

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

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Appeal from Greenville County

**S.C. Supreme Court**

G. Edward Welmaker, Circuit Court Judge

OCTAVIUS LAMAR WHITMIRE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000934

APPENDIX

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

COURT OF GENERAL SESSIONS  
2011-GS-23-02911

STATE OF SOUTH CAROLINA,

vs.

TRANSCRIPT OF RECORD

OCTAVIUS LAMAR WHITMIRE,  
DEFENDANT.

**ORIGINAL**

October 11, 2012  
Greenville, South Carolina

**B E F O R E:**

THE HONORABLE STEVEN H. JOHN, JUDGE.

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

LAUREN D. PRICE, ESQ.  
Assistant Solicitor

JAMES W. BANNISTER, ESQ.  
Attorney for the Defendant

HOLLIE M. JENKINS  
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

1  
2 THE COURT: Yes, Ms. Price.

3 MS. PRICE: Thank you, Your Honor.

4 This is Octavius Whitmire, who is here to plead to  
5 trafficking.

6 THE COURT: All right. Thank you.

7 THE CLERK: Your Honor, this is 2011-GS-23-2911A, the  
8 State v. Octavius Lamar Whitmire. He's indicted for  
9 trafficking cocaine. And he's pleading to the same. And,  
10 Your Honor, this is true-billed.

11 Sir, would you, please, raise your right hand?

12 WHEREUPON,

13 OCTAVIUS LAMAR WHITMIRE,

14 after first having been duly sworn, testified as follows:

15 THE COURT: Thank you, ma'am.

16 Mr. Whitmire, give me your attention, please, sir.  
17 You've come before the Court and you're pleading guilty to  
18 trafficking in cocaine, weight 10 to 28 grams, first  
19 offense; is that correct?

20 DEFENDANT WHITMIRE: Yes, sir.

21 THE COURT: Now, regarding this particular matter,  
22 you understand that the potential sentence -- or the  
23 possible sentence here is a minimum of three and up to 10  
24 years and/or a \$25,000 fine.

25 Do you understand that?

1           DEFENDANT WHITMIRE: Yes, sir.

2           THE COURT: You understand that the legislature has  
3 determined that you cannot be given probation for this  
4 particular offense. You understand that you can't be  
5 suspended down to probation.

6           Do you understand that?

7           DEFENDANT WHITMIRE: Yes, sir.

8           THE COURT: It's, also, listed as a violent and  
9 serious offense by the State of South Carolina.

10          Do you understand that?

11          DEFENDANT WHITMIRE: Yes, sir.

12          THE COURT: And you've talked to Mr. Bannister about  
13 that; correct?

14          DEFENDANT WHITMIRE: Yes, sir.

15          THE COURT: And just to cover one thing with you.  
16 You understand regarding -- I don't know if you have a  
17 prior record or you don't. I'll hear about that in just a  
18 second.

19          But if the Court accepts this plea, you'll have, at  
20 least, one serious strike on your record. And the State  
21 of South Carolina has a three-strike law regarding serious  
22 offenses and a two-strike law regarding most serious  
23 offenses. And what that means is if you come to court and  
24 it's going to be your second most serious, or you come to  
25 court and it's going to be your third serious offense, the

1 State can be asking for life in prison without the  
2 possibility of parole.

3 Even though -- this trafficking in cocaine, 10 to 28  
4 grams, the sentence is three to 10. If it was your third  
5 and you had three serious, they could be saying, Judge, I  
6 want the sentence to be life in prison without the  
7 possibility of parole.

8 Do you understand these are the consequences that  
9 could happen in the future? Do you understand that?

10 DEFENDANT WHITMIRE: Yes, sir.

11 THE COURT: And you understand regarding drug  
12 sentences, if there's another drug offense, the penalties  
13 increase.

14 Do you understand that?

15 DEFENDANT WHITMIRE: Yes, sir.

16 THE COURT: This matter comes before the Court by way  
17 of a negotiated sentence.

18 And that sentence is what, Solicitor, please?

19 MS. PRICE: Your Honor, it is seven years active  
20 time.

21 THE COURT: All right. Very good.

22 MS. PRICE: And this is a negotiated plea, first  
23 offense, although it is a true second [phonetic].

24 THE COURT: All right. Very good.

25 Mr. Whitmire, regarding this matter of the negotiated

1 sentence, you understand that the Court doesn't have to  
2 accept the negotiations. If I don't find it's an  
3 appropriate sentence, I would allow you to withdraw your  
4 plea. But I don't have to give you that sentence.

5 Do you understand that?

6 DEFENDANT WHITMIRE: Yes, sir.

7 THE COURT: Understanding all these things we've now  
8 just talked about, do you want to go forward with your  
9 plea?

10 DEFENDANT WHITMIRE: Yes, sir.

11 THE COURT: Are you currently under the influence of  
12 any drugs or intoxicants of any kind? Do you currently  
13 have them in your system?

14 DEFENDANT WHITMIRE: No, sir.

15 THE COURT: Are you suffering from any kind of  
16 physical, mental, or emotional problem that would keep you  
17 from understanding what we're doing here today?

18 DEFENDANT WHITMIRE: No, sir.

19 THE COURT: When you plead guilty, you give up  
20 certain Constitutional rights. Among those are the right  
21 to remain silent. When you speak to me, you give those  
22 rights up.

23 Do you understand that?

24 DEFENDANT WHITMIRE: Yes, sir.

25 THE COURT: Other rights are the presumption of

1 innocence, the right against self-incrimination. In a  
2 trial, the State would have to prove you guilty beyond a  
3 reasonable doubt. If you plead guilty, you give those  
4 rights up.

5 Do you understand that?

6 DEFENDANT WHITMIRE: Yes, sir.

7 THE COURT: A jury trial -- you're entitled to a jury  
8 trial. Twelve men and women would look at the facts  
9 presented by the State to see if there are facts to prove  
10 you guilty beyond a reasonable doubt. When you plead  
11 guilty, you give up your jury trial.

12 Do you understand that?

13 DEFENDANT WHITMIRE: Yes, sir.

14 THE COURT: In a jury trial, with your attorney,  
15 Mr. Bannister, you can question the witnesses presented by  
16 the State, challenge the evidence presented by the State.  
17 If you wanted to, you could present a defense and testify,  
18 and call in your witnesses on your behalf. When you plead  
19 guilty, you give up those rights.

20 Do you understand that?

21 DEFENDANT WHITMIRE: Yes, sir.

22 THE COURT: Now, you come before the Court, and  
23 you're pleading guilty to the crime of trafficking  
24 cocaine, 10 to 28 grams, first offense.

25 Are you pleading guilty to that crime freely and

1 voluntarily?

2 DEFENDANT WHITMIRE: Yes, sir.

3 THE COURT: Of your own free will?

4 DEFENDANT WHITMIRE: Yes, sir.

5 THE COURT: Are you pleading guilty because you are  
6 guilty of that crime?

7 DEFENDANT WHITMIRE: Yes, sir.

8 THE COURT: Now, did anybody promise you anything, or  
9 threaten you, or force you in any way to get you to plead  
10 guilty?

11 You understand it's a negotiated sentence. But other  
12 than that, did anybody promise you anything, or force you  
13 in any way to get you to plead guilty?

14 DEFENDANT WHITMIRE: No, sir.

15 THE COURT: All right. You're here today with your  
16 attorney, Mr. Bannister; correct?

17 DEFENDANT WHITMIRE: Yes, sir.

18 THE COURT: Did you tell him everything he needs to  
19 know about this case?

20 DEFENDANT WHITMIRE: Yes, sir.

21 THE COURT: My next question is, do you need any more  
22 time to talk to him?

23 DEFENDANT WHITMIRE: No, sir.

24 THE COURT: All right, sir. Are you satisfied with  
25 his help and representation?

1           DEFENDANT WHITMIRE: Yes, sir.

2           THE COURT: Any complaints about his help or  
3 representation?

4           DEFENDANT WHITMIRE: No, sir.

5           THE COURT: Mr. Bannister, you represent the  
6 interests of your client, Mr. Whitmire, in these matters?

7           MR. BANNISTER: I do, Your Honor.

8           THE COURT: And he comes before the Court to enter a  
9 plea of guilty to the offense named.

10          Do you concur?

11          MR. BANNISTER: I do.

12          THE COURT: And do you believe he comes before the  
13 Court of his own free will and accord?

14          MR. BANNISTER: I do, Your Honor.

15          THE COURT: Have you explained to him his  
16 Constitutional rights, any defenses he might have, as well  
17 as the information and the facts that would be presented  
18 against him by the State, and the possible sentence he may  
19 face?

20          MR. BANNISTER: I have. And I believe he understands  
21 what he is facing in this case.

22          THE COURT: Very good.

23          Thank you very much.

24          All right. Solicitor, the facts of the case.

25          Mr. Whitmire, if you'll listen to the facts. Because

1 I'll be asking you a question after that.

2 Go ahead, Solicitor.

3 MS. PRICE: Thank you, Your Honor.

4 May it please the Court.

5 On January 17, 2011, officers responded to a call of  
6 a suspicious vehicle at Drive. They  
7 discovered two individuals were in a vehicle matching the  
8 description of the called-in vehicle in front of  
9 Drive.

10 Those individuals said they were waiting for their  
11 cousin. They told officers this cousin would be arriving  
12 in a white van. One of the individuals made a call and  
13 told someone, Where are you? The police are here. And we  
14 told them we're waiting for you to show up.

15 A short time later, the Defendant appeared walking  
16 and gave officers his identification, which contained his  
17 address. The vehicle at the scene was searched with  
18 consent, but nothing was discovered. The driver of the  
19 vehicle, however -- excuse me, sir. The passenger of the  
20 vehicle, however, had approximately \$2,300 in cash on his  
21 person.

22 Officers let everyone leave, but found the behavior  
23 of all three individuals suspicious, and wondered why this  
24 Defendant had walked up, instead of driving up in a van as  
25 he was supposed to. The officers drove around the

1 neighborhood and saw a white van parked in a lot at  
2 Road. They ran the tag on that vehicle, and it  
3 came back as registered to the address the Defendant had  
4 earlier provided. A K-9 was called out and alerted on the  
5 vehicle.

6 About this time, the Defendant reappeared and asked  
7 the officers what they were doing. They informed him  
8 about the alert and notified him somebody would be  
9 searching his vehicle. Upon searching the vehicle,  
10 officers found a digital scale. And in the section  
11 between the back and the driver's seat, they found two  
12 bags, which were field-tested and later lab-tested  
13 positive for a total of 20.35 grams of cocaine.

14 The Defendant gave a statement saying the cocaine  
15 belonged to his "homeboy," and that he would give that  
16 person the opportunity to turn himself in. He, also, said  
17 he'd been across the street at the Citgo and his friends  
18 had taken the vehicle. But officers retrieved and  
19 reviewed surveillance videos from that time. The  
20 Defendant was not at the Citgo. No one ever turned  
21 themselves in.

22 And, Your Honor, he gave -- this Defendant gave  
23 inconsistent statements about the individuals who were  
24 originally stopped and about why they were there.

25 All of this occurred within Greenville County. And

1 those are the facts that the State would present at trial.

2 THE COURT: All right. Can you tell me the prior  
3 record, if any, of Mr. Whitmire, please?

4 MS. PRICE: Yes, Your Honor.

5 In 1997, possession with intent to distribute crack  
6 cocaine; 1998, two counts of possession with intent to  
7 distribute crack cocaine, for which he received a YOA  
8 sentence; trespassing in 2000, and CDV; 2002, possession  
9 with intent to distribute marijuana, and an alcohol charge  
10 associated with that for which he received five years and  
11 \$5,000, suspended to one year of home incarceration. And  
12 he was revoked in 2003 on that.

13 THE COURT: Thank you.

14 All right. Mr. Whitmire, regarding the facts as  
15 stated by the Solicitor of this case, you heard those  
16 facts; correct?

17 DEFENDANT WHITMIRE: Yes, sir.

18 THE COURT: And a brief summary of the same facts are  
19 in your indictment here for the trafficking in cocaine.

20 My question to you is, are those facts true and  
21 correct?

22 DEFENDANT WHITMIRE: Yes, sir.

23 THE COURT: Is that what occurred?

24 DEFENDANT WHITMIRE: Yes, sir.

25 THE COURT: And you understand under those facts,

1 you're committing a crime. You understand that, don't  
2 you?

3 DEFENDANT WHITMIRE: Yes, sir.

4 THE COURT: All right. Sir, have you understood my  
5 questions here today?

6 DEFENDANT WHITMIRE: Yes, sir.

7 THE COURT: Have all your answers to me been the  
8 truth?

9 DEFENDANT WHITMIRE: Yes, sir.

10 THE COURT: Did anybody tell you how to answer my  
11 questions?

12 DEFENDANT WHITMIRE: No, sir.

13 THE COURT: And do you understand you have the right  
14 to appeal your guilty plea within 10 days?

15 DEFENDANT WHITMIRE: Yes, sir.

16 THE COURT: I find there's been a substantial,  
17 factual basis for the plea. I find the Defendant's  
18 decision to plead has been done freely, voluntarily,  
19 knowingly, and willingly. I find that he has had the  
20 advice of competent counsel with whom he is satisfied.  
21 Therefore, Mr. Whitmire's decision to plead guilty to  
22 trafficking cocaine, first offense, weight 10 to 28 grams,  
23 is accepted.

24 All right. Mr. Bannister.

25 MR. BANNISTER: Thank you, Your Honor.

1           Just a couple of quick things. You may have noticed  
2 a little hesitation from Octavius on some of the questions  
3 that you've asked. And I think, in summary, what I would  
4 say is, he did not want a trial, although we're on the eve  
5 of trial and prepared to go to trial today. He wasn't --  
6 he wanted the offer to be better than what it currently  
7 is. In my opinion, the offer substantially takes into  
8 account the risk he would have had at trial, although he  
9 did have some defenses. And I would have been prepared to  
10 present those on a construction issue. And it's a  
11 circumstantial case, as you've heard.

12           One of the things working against Octavius of what  
13 happened -- basically, Octavius was putting together  
14 somebody he knew who had drugs and somebody who wanted to  
15 buy drugs. Unfortunately, he was behind on his child  
16 support at that time. He, basically, got \$75 for putting  
17 this deal together. And he was the one who got caught  
18 with it.

19           He's got a bad record. And I think his risk at trial  
20 was so severe, based on his record, that I believe this is  
21 an appropriate sentence. Taking that into account, I wish  
22 it could have been better for him. I know he feels that  
23 way, too. But, you know, it's -- he's committed a crime.  
24 And his record has put him in a position where there are  
25 few options.

1 THE COURT: Thank you very much.

2 MR. BANNISTER: Your Honor, Mr. Whitmire would like  
3 to say something to the Court.

4 THE COURT: Yes, sir, absolutely.

5 I'll be glad to hear from you, Mr. Whitmire.

6 DEFENDANT WHITMIRE: I will admit my guilt in this  
7 crime. I'll just say with this plea offer, you know, I  
8 kind of thought it was being too much. But the law is the  
9 law, you know.

10 The last time I was in trouble was in 2001. I've  
11 been a law-abiding citizen since then, you know. I've  
12 been working, you know, doing all the proper things, you  
13 know. I got my, you know, child support together. I,  
14 actually, have not been charged with no crime since 2001,  
15 until this incident happened, you know. Even though, you  
16 know, I still say that the drugs are not -- wasn't mine,  
17 you know, just my involvement in it, you know. I will  
18 take my guilt for the involvement in it, but, you know.

19 All I ask for -- you know, like I say, I understand  
20 that seven years is the plea deal. But anything I can get  
21 a little bit less, you know, I feel like I would be doing  
22 everything the proper way. It's just that I had got to  
23 the point in my life when they do background checks on me,  
24 and I pass them now. You know, like people who do  
25 seven-year, 10-year background checks, they offer me

1 employment. And I have been employed since that one time,  
2 you know. And, you know, I have been gainfully employed,  
3 you know.

4 And my little daughter, you know. I've been doing  
5 pretty much the right thing and staying out of trouble.  
6 You've got to understand, you know, I admit my guilt here,  
7 you know. I didn't want to go to trial. Because if I  
8 went to trial, I know my chances.

9 THE COURT: Yes, sir.

10 DEFENDANT WHITMIRE: But, Your Honor, I just say, you  
11 know, I will take responsibility for it. But if you could  
12 be a little more lenient, if you can, I would appreciate  
13 it.

14 THE COURT: Thank you very much.

15 DEFENDANT WHITMIRE: Yes, sir.

16 THE COURT: Did Mr. Whitmire spend any time in jail  
17 after he was arrested, Mr. Bannister?

18 MS. PRICE: Yes, sir.

19 MR. BANNISTER: Yes, sir.

20 THE COURT: Very good.

21 Thank you.

22 2011-GS-23-2911, the State of South Carolina, County  
23 of Greenville v. Octavius Lamar Whitmire, regarding  
24 trafficking cocaine, 10 to 28 grams, first offense.

25 Mr. Whitmire, I have taken into consideration what

1 you have asked of the Court, and what your attorney has  
2 asked and explained to the Court. And I appreciate the  
3 circumstances. You, also, appreciated the fact that the  
4 prior record in your case, it is what it is. And, as I  
5 told you in the plea colloquy, when you have prior drug  
6 offenses, it affects where you are. Even if it's not an  
7 enhancement, it does affect sentencing if a person has  
8 prior convictions and if they have prior drug convictions.

9 I appreciate what you've asked the Court. But I do  
10 find that the negotiated sentence in this matter is  
11 proper. And I am going to follow the negotiations that  
12 have been negotiated among yourself, your attorney, and  
13 the State.

14 The sentence is you are committed to the state  
15 Department of Corrections for a determinate term of seven  
16 years.

17 Thank you very much.

18 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*

19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF REPORTER

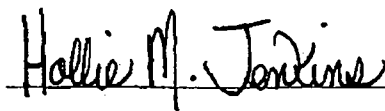
STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 11th day of October, 2012.

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

February 19, 2013



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

FORM 5

STATE OF SOUTH CAROLINA )  
 County of GREENVILLE )  
Octavius Lamar Whitmore )  
 Full name and prison number (if any) of Applicant )  
SDC 249896 )  
 v. )  
 State of South Carolina )

IN THE COURT OF COMMON PLEAS

FILED - CLERK OF COURT  
 GREENVILLE CO  
 2012 NOV 14 PM 4:36

APPLICATION FOR  
 POST-CONVICTION RELIEF

2012-CP-23-07207

**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 Kirkland Corr. Institution
2. Name and location of Court which imposed sentence General Session  
Thirteenth Judicial Circuit Court 305 E. North St. Greenville SC 29601
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2011 GS 2302911
  - (b) Trafficking Cocaine 1<sup>st</sup> Offense

- (c) \_\_\_\_\_
- 5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) October 11th, 2012 - Sentencing date.
  - (b) Seven (7) years - Sentencing term.
  - (c) \_\_\_\_\_

- 6. Check whether a finding of guilty was made:
  - (a) after a plea of guilty My plea of guilty was involuntary
  - (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?  
I am appealing the "Seven (7) year sentence"

- 8. If you answered "yes" to (7), list:
  - (a) the name of each Court to which you appealed:
    - i. This is the initial appeal through the (PCR Court)
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. \_\_\_\_\_
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- 9. If you answered "no" to (7), state your reasons for not so appealing:
  - (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) Coercion to Plead guilty by Counsel
- (c) Error and Prejudice by Counsel

11. State concisely and in the same order the facts which support each of the grounds set out in (10): BECAUSE I DIDN'T HAVE THE THREE THOUSAND TO PAY.

- (a) Counsel demanded I Plead guilty, OR RECEIVE Twenty five Year
- (b) I WAS INDUCED TO Plead guilty OR I WOULD HAVE NOT Plead
- (c) Counsel errored in Coercion me to Plead guilty, Counsel was prejudi  
in that he prejudged me as guilty and threaten me with a Sentence

12. Prior to this application have you filed with respect to this conviction: of twenty five years

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

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

(a) the specific nature thereof:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(b) the name and location of the Court in which each was filed:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

## Continued from Page Three (3)

Question Eleven (11) State Concisely and in the Same order the facts which Supports each of the Grounds Set out in L 10]

(a) I advised Counsel of my Constitutional right to a Jury trial under the Sixth Amendment. Counsel asked that I pay Three Thousand dollars, but further stated he knew that I couldn't pay it because I still owed him money, and that my best bet was to Plea to the seven years or get found guilty and receive Twenty five years. Counsel made it clear because I didn't have the additional Three Thousand dollars ~~and still owed him money I'd best~~ Plead guilty.

Therefore, I assure this Court that, but for Counsel's errors, I would not have Plead guilty and would have Continued to ask for a Jury trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1975)  
See also, Strickland v. Washington, 466 U.S. 668, 677, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)

(b) I Continued to inform Counsel of my desire to go to trial, only to have him continuously ask for the remainder of the money I owed him. I assured Counsel I would pay him as soon as I can. Counsel informed me that if I did come up with the three additional thousand dollars he would assure me probation. If not, plea to seven years or go to trial and get the twenty five years.

Therefore I was coerced and forced to plead guilty. Therefore, as pointed out in ROSCOE v. STATE, 345 S.C. 161, 546 S.E. 2d 417 (2001), (A defendant who enters a plea on the advice of Counsel may attack the voluntary and intelligent character of the plea by showing that Counsel's representation fell below an objective standard of reasonableness and that there is a reasonable

---

probability that, but for Counsel's errors, the defendant would not have pleaded guilty, but would have insisted on going to trial.

(c) Counsel erred in that he prejudged me, and that in its self moved him to be prejudice against me. Mainly "denying me my Sixth Amendment right to a jury trial." Shewfelt v. Alaska, 228 F3d 1088 (9th Cir 2000) where the Court ruled "Denial of a jury trial is a structural error subject to automatic reversal.

(c) the disposition thereof:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(d) the date of each such disposition:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

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

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

*No*

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- (a) "This is my initial Appeal"
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

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

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. Jim Bannister  
401 Pettigru St. Greenville S.C. 29607
  - ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

- i. Preliminary Hearing
- ii. Final Judgement Hearing

iii. \_\_\_\_\_

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

Time Served  
And/or Probation  
or a Time-Cut

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

None

STATE OF SOUTH CAROLINA )  
County of Greenville )

VERIFICATION

I, Octavius Lamar Whitmore, 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.

x Octavius Whitmore

SWORN to and subscribed before me this 29<sup>th</sup>  
day of Oct, 2012

Jimmy Thompson (L.S.)  
Notary Public

My Commission Expires April 1, 2021

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

I, Octavio L. Whitmore, 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.

*Octavio L. Whitmore*  
Applicant

SWORN or affirmed to and subscribed before me this

29<sup>th</sup> day of Oct, 2012

*Justin J. Thompson*  
Notary Public

My Commission Expires

My Commission Expires: April 1, 2021

## CERTIFICATE OF SERVICE

I, Octavius Lamar Whitmire, hereby state that a copy of the attached, "Application For Post Conviction Relief", was served upon the Honorable Alan Wilson Attorney General for the State of South Carolina by depositing a copy of the same in the United States mail with the proper pre-paid postage, and addressed to his office at, "P.O. Box 11549 Columbia S.C. 29211, on this 29<sup>th</sup> day of Oct., 2012.

Octavius Lamar Whitmire

Sworn and Subscribe to me,  
this 29<sup>th</sup> day of Oct 2012

My Commission Expires  
April 1, 2021

My Commission Ends  
Jimmy Thompson

Dejavus L Whitmire #249896 C-1-41



Mailroom  
Midland Correctional Institution  
4344 Broad River Road  
Columbia, S.C. 29210

2012-CP-23-

KCI MAILROOM  
MAY 05 2012

Greenville County Courthouse  
Clerk of Court  
Paul B. Mickersiemer  
305 E. North St  
Greenville SC 29601

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Octavius Lamar Whitmire, )  
 S.C.D.C. No. 249896, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-7207

**RETURN**

In response to the post-conviction relief application filed November 14, 2012, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the June 2011 term of General Sessions for trafficking cocaine (2011-GS-23-2911A). James W. Bannister, Esquire represented the Applicant.

On October 11, 2012, the Applicant pled guilty. The Honorable Steven H. John sentenced the Applicant to seven years for trafficking cocaine (10-28 grams), first offense. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

## II.

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

1. Ineffective assistance of counsel:
  - a. Coerced the Applicant into pleading guilty.
  - b. Threatened the Applicant with a twenty-five year sentence.
  - c. “[M]ade it clear” to the Applicant that he should plead guilty because he could not pay an additional \$3000.
2. Involuntary guilty plea.

## III.

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

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel.

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

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

#### IV.

The Applicant's assertion that his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant would not have pled guilty and would have insisted on going to

trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

The Respondent submits the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. at 265, 305 S.E.2d at 248.

V.

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

VI.

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

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

KAREN C. RATIGAN  
Assistant Deputy Attorney General

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

By:

  
Attorneys for Respondent

May 3, 2013


STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	
	)	2012-CP-23-7207
	)	
OCTAVIUS LAMAR WHITMIRE, 249896	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

---

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

**Octavius Lamar Whitmire, 249896  
Kirkland Correctional Institution  
4344 Broad River Road  
Columbia SC 29210**

DATED this 3rd day of May, 2013.

  
Judy A. Carey, Legal Assistant  
For Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

OCTAVIUS L. WHITMIRE, )  
 )  
 PLAINTIFF, )  
 )  
 -VS- )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 DEFENDANT. )  
 \_\_\_\_\_ )

2012-CP-23-07207

FEBRUARY 21, 2014

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE G. EDWARD WELMAKER, JUDGE

APPEARANCES:

CAROLINE HORLBECK, ESQUIRE  
ATTORNEY FOR THE PLAINTIFF

KAREN RATIGAN, ESQUIRE  
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS  
CIRCUIT COURT REPORTER

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**PLAINTIFF'S EXHIBITS**

<b>NO</b>	<b>DESCRIPTION</b>	<b>ID</b>	<b>EV</b>
	(NONE)		

**DEFENDANT'S EXHIBITS**

	(NONE)		

**COURT'S EXHIBITS**

	(NONE)		



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

5           THE WITNESS: Yes, ma'am.

6           THE CLERK: Thank you. Please state your  
7 full name for the record.

8           THE WITNESS: Octavius Lamar Whitmire.

9           THE CLERK: Thank you. You may be seated.

10                           **OCTAVIUS LAMAR WHITMIRE,**

11                   **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

12                                   **DIRECT EXAMINATION**

13 **BY MS. HORLBECK:**

14 Q.       Mr. Whitmire, you pled guilty to trafficking  
15 cocaine first offense?

16 A.       Correct.

17 Q.       Ten to twenty-eight grams?

18 A.       Yes, ma'am.

19 Q.       Okay. Now, was that charge always a first  
20 offense or was it originally a second offense?

21 A.       First offense.

22 Q.       Are you sure?

23 A.       The original charge was trafficking crack  
24 cocaine.

25 Q.       Second offense; correct?

*Octavius L. Whitmire -vs- State of South Carolina (2012-CP-23-07207)*  
*Octavius L. Whitmire - Direct Examination by Ms. Horlbeck*

6

1 A. First offense.

2 Q. And you were scheduled to go to trial that day;  
3 correct?

4 A. Yes, ma'am.

5 Q. And are you sure that your charge was not reduced  
6 to a first offense? Are you positive that you weren't  
7 actually scheduled to go to trial on a second offense?

8 A. Yes, ma'am.

9 Q. All right. So nevertheless, you actually pled to  
10 the first offense. And who represented you during that  
11 plea?

12 A. Mr. Jim Bannister.

13 Q. All right. Was Mr. Bannister retained or was he  
14 appointed?

15 A. Retained.

16 Q. How long had Mr. Bannister been representing you  
17 on this charge?

18 A. I'll say about a year.

19 Q. How many times did you meet with Mr. Bannister?

20 A. Maybe three times.

21 Q. In his office or at the jail?

22 A. I met him in his office twelve -- I mean, two  
23 times and at the courthouse.

24 Q. So you had been released on bond; correct?

25 A. Yes, ma'am.

1 Q. During your meetings with Mr. Bannister, did you  
2 and he discuss and review discovery?

3 A. Yes, ma'am.

4 Q. All right. Did you and he discuss a search and  
5 seizure matter as part of the preparation of your case  
6 for trial?

7 A. Somewhat. Not completely.

8 Q. All right. Is -- go ahead.

9 A. I mean, we didn't completely discuss the search  
10 and seizure issue about it.

11 Q. What didn't you discuss then?

12 A. More, you know, ---

13 Q. I mean, what did you not discuss? What did you  
14 feel that you and Mr. Bannister should have discussed  
15 regarding the search and seizure issue?

16 A. The warrant -- the warrantless search.

17 Altogether, you know, about being at, you know, pretty  
18 much the stop and search.

19 Q. All right. And this is a case that involved a  
20 vehicle?

21 A. Yes, ma'am.

22 Q. Was this vehicle yours?

23 A. No, ma'am.

24 Q. And were the drugs found in your possession?

25 A. No, ma'am.

1 Q. Okay. And did this case involve an initial  
2 search by a drug dog?

3 A. No, ma'am. It initiated from some guys being at  
4 my friend's house and they searched him, you know, with  
5 consent of a search warrant. And like an hour later,  
6 you know, they say they felt like something wasn't  
7 right and they continued to do an investigation after  
8 they let everyone go and go look for another vehicle.

9 Q. Do you recall whether or not a drug dog was used  
10 at all in this case?

11 A. Yeah. A drug dog was used.

12 Q. All right. Did you and Mr. Bannister discuss the  
13 drug dog and possibly challenging the search and  
14 seizure based on the success rate of the drug dog?

15 A. No. Not the success rate of the drug dog. We  
16 really just questioned the drug dog at the preliminary  
17 hearing.

18 Q. Okay. Was -- to your knowledge was Mr. Bannister  
19 prepared to present that issue -- present that motion  
20 prior to trial?

21 A. He didn't inform me of that, no.

22 Q. All right. Did you and Mr. Bannister discuss  
23 your defense in this trial?

24 A. Maybe a week before, you know, we ---

25 Q. What was your defense?

1 A. My defense was, you know, I wasn't driving the  
2 vehicle. I was not, you know, pulled over by officers,  
3 you know, driving the vehicle or anything like that.

4 Q. And the ownership of the drugs, what was your  
5 defense on that?

6 A. That they wasn't mine.

7 Q. Okay. All right. Were your fingerprints found  
8 on the drugs or on the baggie or anything -- any  
9 fingerprints found having to do with the drugs?

10 A. No, ma'am.

11 Q. All right. Now, ultimately, even though you were  
12 scheduled for trial, you didn't go to trial; is that  
13 correct?

14 A. That's correct.

15 Q. All right. Why is that?

16 A. Because, you know, about a week before the trial  
17 date actually, you know, he asked me ---

18 Q. Who is he?

19 A. When Mr. Bannister actually asked me to plea,  
20 they had came up with an offer that he thought was  
21 pretty ---

22 Q. What was the offer?

23 A. Seven years.

24 Q. Seven years?

25 A. Yes, ma'am.

*Octavius L. Whitmire -vs- State of South Carolina (2012-CP-23-07207)*  
*Octavius L. Whitmire - Direct Examination by Ms. Horlbeck*

10

1 Q. And what was the advice Mr. Bannister gave you  
2 about that seven year offer?

3 A. He told me that, you know, that's pretty much a  
4 good deal for me. And like further on, you know, he  
5 was telling me -- I was like, you know, I really didn't  
6 want to plead to that because they wasn't my drugs.  
7 They did not find me with no drugs. And he continued  
8 to go like, you know, -- you know, I asked him for a  
9 trial on several occasions. And he was just like, you  
10 know, that would be a bad idea. He was like, they're  
11 going to give you twenty-five years if you go to trial.

12 Q. Did he say why he thought it was a bad idea for  
13 you to proceed to trial instead of plead?

14 A. Because of my record, my past record.

15 Q. Okay. All right. So ultimately what did you do  
16 about his advice to plead? Did you take it or did you  
17 say, no, I want to go to trial?

18 A. I said no several times about going to trial.  
19 And it just came to a point to where, you know, he  
20 wouldn't agree with me pretty much going to trial. So,  
21 you know, I went to the court -- came here to the  
22 courthouse to speak with Mr. Bannister about it.

23 Q. On the day of trial you came to the courthouse?

24 A. No. Like two days before trial.

25 Q. Okay.

1 A. And I was just like, you know, I wanted to go to  
2 trial. He was just like, you know, a trial is going to  
3 cost you three thousand dollars to go to trial. He was  
4 just like, you know, I know you don't have that money  
5 because, you know, you still owe me money.

6 Q. Uh-huh (affirmative).

7 A. And I was just like, oh man. So the following  
8 day, the day before trial, you know, I asked Mr.  
9 Bannister, I said, it seems like you ain't in my best  
10 interest on what I want to do, so I'd prefer, you know,  
11 -- I asked him if I can release him as my counsel. And  
12 he was just like, he was just like -- at that moment he  
13 didn't really give an answer. Well, I asked to consult  
14 with another attorney. He actually gave me my files to  
15 consult with another attorney, you know, that I  
16 actually paid to, you know, go over my files.

17 Q. What other attorney did you consult with?

18 A. Mr. Maurice McNab.

19 Q. And you said you paid him. How much did you pay  
20 him?

21 A. Five hundred dollars.

22 Q. Did you have any family members present the day  
23 of your plea to pay Mr. McNab some more money?

24 A. Yeah. I had family members present.

25 Q. Okay. Who from your family showed up?

*Octavius L. Whitmire -vs- State of South Carolina (2012-CP-23-07207)*  
*Octavius L. Whitmire - Direct Examination by Ms. Horlbeck*

12

1 A. There were two of my cousins.

2 Q. Do you know much money they brought to pay Mr.

3 McNab?

4 A. Actually it was five grand. Yes, ma'am.

5 Q. Okay. Was Mr. McNab hired ultimately in this

6 case?

7 A. No. Actually he showed up at court that morning

8 of the day of my trial and he went in and spoke with

9 Mr. Bannister and I don't know who else, because I

10 stood outside. And he came back out and just told me

11 there wasn't nothing he could do for me.

12 Q. Was the case -- would the solicitor consent to a

13 continuance so that Mr. McNab could get up to speed and

14 represent you?

15 A. I never got to speak to the solicitor.

16 Q. Okay. All right. But ultimately your case was

17 not continued that day; is that correct?

18 A. No, ma'am.

19 Q. All right. So you wanted a trial. What changed?

20 What changed your mind that day? Why did you plead?

21 A. Pretty much he was telling me, you know, ---

22 Q. Who is he?

23 A. Mr. Bannister was telling me, you know, if we end

24 up in trial it'll cost three thousand. And I, you

25 know, I wanted to change attorneys. You know, he said

1 I was going to get twenty -- he told me I would get  
2 twenty-five years. And I was like, well, I'm not going  
3 to go up there and, you know, do that. So I pretty  
4 much was like, you know, the difference between seven  
5 and twenty-five is like a big difference.

6 Q. Okay. All right. So you wanted Mr. McNab to  
7 represent you; is that correct?

8 A. That's correct.

9 Q. All right. But the case was not continued that  
10 day; is that correct?

11 A. Yes, ma'am.

12 Q. All right. And you testified that Mr. Bannister  
13 advised you that you could face up to twenty-five  
14 years?

15 A. Yes, ma'am.

16 Q. Now, did he tell you you could face up to twenty-  
17 five years or did he say, you're going to get twenty-  
18 five years?

19 A. He said I'm going to get twenty-five years.

20 Q. Okay. And how did that make -- how did that  
21 impact your decision that day?

22 A. I'm not -- it scared me pretty much.

23 Q. How did that impact your decision ---

24 A. To go ahead and plead?

25 Q. Yes?

1 A. I mean, you know, like I said, the difference  
2 between pleading to seven or to actually -- just  
3 thinking you're going to get -- knowing you're going to  
4 get twenty-five years, it was like I had to settle for  
5 the seven.

6 Q. How did the failure to get a continuance and the  
7 advice that you faced up to twenty-five years or that  
8 you would get up to twenty-five years, how did that  
9 make your plea involuntary and not freely entered?

10 A. Because from the beginning, you know, like I  
11 said, I asked for a trial, you know, on several  
12 occasions. And you know, he kept telling me, you know,  
13 that will be a bad idea. I understand him being an  
14 attorney and he might feel that way because of my past  
15 record. But I also felt that I was innocent in the  
16 whole case.

17 Q. Uh-huh (affirmative).

18 A. You know, being that the drugs wasn't mine. And  
19 I just didn't want to plead to it.

20 Q. But you did it; right?

21 A. Yes, ma'am.

22 Q. Why didn't you tell the judge at the time that  
23 you felt really pressured and scared into pleading?

24 A. At the point, at the point when I actually was  
25 trying to get another attorney and tell Mr. Bannister

1 that I wanted to release him, he was telling me, you  
2 know, you go and find a judge and you ask to have me  
3 released, he's not going to release you. Actually he's  
4 going to just have me sit in court with you while you  
5 go ahead with your case. And if he's telling me that  
6 the judge is not going to, you know, let me get a  
7 chance to have another attorney, I mean, I had to go  
8 with him. And then during my proceedings, you know,  
9 the judge asked me several questions, you know, that I  
10 was very hesitant on answering them. But you know,  
11 it's like it's part of the procedure that you say, you  
12 know, yes, sir, to keep the proceedings going.

13 Q. All right. Is there anything else that you think  
14 that Mr. Bannister should have done or didn't do or did  
15 do that he shouldn't have done or didn't do that he ---

16 A. Actually I had several questions, you know, that  
17 I was trying to get into Mr. Bannister, you know,  
18 before that as far as like I never got an answer to why  
19 I was being arrested, you know, twice on the same  
20 incident. You know, like Mr. Bannister, you know, I  
21 thought I was arrested for, you know, trafficking crack  
22 cocaine and possession with intent to distribute  
23 cocaine like three months down the road maybe, four  
24 months maybe, I was called to general sessions court  
25 telling me that the officers made a mistake and they

1 charged me wrong and they was, you know, dropping the  
2 charged. Well, when he tells me that, you know, I'm  
3 thinking maybe it was over, but you know, I went right  
4 back in front of another judge, a general sessions  
5 judge that day and he gave me another charge, you know,  
6 had me turn myself into the sheriff's department or  
7 whatever, and you know, ---

8 Q. Were you directly indicted; is that what you're  
9 talking about?

10 A. Yes, ma'am.

11 Q. Okay. And you didn't understand that process of  
12 how you could be directly indicted and ---

13 A. No, ma'am.

14 Q. --- and have your charge dismissed?

15 A. Yes, ma'am.

16 Q. Okay. And you said that you and Mr. Bannister  
17 did not discuss that issue?

18 A. No, ma'am.

19 Q. Did you ask him about the direct indictment?

20 A. No. Only way I found out about the direct  
21 indictment, you know, whatever it was, is once I'm in  
22 the Department of Corrections, and you know, I actually  
23 started working and seeing what was going on with my  
24 case..

25 Q. Okay. All right. What other issues did you want

1 to raise today? What other mistakes did you say, if

2 any, that Mr. Bannister made in this case?

3 A. That would be about it.

4 Q. Please answer any questions that Mr. Ratigan may

5 have for you.

6 A. Okay.

7

**CROSS EXAMINATION**

8 **BY MS. RATIGAN:**

9 Q. So your testimony is that you did review all the  
10 evidence with Mr. Bannister?

11 A. Yes, ma'am.

12 Q. And did y'all discuss the drug dog issues?

13 A. Not really.

14 Q. Not really?

15 A. No, ma'am.

16 Q. Not at all?

17 A. No.

18 Q. And I believe you testified it was mentioned at  
19 the preliminary hearing; you just never talked about it  
20 again?

21 A. Yeah, we spoke about it at the preliminary  
22 hearing. That was about it.

23 Q. And did you tell Mr. Bannister your version of  
24 what happened that day?

25 A. I did.

1 Q. Okay. And you do have at least one prior drug  
2 conviction; do you not?

3 A. Yes, ma'am.

4 Q. Okay. And your testimony is you decided to plead  
5 guilty instead of going to trial because you were  
6 scared of getting that twenty-five years?

7 A. Yes, ma'am.

8 Q. But your contention today is that you're innocent  
9 of these charges?

10 A. Yes, ma'am.

11 Q. Well, why did you tell the judge you were guilty?

12 A. Because, you know, as a process of going in front  
13 of a judge and pleading guilty, you must say yes sir to  
14 every question that he asks you.

15 Q. And that's also why you agreed with the state's  
16 version of the facts?

17 A. Yes, ma'am.

18 Q. Okay. Did Mr. Bannister explain to you what a  
19 negotiated sentence would mean?

20 A. No, ma'am.

21 Q. He never told you that the judge would either  
22 give you the seven or not take it at all? He never  
23 explained that?

24 A. No. Pretty much the judge explained it to me as  
25 far as, you know, he was just like, I don't have to go  
26 along with it, you know.

1 Q. So because you had already talked to another  
2 lawyer, would it be fair to say you were unhappy with  
3 Mr. Bannister that day?

4 A. Correct.

5 Q. Well, why did you tell the judge that you were  
6 satisfied with his representation?

7 A. Like I said, it was part of those proceedings.  
8 But, you know, when the judge asked me those questions,  
9 you know, it was a lot of hesitation to where Mr.  
10 Bannister himself noticed it, you know, and he went  
11 forward like he believed he know why I'm hesitating,  
12 you know, and ---

13 Q. Why didn't you ask the judge to have Mr. McNab  
14 represent you instead of Mr. Bannister?

15 A. I never got a chance to ask the judge.

16 Q. You never had a chance during this entire plea  
17 hearing to talk with the judge at all about this?

18 A. No. Actually before the hearing, before I seen  
19 the judge, Mr. Bannister had already informed me that,  
20 you know, Mr. McNab had already me there was nothing he  
21 can do for me. And Mr. Bannister had already informed  
22 me that if I tried to release him that the judge would  
23 not allow that to happen.

24 Q. So you're saying all these things forced you into  
25 pleading guilty?

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20

1 A. Yes, ma'am.

2 Q. But you never told the judge you felt pressured  
3 to plead guilty?

4 A. I didn't.

5 Q. Okay.

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

7 THE COURT: Any redirect?

8 MS. HORLBECK: No, Your Honor.

9 THE COURT: All right. Thank you, sir. You  
10 may step down, Mr. Whitmire.

11 MS. HORLBECK: Judge, that's all we have.

12 THE COURT: Any witnesses from the state?

13 MS. RATIGAN: Yes, Your Honor, we'd call Mr.  
14 Bannister.

15 THE CLERK: Place your left hand on the  
16 bible. Please raise your right hand.

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

21 THE WITNESS: I do.

22 THE CLERK: Thank you. Please state your  
23 full name for the record.

24 THE WITNESS: James W. Bannister.

25 **JAMES W. BANNISTER,**

1           **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

2                                   **DIRECT EXAMINATION**

3 **BY MS. RATIGAN:**

4 Q.       Mr. Bannister, do you recall representing Mr.

5 Whitmire on these charges?

6 A.       Yes, I do.

7 Q.       And were you, in fact, retained?

8 A.       Yes.

9 Q.       Did you file the usual discovery motions?

10 A.      I did.

11 Q.      Did you receive those from the state?

12 A.      I did.

13 Q.      Did you review them with Mr. Whitmire?

14 A.      Extensively. Yes.

15 Q.      How many times would you say you would have met  
16 with him prior to this date?

17 A.      I want to say that my representation covered  
18 something in the neighborhood of eighteen months. I  
19 probably met with him -- I know I met with him  
20 somewhere in the ball park of ten to fifteen times to  
21 go over the discovery. One of the things that we  
22 specifically went over involved the drug search by the  
23 dog. I spent probably about an hour up here going  
24 through the records that related to the dog because I  
25 felt like there might be an issue there. And frankly,

1 it's one that I'm professionally interested in. It  
2 turned out that this particular dog was accurate only  
3 about fifty percent of the time. And so I was prepared  
4 to, I thought, make a pretty substantial motion to  
5 suppress based on that. There were some other issues  
6 in the case that that might have not been the end of  
7 it. But I can tell you, we went back and forth on how  
8 that issue would have impacted his case at least four  
9 or five times. I met with him after I had gotten the  
10 dog records. The hang-up for us was always that if he  
11 went to trial and we lost, it was going to be a second  
12 offense. And with the offer at a first offense, not  
13 only was he looking at significant less jail time, but  
14 he went from eighty-five percent to roughly sixty-five  
15 percent in terms of the SCDC calculated sentence, which  
16 I explained to him would be an advantage to him.

17 Q. In these meetings you had with Mr. Whitmire, did  
18 he ever tell you his version of what happened that day?

19 A. He did.

20 Q. Did he ever tell you that he was innocent?

21 THE WITNESS: Your Honor, is the  
22 attorney/client privilege waived at this point?

23 THE COURT: It is.

24 A. He told me that the drugs were his. That he had  
25 literally gotten involved in one more deal because he

1 was trying, in his words, go legit and he needed a  
2 little bit of extra money. Now, I may not have that  
3 exactly right, but I knew that there was no way I could  
4 put him on the stand given the situation. However, I  
5 did believe that there was a viable defense to the case  
6 because there was -- it just wasn't entirely clear, I  
7 didn't believe, that the state was going to be able to  
8 prove that the drugs were his because they were found  
9 in the van, there were other people involved in the  
10 case, but were the drugs his? Absolutely.

11 Q. And did you discuss with him the search and  
12 seizure in this case?

13 A. I did.

14 Q. And you believed you had a pretty good motion to  
15 suppress based on the drug dog's success rate, you  
16 said?

17 A. I did. I told him repeatedly that I thought that  
18 was a good issue, but I could never promise him that  
19 that was going to be a winner. And frankly I told him,  
20 I said, but for your prior drug conviction, I would be  
21 telling you to go to trial because I just don't think  
22 we would get hurt any worse at trial than we would have  
23 if you had just pled guilty. But with the second  
24 offense, it raised the stakes significantly so that we  
25 had to recognize that it was a much larger risk for

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24

1 him. And it was for a lot of reasons.

2 Q. Mr. Whitmire testified that his charges were  
3 dismissed and that he was direct indicted. Does that  
4 sound accurate?

5 A. I think where the confusion is, is that -- and I  
6 am doing this just from memory, so this is to the best  
7 of my recollection. He may have initially been charged  
8 with a first offense in the warrant and then as we went  
9 -- as it looked like we were definitively going to go  
10 to trial because this case was out there for a long  
11 time, I mean we had a number of different -- I had a  
12 number of different conversations with the prosecutor  
13 about it, I think then he got indicted for the second  
14 offense. But I may have that, I may have that part --  
15 I'm not certain of that.

16 Q. In your opinion was there any basis to challenge  
17 the indictment in this case?

18 A. No. No. They were just cleaning up the charges  
19 so that if we were going to go to trial that there  
20 would be the -- it would be in a position where,  
21 frankly, that he would be facing a toucher sentence.

22 Q. And Mr. Whitmire testified that the state -- that  
23 you conveyed that seven year negotiated offer from the  
24 state about a week beforehand. Does that sound about  
25 right?

1 A. That offer had been on the table, I believe, for  
2 a lot longer than that amount of time. What Mr.  
3 Whitmire's issue was, was he didn't want to go to trial  
4 and he didn't want to do seven years. He wanted a  
5 better deal and kept thinking that we might could get  
6 something better than what had been offered. And so  
7 that's what delayed us. Ultimately when we got to  
8 court for the trial, I was prepared to go to trial. I  
9 would have been happy to do it, and I told him, I said  
10 -- but he did not want to go to trial. He had brought  
11 Mr. McNab to court, and I had a long talk with him. I  
12 said, you know, look, if you want to get involved  
13 that's fine with me, but I've got to be relieved by the  
14 judge. I said, I think you ought to consider that at  
15 that point I had had some conversations with, I want to  
16 say Lauren Price was the prosecutor, I had some  
17 conversations with her. I said, my client is telling  
18 me he wants to fire me and put Mr. McNab in. I said, I  
19 don't -- I'm not opposed to that. I said, but I'm  
20 ready to go, either way. So in my experience when  
21 somebody has been out there that long for trial and  
22 they wait until the moment of trial to try to  
23 substitute counsel, what I anticipated happening was  
24 that I would be asked, are you ready to go to trial,  
25 Mr. Bannister? And I would say yes. And then there

1 was a substantial likelihood that Mr. McNab could try  
2 the case, but that I would be required to sit next to  
3 him to inform him of what was going on and try to catch  
4 him up to speed.

5 Q. So let me -- strike that. The day of -- the day  
6 it was on the trial docket and y'all came up to the  
7 courthouse, did you tell Mr. Whitmire he would get  
8 twenty-five years if he went to trial?

9 A. No. I would have told him the same thing I tell  
10 everybody, which is, look, you're facing up to whatever  
11 the statutory maximum was, and if twenty-five was it,  
12 that's what I would have said you're facing. I would  
13 have told him that if he goes to trial then you can  
14 expect to do worse than the seven years you've got  
15 right now because, if I'm not mistaken, the minimum is  
16 seven years, and that would have been eighty-five  
17 percent, versus what I believed was going to be the  
18 sixty-five percent he was looking at. So I would have  
19 told him it's going to be something between seven and  
20 twenty-five. And I would have probably figured it was  
21 going to be something closer to the middle of those  
22 two. But can I say do I remember that exactly? No. I  
23 mean, I'd be guessing in any event.

24 Q. Do you recall what changed Mr. Whitmire's mind  
25 from going forward with the trial to accepting the

1 seven year negotiated?

2 A. I never got the impression he was willing to take  
3 the risk necessary to go through trial. So I don't  
4 know that he was changing his mind. He was hoping to  
5 get something different on the day of the trial. There  
6 seems to, in some -- there seems to be some indication,  
7 I guess on the street would be the way to put it, that  
8 if you wait till the day of trial, you're going to get  
9 your best offer on that day. I've heard some people  
10 say, well, you always get three offers. Wait for the  
11 third one. It doesn't work that way here in our  
12 circuit, at least it hasn't for me. Usually the offer  
13 is worse on the day of trial. And frankly it was all I  
14 could do to get Lauren Price to put the offer back on.  
15 And not only that, I had to get her to agree to a  
16 negotiated plea because I thought that there was a  
17 substantial likelihood with his background that we were  
18 going to be looking at maybe a ten year sentence  
19 because of the reduction down and the amount of drugs  
20 that were involved.

21 Q. And did you explain to Mr. Whitmire what a  
22 negotiated sentence meant?

23 A. I'm certain that I would have. Can I say that I  
24 remember that precisely? No. But I mean, I would have  
25 talked to him about the fact that the judge can take it

1 or leave it. If he won't take it, we're going to go to  
2 trial. But I was pretty certain that the judge would  
3 take the negotiated plea.

4 Q. Did you put any kind of pressure on Mr. Whitmire  
5 to plead instead of going to trial that day?

6 A. No. In fact, I told him over and over again, I'm  
7 ready to go. You know, it's time to tee it up.

8 Q. Was Mr. Whitmire unhappy with you that day or was  
9 he just unhappy with the situation he was in?

10 A. I think he was frustrated with the situation. If  
11 he was -- well, clearly he had brought another lawyer  
12 there to see if he would represent Mr. Whitmire. That  
13 was a little bit -- that caught me off guard a little  
14 bit. One of the things I had done for Mr. Whitmire  
15 while I was representing him on the criminal case, was  
16 he had some issues in family court. He had gone in and  
17 I think they were getting ready to put him in jail or  
18 put him in jail on child support. He had his minister  
19 come talk to me and ask me if I would help him out. I  
20 did that basically for nothing. And he still grieved  
21 me on the fee.

22 Q. This is kind of a Monday morning quarterback type  
23 question. But in your opinion is there anything you  
24 believe you could have done differently for a different  
25 outcome in this case?

1 A. From a plea standpoint?

2 Q. Yes?

3 A. No. He was -- I mean, we got the plea because of  
4 the issues that there were in the case.

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

6 THE COURT: You may cross examine the  
7 witness.

8 MS. HORLBECK: Just briefly.

9 **CROSS EXAMINATION**

10 **BY MS. HORLBECK:**

11 Q. You said that you weren't expecting Mr. McNab to  
12 show up to court that day; is that correct?

13 A. Yeah. It may be that it would have been within  
14 like twenty-four, thirty-six hours that I got some call  
15 about, hey, I want to substitute counsel. And I would  
16 have said, look, you're on the trial docket. I'll show  
17 up. If you've got anybody there that wants to say,  
18 hey, I'll take it, then that's fine with me.

19 Q. All right. And when Mr. McNab showed up, was  
20 there any motion for a continuance made in front of the  
21 judge?

22 A. I told -- I think I told Mr. McNab, I said, you  
23 know, if you want to make a motion for continuance,  
24 then that's fine with me.

25 Q. Okay.

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*James W. Bannister - Cross Examination by Ms. Horlbeck*

30

1 A. You know, I don't have a dog in that fight. I am  
2 ready to go. I am not going to ask for a -- me  
3 personally ask for a continuance because I've got no  
4 reason -- there's no factual basis for me to do that.

5 Q. Okay.

6 A. You know, if you substitute him as counsel for  
7 me, then I'm done.

8 Q. Okay. Did you advise Mr. Whitmire that he could  
9 make a motion for a continuance? Do you recall talking  
10 about that?

11 A. I mean, we talked about a number of things. I  
12 can't remember if that was one of them or not, in all  
13 honesty. But I was definitely talking with Mr. McNab  
14 about that because we brought Ms. Price out and Mr.  
15 McNab said, if I can involved can I get a continuance  
16 so that I can get up to speed?

17 Q. Okay.

18 A. And she let it be known in no uncertain terms  
19 that she would fight that tooth and nail.

20 Q. Okay. All right. And likewise, a motion to be  
21 relieved, did you get the impression she would have  
22 fought that tooth and nail, as well?

23 A. Yes. I mean, that was pretty clear. I think  
24 that's why Mr. McNab said, there's nothing I can do for  
25 you.

1 Q. Okay.

2 A. I mean, you're stuck. You've waited too long.

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

4 THE COURT: Redirect?

5 MS. RATIGAN: No redirect. And the state  
6 would rest, Your Honor.

7 THE COURT: Thank you. You may step down.

8 THE WITNESS: Thank you, Your Honor. Am I  
9 free to leave?

10 MS. RATIGAN: May he be released?

11 THE COURT: You may be released.

12 Anything in reply?

13 MS. HORLBECK: No, Your Honor.

14 THE COURT: I've had an opportunity  
15 beforehand to read over the transcript. And I think it  
16 accurately reflects what the testimony has been from  
17 both sides. I find by the burden of proof that the  
18 petitioner has not met the burden to show that  
19 ineffective assistance of counsel under the prevailing  
20 professional norms and under *Strickland*.

21 Furthermore I find there's not been any prejudice  
22 shown. I think the plea was knowingly made. I think  
23 Judge John extensively went over everything with him  
24 from the transcript, particularly in light of the law  
25 as to pleas.

1           Of course, I believe that there's failure of  
2 evidence. I deny the petition and application. It  
3 doesn't demonstrate that there's been a violation of  
4 the *Strickland* standard.

5           If you'll prepare me an order to the *Marler versus*  
6 *State* factors are covered. Appreciate it.

7           MS. RATIGAN: Thank you, Your Honor.

8

9           [END OF REQUESTED TRANSCRIPT OF RECORD]

1

## CERTIFICATE OF REPORTER

2 I, the undersigned Danette P. Hanks, Official  
3 Court Reporter for the Thirteenth Judicial Circuit of  
4 the State of South Carolina, do hereby certify that the  
5 foregoing is a true, accurate, and complete transcript  
6 of record of all the proceedings had and evidence  
7 introduced in the trial/hearing of the captioned case,  
8 relative to appeal, in the Court of Common Pleas for  
9 Greenville County, South Carolina, on the 21st day of  
10 February, 2014.

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

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

15

July 30, 2014

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Circuit Court Reporter

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Octavius Lamar Whitmire, )  
 S.C.D.C. No. 249896, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-7207

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2014 MAR 25 PM 12 33

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 14, 2012. The Respondent made its return on May 3, 2013. An evidentiary hearing into the matter was convened on February 21, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, James W. Bannister, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the June 2011 term of the Greenville County Grand Jury for trafficking cocaine (2011-GS-23-2911A). He was represented by James W. Bannister, Esquire.

1  


On October 11, 2012, the Applicant pled guilty pursuant to a negotiated sentence. The Honorable Steven H. John sentenced the Applicant to seven years for trafficking cocaine (10-28 grams), first offense. The Applicant did not appeal.

### ALLEGATIONS

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

1. Ineffective assistance of counsel:
  - a. Coerced the Applicant into pleading guilty.
  - b. Threatened the Applicant with a twenty-five year sentence.
  - c. "[M]ade it clear" to the Applicant that he should plead guilty because he could not pay an additional \$3000.
2. Involuntary guilty plea.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

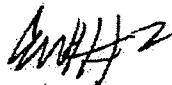
This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed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

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

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

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

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he



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

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Applicant stated he retained plea counsel and had three meetings with him about his case. The Applicant stated they reviewed the State's evidence and his version of events. The Applicant stated, however, that they "somewhat" reviewed the search and seizure and that plea counsel should have further discussed the warrantless search. The Applicant stated plea counsel had questions about the drug dog at the preliminary hearing but did not say they'd argue this at trial. The Applicant stated they discussed that his defense would be that he was not the driver and the drugs were not his. The Applicant stated plea counsel told him - one week before the plea hearing - that the State made a plea offer for a seven-year sentence. The Applicant stated

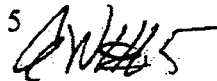
he consulted with another attorney (Maurice McNab) and that attorney came to the courthouse and spoke to plea counsel. The Applicant stated, however, that the case was not continued and plea counsel told him a trial <sup>counsel</sup> ~~counsel~~ cost \$3000 and he would receive a twenty-five year sentence. The Applicant stated this scared him, so he pled guilty. The Applicant admitted he told the plea judge he was guilty, the facts were accurate, and he was satisfied with plea counsel because this was part of the guilty plea process. The Applicant also admitted he did not tell the plea judge that he felt pressured to plead guilty.

Plea counsel confirmed he was retained. Plea counsel testified he filed discovery motions, received the discovery materials, and reviewed those materials "extensively." Plea counsel testified he likely met with the Applicant 10-15 times to review the case, discovery materials, and search. Plea counsel testified the Applicant admitted the drugs were his. Plea counsel testified he could not have called the Applicant as a witness, but would have argued the State could not prove the drugs were his. Plea counsel testified he reviewed the search and seizure with the Applicant. Plea counsel testified he spent one hour researching the drug dog's records and learned the dog was 50% accurate. Plea counsel testified there was a good argument in support of suppression and discussed this with the Applicant 4-5 times. Plea counsel testified the plea offer to reduce the charge to a first offense and offer a seven-year negotiated sentence was available for much longer than the week before the plea hearing. Plea counsel testified the Applicant neither wanted to accept the offer nor go to trial. Plea counsel testified the case as on the trial docket and he was prepared for trial. Plea counsel testified he was surprised when the Applicant brought McNab to court but that he spoke to McNab about the case and anticipated he would sit second chair to McNab at a trial. Plea counsel testified the State would have opposed any continuance request. Plea counsel testified he would have explained the sentence range for

the offense and the nature of a negotiated sentence. Plea counsel testified he did not pressure the Applicant to plead guilty, as he was prepared for trial.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.8; p.12). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.6-9). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he was pressured into entering a guilty plea; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly investigate and review the case. Plea counsel testified he reviewed discovery materials with the Applicant several times. Plea counsel testified he and the Applicant discussed the search and seizure issue, as well as the results of his investigation into the drug dog. This Court notes plea counsel is a very experienced criminal defense attorney and finds his testimony is credible. This Court finds plea counsel conducted a thorough investigation and was prepared to take the Applicant's case to trial. This Court finds the Applicant has failed to articulate what more plea counsel should have done to investigate and prepare his case. This Court also finds the Applicant has failed to present evidence of what counsel would have found with a more

<sup>5</sup> 

thorough investigation. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel pressured him into pleading guilty. This Court finds credible plea counsel's testimony that he was prepared for trial in this case. This Court finds plea counsel explained the terms of the plea offer to the Applicant and the sentencing range for the offense. This Court finds that, while the Applicant made a last-minute attempt to secure new counsel and delay the trial, the Applicant ultimately made a voluntary and informed decision to accept the State's offer of a seven-year negotiated sentence. This Court notes the Applicant told the plea judge that he understood the questions asked of him during the plea colloquy and had given truthful answers. (Plea transcript, p.13). This Court finds the guilty plea transcript refutes the Applicant's assertions that he was pressured into pleading guilty and had been told how to answer the judge's questions. See Stalk, 375 S.C. at 300, 652 S.E.2d at 407.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State,

351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed with prejudice.

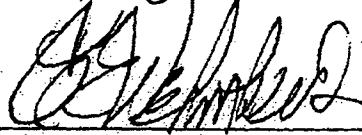
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate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

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**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 19 day of March 2014.



G. Edward Welmaker  
Presiding Judge  
Thirteenth Judicial Circuit



South Carolina.

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2012CP2307207

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2012 MAR 25 PM 12:33

Octavius Lamar Whitmire vs. South Carolina State Of

**CHECK ONE:**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other: \_\_\_\_\_

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

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this :

Court Reporter:

**PRESIDING JUDGE - G Edward Welmaker**

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Caroline M.W. Horlbeck 101 Whitsett Street  
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,  
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

POST CONVICTION RELIEF HEARING

*Registered*  
*Verdict submitted*

*PCK*

STATE OF SOUTH CAROLINA

)  
)

THIRTEENTH JUDICIAL CIRCUIT

COUNTY OF GREENVILLE

STATE OF SOUTH CAROLINA

ORDER OF APPOINTMENT OF LEGAL

VS.

COUNSEL FOR INDIGENT DEFENDANT

Octavius Lamar Whitmire

Inmate

SCDC# 249896

✓ Kirkland Correctional Institute

Address

4344 Broad River Rd

City/State/ZIP

Columbia SC 29210

Telephone

PCR Case No. 2012 CP 23 07207

Original Attorney: James W. Bannister

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law.

THEREFORE, Caroline Hornbeck, Attorney at Law, is appointed as counsel for the defendant.

This 3 day of June, 2013

[Signature]

Criminal Justice Coordinator

13-69

WITNESSES

*pl*  
D. J. Gaul

Greenville Police Department

1/17/2011

DOCKET NO. 2011-GS-23- 002911A  
JLX

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

JUNE TERM 2011

10-11-12 THE STATE

vs.

OCTAVIUS LAMAR WHITMIRE

ARREST WARRANT NUMBER  
DIRECT PRESENTMENT

DOB: 06-28-1978 BM SSN: 250-39-5504

ACTION OF GRAND-JURY

*Bobby D. ...*

Foreperson of Grand Jury

VERDICT

0278

Indictment for

TRAFFICKING COCAINE

VIOLATION § 44-53-0370

Foreperson of Petit Jury  
Date:

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

INDICTMENT FOR  
TRAFFICKING COCAINE

At a Court of General Sessions, convened on JUN 07 2011 the Grand Jurors of Greenville County present upon their oath:

That OCTAVIUS LAMAR WHITMIRE did in Greenville County, on or about the 17th day of January 2011, knowingly sell, manufacture, deliver or bring into the State of South Carolina, or did knowingly provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver or bring into the State or was knowingly in actual or constructive possession of more than 10 grams of Cocaine. This is in violation of §44-53-370 of the South Carolina Code of Laws (1976) as amended.

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

*James Montz*  
SOLICITOR

STATE OF SOUTH CAROLINA )  
 COUNTY OF Greenville )  
 STATE VS. )  
 Octavius Lamar Whitmire )  
 AKA: )  
 Race: BLACK Sex: M Age: 34 )  
 DOB: SS#: )  
 Address: ST. )  
 City, State, Zip: GREENVILLE, SC 29609 )  
 DL#: SID#: )

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS2302911A  
 A/W#: 2011GS2302911A  
 Date of Offense: 1/17/2011  
 S.C. Code § : 44-53-0370(E)(2)  
 CDR Code #: 0278

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 / Trafficking in cocaine, 10 g or more, but less than 28 g - 1st offense

in violation of § 44-53-0370(E)(2) of the S.C. Code of Laws, bearing CDR Code # 0278  
 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 Presentation to Grand Jury. (defendant's initials)  
 The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST:  Price, Lauren Davis SC Bar#  Defendant  Attorney for Defendant SC Bar#  8895

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of 7 years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_

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

CONCURRENT or  CONSECUTIVE to sentence on:  
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 20 days  
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

RESTITUTION:  Deferred  Def. Waives Hearing  Ordered PTUP \_\_\_\_\_  
 Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_ days/hours Public Service Employment \_\_\_\_\_  
 Payment Terms: \_\_\_\_\_  
 Set by SCDPPPS \_\_\_\_\_

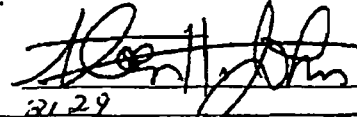
Recipient: \_\_\_\_\_

*Fine:		\$	
§ 14-1-206 (Assessments 107.5 %)		\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$	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	\$	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 (SCCA Surcharge)	\$5	\$	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 pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_  
 \$ \_\_\_\_\_ paid to Public Defender Fund  
 Other: \_\_\_\_\_

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

Clerk of Court/ Deputy Clerk Paul B. Wickhamer  
 Court Reporter: H. Jenkins  
 SCCA/217 (03/2011)

Presiding Judge   
 Judge Code: 2129  
 Sentence Date: 10-11-12