolina
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1 years or seven years?

2 A I don't know how old. Um, if I could just look at
3 my transcript for a minute and look at that to see if I
4 can answer you?

5 **MR. JOHNSON:** And Your Honor, just for the record,
6 I would believe that ATU would be a -- a, uh, ancillary,
7 uh, issue in this case. It's collateral consequences
8 should not be considered in a PCR hearing.

9 **THE COURT:** I understand; note your objection.

10 **MR. STANFORD:** Uh, and -- and, Your Honor, our
11 position on that would be that was a part of what was in
12 his mind as relates to the plea.

13 **THE COURT:** Go ahead please, sir.

14 A (After pause) Okay; I don't know how old the Saluda
15 charges were and I -- I don't know whether he was
16 arrested on those charges prior to the Greenwood charges
17 or after the Greenwood charges arose. I just don't know.

18 Q When you---

19 A Um, I believe Saluda had a hold on him and -- and he
20 was transported from the Greenwood Detention Center
21 straight to Saluda.

22 Q ---when -- when you represented him, were you aware
23 of the Saluda charges?

24 A I don't think so. I seem to recall, uh, getting a
25 telephone call from his attorney on his Saluda charges.

Zachery Phillips versus State of South Carolina
Case No. 2011-CP-24-1428
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Before The Honorable R. Lawton McIntosh

1 Q And when was that call, before he plead or after he
2 plead?

3 A I believe it was after and before the sentencing --
4 I believe, if my -- if my memory's correct.

5 Q So the two of you never talked about him having any
6 other pending charges?

7 A He did not tell me he had any other charges.
8 Normally I -- I -- I -- it's my practice to ask, and I
9 don't recall that he told me he had those.

10 Q Now, you advised him to accept the fifteen years; is
11 that correct?

12 A Um, I don't think I advised him to accept that. Uh,
13 I -- I asked him what he wanted to do on the case,
14 whether it was a plea or a trial, and he explained to me
15 that he wanted to plead guilty. And I don't think I -- I
16 don't think I told him yes, you should just go in and --
17 and say yes, thank you for the fifteen -- your
18 recommendation -- I'll take fifteen years.

19 Q But isn't it true that he advised you that he would
20 plead guilty based on the representation that you gave
21 him as relates to the strength or weakness of the case?

22 A Um, well I -- say that again?

23 Q Is it true that he said he would plead guilty based
24 on your advising him, based on the strength of the case
25 or the weakness of the case? Based on your assessment of

Zachery Phillips versus State of South Carolina
Case No. 2011-CP-24-1428
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Before The Honorable R. Lawton McIntosh

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1 the case?

2 A Well, I mean my -- my assessment of the case was --
3 you know, and there's a description of the facts, I
4 don't -- I mean I think on page twelve, line seventeen
5 through twenty-two, um, Mr. Phillips had -- had told the
6 police that there was a -- that there was a drug hidden
7 inside a vehicle, um, and the officers got consent from
8 the vehicle owner and they searched. And based on what
9 Mr. Phillips said, they were able to find the drugs.

10 Um, so based on that, I explained what I thought
11 about the case to Mr. Phillips and then it was his choice
12 whether to plead or go to trial.

13 Q But now, you were -- as relates to the drugs found
14 in the vehicle, you were aware of the fact that that
15 vehicle had been turned back to the rental company and
16 the police went back out later and found those drugs; is
17 that correct?

18 A Um, I don't know where it -- I don't -- I -- I had
19 to give my discovery to Mr. Phillips because he lost the
20 original copy that I'd given him so I don't have a -- I
21 haven't been able to refresh my memory on the facts. But
22 my understand was is that they -- if it was a rental car
23 then the police went to the rental company and were able
24 to obtain consent from them and then looked in the
25 steering wheel. That was my understanding according --

1 just based on what I've read in the transcript.

2 Q But now this was hours after he had in fact been in
3 custody; is that correct?

4 **THE COURT:** Let me---

5 A I don't recall.

6 **THE COURT:** ---let me step in. Mr., uh, Stanford,
7 the basis, although I'll let him testify as to
8 voluntariness of his plea---

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

10 **THE COURT:** ---the basis of his petition is that he
11 asked for less than fifteen and his counsel didn't do
12 that, and was therefore ineffective. And, didn't
13 challenge the fact that there was no ATU available to him
14 in the Department of Corrections.

15 And so that's -- that's the basis I'm going to
16 entertain during this hearing.

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

18 **THE COURT:** Okay, sir.

19 Q Now counselor, as it relates to the fifteen years,
20 uh, when you was before Judge Griffith, you never asked
21 for anything less than fifteen years; is that correct?

22 A I did apparently at the motion to reconsider.

23 Q At the -- at the -- at the plea hearing, not the
24 motion to reconsider.

25 A My -- my review of the transcript shows that I asked

Zachery Phillips versus State of South Carolina
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1 for as much leniency as The Court could offer.

2 Q I believe you asked for house arrest and you said
3 that you felt that that really was -- was not gonna
4 happen; is that right?

5 A I don't -- I don't know where you're looking; where
6 are you?

7 Q Uh, page twenty-seven on the transcript; it starts
8 on page twenty-six. (After pause) But page twenty-seven,
9 line fifteen---

10 A Oh, I see -- yes. Okay, yes you're correct.

11 Q So basically that's the only thing that you asked is
12 something that you knew was not possible; is that
13 correct?

14 A And I explained to him that that was not possible
15 and I also put that on the record.

16 **MR. STANFORD:** Beg The Court's indulgence?

17 **THE COURT:** Yes, sir.

18 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
19 CONFERENCE, OFF THE RECORD.)

20 (WHEREUPON, PROCEEDINGS CONTINUED.)

21 **MR. STANFORD:** That's all I have.

22 **THE COURT:** Thank you, sir.

23 **MR. JOHNSON:** No further questions, Your Honor.

24 **THE COURT:** Thank you, ma'am, you may step down.

25 (WITNESS STEPPED DOWN.)

Zachery Phillips versus State of South Carolina
Case No. 2011-CP-24-1428
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1 **THE COURT:** Anything further from The State?

2 **MR. JOHNSON:** No further witnesses, Your Honor.

3 **THE COURT:** Any reply from the Petitioner?

4 **MR. STANFORD:** No, Your Honor.

5 **THE COURT:** All right. For the record, uh, I
6 reviewed the transcript in this matter; I've listened to
7 the evidence. Uh, clearly Mr. Phillips plead freely and
8 voluntarily on a recommended sentence from The State of
9 fifteen years. These were reduced charges which lessened
10 his exposure to the time he could have gotten.

11 Uh, Judge Griffith fully and sufficiently covered
12 Mr. Phillips' rights and the waiver of those rights and
13 explained to him the ranges of the sentences he could
14 get.

15 Defendant specifically stated in the transcript that
16 there were no promises being made to him, um, and that he
17 was in fact pleading freely and voluntarily.

18 Uh, the fact is that, uh, it came to The Court on a
19 recommendation; The Court was free to sentence him to the
20 full amount provided by law.

21 Um, that being said, uh, this Applicant has not
22 suffered any prejudice. 'Cause even after Judge Griffith
23 had been able to -- had sentenced Mr. Phillips to fifteen
24 years, uh, counsel was able to come back in and get him
25 to reduce it to twelve.

Zachery Phillips versus State of South Carolina
Case No. 2011-CP-24-1428
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1 Uh, therefore, Mr. Phillips has failed to meet his
2 burden of proof in this matter on the grounds stated.

3 I do note for the record, by the transcript, where
4 Mr. Phillips, uh, plead to fifteen years that counsel did
5 in fact ask for leniency. The fact that she may not have
6 asked for a specific time range is inconsequential
7 whatsoever. Um, she also was able to success- --
8 successfully get him credit for two hundred and thirty-
9 five days, and that she otherwise asked for as much
10 leniency as he could get. So, there's no basis for, uh,
11 this petition.

12 Anything into the Department of Corrections, I agree
13 with The State is collateral and will not be a part of
14 whether or not this man plead guilty freely and
15 voluntarily.

16 So, I'm denying the petition. Thank you very much.

17 **MR. STANFORD:** Thank you.

18 **THE COURT:** You may state that in the order.

19 **MR. JOHNSON:** Thank you, Your Honor.

20 (WHEREUPON, HEARING ENDED AT 11:15 A.M.)

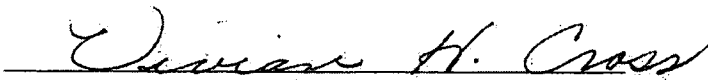
21 *****END OF REQUESTED TRANSCRIPT*****
22
23
24
25

Zachery Phillips versus State of South Carolina
Case No. 2011-CP-24-1428
PCR Hearing of November 28, 2012
Before The Honorable R. Lawton McIntosh

1 STATE OF SOUTH CAROLINA)
2) CERTIFICATE OF REPORTER
3 COUNTY OF LAURENS)
4
5
6

7 I, THE UNDERSIGNED VIVIAN H. CROSS, OFFICIAL COURT
8 REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF
9 SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
10 TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF THOSE
11 PROCEEDINGS REQUESTED AND EVIDENCE INTRODUCED IN THE TRIAL
12 OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF
13 COMMON PLEAS FOR GREENWOOD COUNTY (BUT HEARD IN LAURENS
14 COUNTY), SOUTH CAROLINA, ON THE 28TH DAY OF NOVEMBER 2012.

15 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
16 COUNSEL NOR INTEREST TO ANY PARTY HERETO.
17
18
19
20

21 
22 VIVIAN H. CROSS, COURT REPORTER
23 TENTH CIRCUIT AT LARGE
24 AUGUST 13, 2014
25

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENWOOD)
)
)
 Zachary Phillips, #269602,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 EIGHTH JUDICIAL CIRCUIT

2011-CP-24-1428

ORDER OF DISMISSAL

FILED COMMON PLEAS
 8TH JUDICIAL CIRCUIT
 GREENWOOD COUNTY, S.C.
 2012 SEP 27 11:11 AM

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 16, 2011. The Respondent made its Return on September 26, 2012. An evidentiary hearing into the matter was convened on November 29, 2012, at the Laurens County Courthouse. Tommy Stanford, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Caroline Horlbeck, Esquire also testified. This Court also had before it a copy of the records of the Greenwood County Clerk of Court, records from the South Carolina Department of Corrections, and the guilty plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. The Applicant was indicted at the March 2010 term of the Greenwood County Grand Jury for Trafficking in Cocaine Base (2010-GS-24-0403) and Possession of Marijuana with Intent to Distribute (PWID) (2010-GS-24-0407). The Applicant was represented by Caroline Horlbeck, Esquire. On May 9, 2011, the

Applicant pled guilty to Trafficking Crack Cocaine, 2nd offense and PWID Marijuana, 3rd offense. On May 17, 2011, the Honorable Eugene C. Griffith sentenced the Applicant to confinement for fifteen (15) years for each charge to run concurrently. The Applicant filed a Motion to Reconsider his sentence, which was granted. On July 13, 2011, Judge Griffith re-sentenced the Applicant to twelve (12) years for each charge to run concurrently. The Applicant did not appeal his conviction and sentence.

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

1. "Ineffective Assistance of Counsel"
 - a. "My counsel fail(sic) to let me know they never had possess(sic) of the car. The car was never impound(sic) into police evidence room."
 - b. "My counsel fail(sic) to let the court know the officer in my case had to resign."

At the PCR hearing, the Applicant proceeded on his claim that Counsel was ineffective for not arguing for less than fifteen years' incarceration at the plea hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence."

Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

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

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. 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).

Arguing for a Lesser Sentence

At the hearing, the Applicant testified Counsel failed to argue for a sentence that was less

than fifteen years. He also stated it was not until the hearing on his Motion for Resentencing did Counsel argue for less than fifteen years when she argued for a sentence of seven years. The Applicant testified he had discussion with Counsel about the State's recommendation of fifteen years, but also stated he thought he could get less time. The Applicant further testified these discussions with Counsel affected his decision to plead guilty.

On cross-examination, the Applicant admitted while he pled to Trafficking Crack Cocaine, 2nd offense, he was originally charged with Trafficking Crack Cocaine, 3rd offense, which carries a mandatory minimum of twenty-five years in prison. He also testified he agreed with the facts of the case as read by the solicitor at the plea hearing. The Applicant further admitted he told the plea judge there were no promises, other than the State recommending a fifteen-year sentence, to induce him to plead guilty. The Applicant testified he told the plea judge, under oath, that he was, in fact, guilty of the charged crimes. He also stated he was satisfied with Counsel, and Counsel had answered all of his questions.

Counsel testified she met with the Applicant several times and discussed his constitutional rights, the discovery from the State, and the minimum and maximum penalties. She also stated she explained the State was recommending a fifteen-year sentence for all charges, to run concurrently. Counsel testified she did not promise the Applicant that he would receive a certain sentence. Additionally, she stated she asked the plea court for leniency in sentencing. Counsel further testified she filed a Motion for Resentencing on the Applicant's behalf, which was granted, and thereafter, the Applicant's sentence was reduced to twelve years.

On cross-examination, Counsel stated it was the Applicant's decision to plead guilty, and the strength of the State's case was solidified by the Applicant's own statement that there was

crack cocaine in the vehicle he was driving on the incident date. Counsel further stated that while she did not ask the plea court for a sentence that was less than fifteen years, she did ask the plea court for leniency in sentencing.

This Court has reviewed the evidence presented at the hearing as well as the plea transcript and other records. This Court finds Counsel's testimony concerning her asking the plea court for leniency is credible. First, in the plea transcript, Counsel does, in fact, ask the plea court for leniency in the mitigation stage of the plea. (Tr. p. 28 ll. 5-6). The fact that Counsel did not specifically ask the plea court for a sentence that was less than fifteen years is of no consequence. The Applicant was facing a mandatory minimum of twenty-five years on the Trafficking Crack Cocaine, 3rd offense alone. He was facing a total of nearly sixty years for all of his charges. The Applicant also pled guilty, according to the record, freely and voluntarily. Furthermore, the Applicant specifically stated, under oath, he had not been promised anything besides the State recommending a fifteen-year sentence. (Tr. p. 16 ln. 10). See Holden v. State, 393 S.C. 565, 575-76, 713 S.E.2d 611, 617 (2011) (“[W]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.” quoting Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

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

This Court also finds the Applicant has failed to prove the second prong of Strickland – that

he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

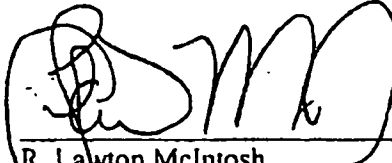
CONCLUSION

Based on all 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 notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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!

R. Lawton McIntosh
Presiding Circuit Court Judge
Eighth Judicial Circuit

3-25, 2013
Anderson, South Carolina

WITNESSES

Jeffrey Crisp
Greenwood Police Department

WARRANT NUMBER

1827286

Wesley Padden
Foreman of the Grand Jury

Date: *3/26/10*

VERDICT

Guilty

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

March Term, 2010
Indictment # 10GS24- *403*

THE STATE

vs.

Zachary Fitzgerald Phillips COPY
RAM MOON
SHERIFF AND GS
GREENWOOD COUNTY
S.C.

INDICTMENT FOR

TRAFFICKING IN COCAINE BASE
(CRACK COCAINE)
44-53-0375

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

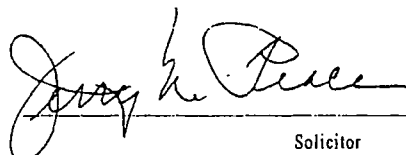
COUNTY OF GREENWOOD

TRAFFICKING IN COCAINE BASE
(CRACK COCAINE)
44-53-0375

At a Court of General Sessions, convened on the 26th day of March, 2010 the Grand Jurors of Greenwood County present upon their oath:

That Zachary Fitzgerald-Phillips, did in Greenwood County, state aforesaid, on or about the 4th day of December, 2009 willfully, unlawfully, and knowingly traffic in cocaine base (crack cocaine), to wit: that the said defendant(s) did sell, manufacture, deliver, purchase, or bring into this State, or provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was in actual or constructive possession or did knowingly attempt to become in actual or constructive possession of more than 10 grams, but less than 28 grams of cocaine base (crack cocaine), in violation of Section 44-53-375 of the South Carolina Code of Laws, 1976, as amended

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


Solicitor

WITNESSES

Jeffrey Crisp
Greenwood Police Department

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

March Term, 2010
Indictment # 10GS24-407

WARRANT NUMBER

1827284

THE STATE

VS. ATTEST A TRUE COPY

Zachary Fitzgerald Phillips

Phillips
INTEGRAL MCGIN
COOP AND GS
GREENWOOD COUNTY
S.C.

Date: *3/14/10*
Foreman of the Grand Jury

Steve Padden

VERDICT

Not Guilty

INDICTMENT FOR

POSSESSION OF MARIJUANA
WITH INTENT TO DISTRIBUTE
44-53-0370

Foreman

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

COUNTY OF GREENWOOD

POSSESSION OF MARIJUANA
WITH INTENT TO DISTRIBUTE
44-53-0370

At a Court of General Sessions, convened on the 26th day of March, 2010 the Grand Jurors of Greenwood County present upon their oath:

That Zachary Fitzgerald Phillips, did in Greenwood County, state aforesaid, on or about the 4th day of December, 2009 willfully, unlawfully, and knowingly possess with the intent to distribute, dispense, or deliver and/or did otherwise, aid, abet, attempt, or conspire to possess with the intent to distribute, dispense, or deliver, a controlled substance defined in Schedule I, II, or III, flunitrazepam or a controlled substance analogue, to wit: Marijuana, a Schedule I controlled substance, in violation of the provisions of Section 44-53-370 of the South Carolina Code of Laws, 1976, as amended

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



Solicitor

WITNESSES

Jeffrey Crisp
Greenwood Police Department

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

WARRANT NUMBER

1827286

COURT OF GENERAL SESSIONS

March Term, 2010

Indictment # 10GS24-

403

THE STATE

VS.

Zachary Fitzgerald Phillips

Bu 1/24/10

Mary Padden

Foreman of the Grand Jury

Date:

3/24/10

VERDICT

Guilty

INDICTMENT FOR

TRAFFICKING IN COCAINE BASE
(CRACK COCAINE)

44-53-0375

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

INDICTMENT FOR

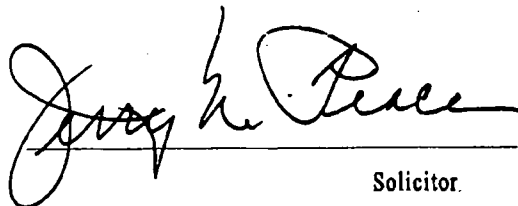
**TRAFFICKING IN COCAINE BASE
(CRACK COCAINE)**

44-53-0375

At a Court of General Sessions, convened on the 26th day of March, 2010 the Grand Jurors of Greenwood County present upon their oath:

That Zachary Fitzgerald Phillips, did in Greenwood County, state aforesaid, on or about the 4th day of December, 2009 willfully, unlawfully, and knowingly traffic in cocaine base (crack cocaine), to wit: that the said defendant(s) did sell, manufacture, deliver, purchase, or bring into this State, or provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was in actual or constructive possession or did knowingly attempt to become in actual or constructive possession of more than 10 grams, but less than 28 grams of cocaine base (crack cocaine), in violation of Section 44-53-375 of the South Carolina Code of Laws, 1976, as amended

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



Solicitor.

COUNTY OF Greenwood
STATE VS.
Zachary F Phillips
AKA:
Race: B Sex: M Age: 28
DOB: SS#:
Address:
City, State, Zip: Greenwood, SC
DL#: SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 10GS24-0403
A/W#: 1827286
Date of Offense: 12/4/2009
S.C. Code §: 44-53-0375(C)
CDR Code #: 0450 0452

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Trafficking Crack Cocaine, 2nd offense (5-30 years)

CONVICTED OF or PLEADS

in violation of § 44-53-0375(C) of the S.C. Code of Laws, bearing CDR Code # 0389 0451
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC) §17-25-45 w/minor 1st or Lewd Act

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: White, Elizabeth SC Bar# 7182 Defendant
Caroline Holbrook SC Bar# 12100 Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 312 days/months/years, or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

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

CONCURRENT or CONSECUTIVE to sentence on: 10 GS 24 407 4404
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 325 days served
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

PTUP days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Recipient:

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5 %), § 14-1-211(A)(1) (Conv. Surcharge), § 14-1-211(A)(2) (DUI Surcharge), § 56-5-2995 (DUI Assessment), § 56-1-286 (DUI Breath Test), Proviso 47.9 (Public Def/Prob), § 14-1-212 (Law Enforce. Funding), § 14-1-213 (Drug Court Surcharge), § 50-21-114 (BUI Breath Test Fee), § 56-5-2942(J) (Vehicle Assessment), Proviso 90.5 (SCCJA Surcharge), 3% to County (if paid in installments), TOTAL.

Appointed PD or appointed other counsel. 47.12 requires \$500, be paid to Clerk during probation. 5-17-11

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

Handwritten notes: Motion to Reconsider granted 7-12-11

Handwritten notes: SC P/As for plea 5-17-11, 215-9, 5-17-11

WITNESSES

Jeffrey Crisp
Greenwood Police Department

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

WARRANT NUMBER

1827287

COURT OF GENERAL SESSIONS

March Term, 2010

Indictment # 10GS24-404

THE STATE

VS.

Zachary Fitzgerald Phillips

Bw 1/24/11

Mrs. Padden

Foreman of the Grand Jury

Date: 3/19/10

VERDICT

Not Guilty

INDICTMENT FOR

VIOLATION SECTION
44-53-0445

Foreman

THE STATE OF SOUTH CAROLINA

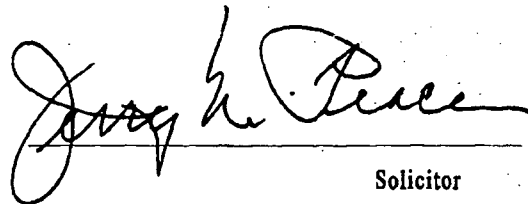
COUNTY OF GREENWOOD

**INDICTMENT FOR
VIOLATION SECTION
44-53-0445**

At a Court of General Sessions, convened on the 26th day of March, 2010 the Grand Jurors of Greenwood County present upon their oath:

That Zachary Fitzgerald Phillips, did in Greenwood County, state aforesaid, on or about the 4th day of December, 2009 did willfully, unlawfully and knowingly distribute, sell, purchase, manufacture, or possess with intent to distribute crack cocaine while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical education center; or a public or private college or university in violation of Section 44-53-445 of the South Carolina Code of Laws, 1976, as amended.

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



Solicitor

STATE OF SOUTH CAROLINA)
 COUNTY OF Greenwood)
 STATE VS.)
 Zachary F Phillips)
 AKA:)
 Race: B Sex: M Age: 28)
 DOB: [REDACTED] SS#: [REDACTED])
 Address: [REDACTED])
 City, State, Zip: Greenwood, SC)
 DL#: [REDACTED] SID#: [REDACTED])

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 10GS24-0404
 A/W#: 1827287
 Date of Offense: 12/4/2009
 S.C. Code §: 44-53-0445(B)
 CDR Code #: 0108

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS
 TO: Drugs / Distribute, sell, purchase, manuf. crack cocaine, or pwid, near school

in violation of § 44-53-0445(B) of the S.C. Code of Laws, bearing CDR Code # 0108
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45
 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Elizabeth White SC Bar# 71182 Zachary F. Phillips Defendant Caroline Hordboeck Attorney for Defendant SC Bar# 12100

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

CONCURRENT or CONSECUTIVE to sentence on: 10 GS 24 403 + 407
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. 25 days 325 days 5049
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SCDPPPS _____

PTUP _____
 _____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Recipient: _____
 *Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCJA Surcharge)	\$5	\$
3% to County (if paid in installments)		\$
TOTAL		\$

Appointed PD or appointed other counsel,
 47.12 requires \$500 be paid to Clerk
 during probation. SCCA Center 5-17-11

Clerk of Court/ Deputy Clerk Chapman Moore
 Court Reporter: J. Walston
 SCCA/217 (03/2011)

Presiding Judge J. Walston for Plea 5-9-11
 Judge Code: 2154
 Sentence Date: 5-17-11

WITNESSES

Jeffrey Crisp
Greenwood Police Department

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

WARRANT NUMBER

1827284

COURT OF GENERAL SESSIONS

March Term, 2010
Indictment # 10GS24-407

THE STATE

VS.
Zachary Fitzgerald Phillips

David Pender
Foreman of the Grand Jury
Date: *3/24/10*

Bo 1/24/10

VERDICT

Not Guilty

INDICTMENT FOR

POSSESSION OF MARIJUANA
WITH INTENT TO DISTRIBUTE
44-53-0370

Foreman

Foreman

THE STATE OF SOUTH CAROLINA

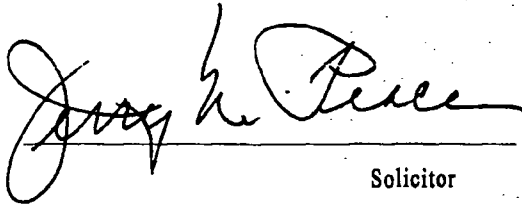
COUNTY OF GREENWOOD

INDICTMENT FOR**POSSESSION OF MARIJUANA
WITH INTENT TO DISTRIBUTE
44-53-0370**

At a Court of General Sessions, convened on the 26th day of March, 2010 the Grand Jurors of Greenwood County present upon their oath:

That Zachary Fitzgerald Phillips, did in Greenwood County, state aforesaid, on or about the 4th day of December, 2009 willfully, unlawfully, and knowingly possess with the intent to distribute, dispense, or deliver and/or did otherwise, aid, abet, attempt, or conspire to possess with the intent to distribute, dispense, or deliver, a controlled substance defined in Schedule I, II, or III, flunitrazepam or a controlled substance analogue, to wit: Marijuana, a Schedule I controlled substance, in violation of the provisions of Section 44-53-370 of the South Carolina Code of Laws, 1976, as amended.

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



Solicitor

STATE OF SOUTH CAROLINA

COUNTY OF Greenwood VS. Zachary F Phillips

AKA: Race: B Sex: M Age: 28 DOB: [redacted] SS#: [redacted] Address: [redacted] City, State, Zip: Greenwood, SC DL#: [redacted] SID#: [redacted]

*CDL Yes [] No [] CMV Yes [] No [] Hazmat Yes [] No [] In disposition of the said indictment comes now the Defendant who was TO: PWID Marijuana 3rd offense (5-20 years)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 10GS24-0407 A/W#: 1827284 Date of Offense: 12/4/2009 S.C. Code § : 44-53-0370(b) CDR Code #: 0188

SENTENCE SHEET

[] CONVICTED OF or [X] PLEADS

in violation of § 44-53-0370(b) of the S.C. Code of Laws, bearing CDR Code # 0188 [X] NON-VIOLENT [] VIOLENT [] SERIOUS [] MOST SERIOUS [] Mandatory GPS(CSC w/minor 1st or Lewd Act) [] §17-25-45

The charge is: [X] As Indicted, [] Lesser Included Offense, [] Defendant Waives Presentment to Grand Jury. (defendant's initials) The plea is: [] Without Negotiations or Recommendation, [] Negotiated Sentence, [X] Recommendation by the State.

ATTEST: White, Elizabeth SC Bar# 7182 Defendant; Caroline Hodbeck SC Bar# 12100 Attorney for Defendant

WHEREFORE, the Defendant is committed to the [X] State Department of Corrections, [] County Detention Center, for a determinate term of 12 months or 1-13-11 under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

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

[X] CONCURRENT or [] CONSECUTIVE to sentence on: 10 GS 24 403 & 404 [X] The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 325 days SCM [] The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

[] RESTITUTION: [] Deferred [] Def. Waives Hearing [] Ordered Total: \$ plus 20% fee: \$ Payment Terms: [] Set by SCDPPPS

PTUP days/hours Public Service Employment

Recipient: *Fine:

Table with 3 columns: Description, Amount, Total. Rows include assessments and surcharges like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments), TOTAL

Obtain GED [] Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling [] Random Drug/Alcohol testing [] Fine may be pd. in equal, consecutive weekly/monthly prmts. of \$ beginning \$ paid to Public Defender Fund Other:

[] Appointed PD or appointed other counsel, 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk [Signature] Court Reporter: [Signature] SCCA/217 (03/2011) Motion to Reconsider granted 7-17-11

Presiding Judge [Signature] Judge Code: 2154 Sentence Date: 5-17-11