
The State of South Carolina

Supreme Court

Appeal from York County
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
2012-CP-46-03762

RECEIVED

JAN 14 2015

S.C. Supreme Court

♦♦♦♦

Devon Miles Brown,

Petitioner,

v.

2014 - 000802

State of South Carolina,

Respondent.

APPENDIX

DALE LIONEL SMITH, ESQ.
483 Broadway, Suite 502
New York, New York 10013
(212) 219-1000

*Attorney for Petitioner
Devon Miles Brown*

RUTLEDGE JOHNSON
Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-1867

Attorney for Respondent

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APPENDIX 1



The South Carolina Court of Appeals

TANYA A. GEE
CLERK
V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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August 30, 2011

Dale L. Smith, Esq.
99 Park Ave., Suite 1600
New York, NY 10016

Re: The State v. Brown, Devon Miles

Dear Counsel:

The following Order has been endorsed on your Motion to Recall the Remittitur, To Reinstate the Appeal and to Enlarge the time to file the Petition for Rehearing in the above entitled case on appeal.

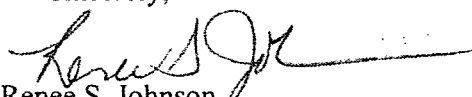
"Motion Denied.

s/ Thomas E. Huff, J. (VCA)
For the Court

August 30, 2011."

Enclosed is original Petition for Rehearing. The copies have been disposed of by the court.

Sincerely,


Renee S. Johnson
Administrative Specialist

TAG/rj

cc: Symmes Watkins Culbertson, Sr., Esquire
Senior Assistant Attorney General Norman Mark Rapoport

The Supreme Court of South Carolina

The State,

Respondent,

v.

Devon Miles Brown,

Petitioner.

The Honorable Lee S. Alford
York County
Trial Court Case No. 2008-GS-46-00406

ORDER

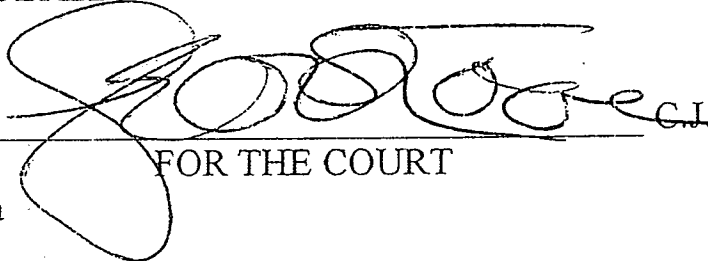
On June 7, 2011, the South Carolina Court of Appeals affirmed the conviction and sentence in this matter. State v. Brown, Op. No. 2011-UP-265 (S.C. Ct. App. filed June 7, 2011). When no petition for rehearing or reinstatement was received, the Court of Appeals sent the remittitur on June 23, 2011.

On August 26, 2011, the Court of Appeals received a motion to recall the remittitur, to reinstate the appeal and to enlarge the time to file a petition for rehearing, and a petition for rehearing. The Court of Appeals denied the motion to recall, reinstate and enlarge, and returned the petition for rehearing without action. Petitioner has now filed a petition for a writ of certiorari with this Court, and a motion to extend the time to serve and file the appendix.

When no petition for rehearing or reinstatement was received by the Court of Appeals with the time specified by Rule 221, SCACR, the Court of Appeals properly sent the remittitur. Where, as here, the remittitur has not been sent down some error of the appellate court, there is simply no authority to recall the remittitur. Further, when the remittitur has been properly sent, no further motion or petition can be considered by either this Court or the South Carolina Court of Appeals. Wise v. South Carolina Dept. of Corrections, 372 S.C. 173, 642 S.E.2d 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. [citations omitted]. The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court. [citation omitted].").

Accordingly, the petition for a writ of certiorari and motion to extend the time to serve and file the appendix are hereby dismissed.

IT IS SO ORDERED.



FOR THE COURT

Columbia, South Carolina
October 25, 2011

cc: Dale L. Smith, Esq.
Symmes Watkins Culbertson, Sr., Esquire
Senior Assistant Attorney General Norman Mark Rapoport
The Honorable Tanya Gee
Chadwicke L. Groover, Esquire

APPENDIX 4

The State of South Carolina

201Q-CP-46-3762

In the

Court of Common Pleas

COUNTY OF YORK

Case No. 2008-GS-46-00406 - Lee S. Alford, Circuit Court Judge

Devon Miles Brown

v.

State of South Carolina

FILED - RECEIVED
2012 OCT 24 PM 3:14
DAVID HAMILTON
CLERK
C.C.P. & G.S.
COUNTY OF YORK, SC

APPLICATION FOR POST-CONVICTION RELIEF

DALE LIONEL SMITH, ESQ.
99 Park Avenue, Suite 1600
New York, New York 10016
(212) 219-1000
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CHADWICKE L. GROOVER, ESQ.
P.O. Box 8578
1225 S. Church Street
Greenville, South Carolina 29604
(864) 232-1763

Attorneys for Devon Miles Brown

APPENDIX 5

1. Dale Lionel Smith, an attorney admitted *pro hac vice* by the South Carolina Court of Appeals to practice law in the State of South Carolina, on behalf of Devon Miles Brown, hereby submits on behalf of Mr. Brown a duly executed and Verified Application for Post-Conviction Relief to this Court.

2. Counsel on behalf of Mr. Brown, hereby seeks leave within the next 30 days to file a Memorandum of Law and Other Evidence in Support of the Application for Post-Conviction Relief since it is not practical to submit the supporting evidence without the memorandum of law.

3. This application is not meant to prejudice the parties, inconvenience the Court or delay the proceedings and there is no prejudice to the parties.

WHEREFORE, Counsel prays that this Court enters an Order granting him the relief requested.

Dated: October 23, 2012

Respectfully submitted,



DALE LIONEL SMITH, ESQ.
99 Park Avenue, Suite 1600
New York, New York 10016
(212) 219-1000

Attorney for Devon Miles Brown

APPENDIX 6

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Devon Miles Brown)

SCDC ID 00327309)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

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 McCormick Correctional Institution 386 Redemption Way
McCormick, South Carolina 29899
2. Name and location of Court which imposed sentence Court of General Sessions York
County South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2008-GS-46-00406
(b) _____
(c) _____
5. The date upon which sentence was imposed and the terms of the sentence:

APPENDIX 7

- (a) March 19, 2008 to a determinate term of 25 years in prison & to pay a fine of \$25,000.00.
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court - Petition for Writ of Certiorari
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Judgment of Conviction Affirmed
- ii. Petition for Writ of Certiorari Dismissed
- iii. _____
- (c) the date of each such result:
- i. June 7, 2011
- ii. October 25, 2011
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2011-UP-265
- ii. N/A
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____

APPENDIX 8

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

(a) Trial counsel rendered ineffective assistance of counsel in violation of the 6th & 14th Amendments to the U.S. Constitution, which guarantees an accused the right to effective assistance of counsel and due process of law, (i) when he failed to inform me that if convicted after trial I would be sentenced to a mandatory 25 years in prison and which caused me to reject a plea offer of 5 years imprisonment and (ii) when prior to and at the sentencing hearing he failed to conduct an adequate investigation and to challenge two prior misdemeanor convictions as unconstitutionally obtained in violation of due process in that they were not knowing, intelligent and voluntary and thus permitted the use of invalid convictions to unlawfully enhance my sentence to a mandatory 25 years in violation of the laws of South Carolina and the Constitution of the United States

(b) Trial counsel rendered ineffective assistance of counsel in violation of the 6th & 14th Amendments to the U.S. Constitution, which guarantees an accused the right to effective assistance of counsel and due process of law, when he failed to make contemporaneous and specific objections (i) to exclude the admission of the marijuana based on the State's failure to present sufficient evidence supporting the police dog's training and reliability in the search warrant affidavit and at the suppression hearing (ii) to exclude the admission of the the uncharged crimes evidence of marijuana possession as irrelevant and unduly prejudicial, and (iii) to the trial court's erroneous jury instruction that the uncharged crimes evidence could be used to prove the elements of the charged offense and thus trial counsel failed to preserve the issues for direct review on appeal and as a result of his deficient performance I was prejudiced.

(c) _____

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

(a) Trial counsel neither informed me of nor made me aware that if I was convicted after trial that the charged offense would represent a third trafficking offense because of my two prior misdemeanor marijuana-related convictions in New York and as a result I would be sentenced to a mandatory 25 years in prison. Had trial counsel made me aware that the charged offense would be considered a third trafficking or marijuana-related offense I would have accepted the State's plea bargain offer of 5 years imprisonment to resolve the case and I would not have proceeded to trial. Moreover, trial counsel neither investigated my criminal history nor

APPENDIX 9

did he obtain a record of the transcripts of my guilty pleas which would have revealed that the pleas were defective and obtained in violation of the constitution as not knowing, intelligent and voluntary and further trial counsel failed to object to the use of the prior invalid convictions to enhance my sentence to a mandatory 25 years as a third trafficking conviction although the two prior convictions were obtained in violation of due process of law. Accordingly, trial counsel rendered deficient performance both prior to and at the sentencing hearing and as a result of his deficient performance I was prejudiced.

(b) Trial counsel failed make a contemporaneous and specific objection (i) to exclude the admission of the marijuana based on the State's failure to present sufficient evidence supporting the police dog's training and reliability in the search warrant affidavit and at the suppression hearing (ii) to exclude the admission of the the uncharged crimes evidence of marijuana possession as irrelevant and unduly prejudicial, and (iii) to the trial court's erroneous jury instruction that the uncharged crimes evidence could be used to prove the elements of the charged offense and thus he failed to preserve the issues for direct review on appeal and as a result of his deficient performance I was prejudiced

(c) _____

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

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

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

(a) the specific nature thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A

APPENDIX 10

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or

APPENDIX 11

Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A

(b) _____

(c) _____

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

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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

(a) the name and address of each attorney who represented you:

i. David Clayton Cook, The Cook Law Firm P.O. Box 1449 Lancaster, South Carolina 29721

ii. DALE LIONEL SMITH, ESQ. 99 Park Avenue, Suite 1600 New York, New York 10016

iii. _____

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

i. Arraignment, Trial, and Sentencing.

ii. Appeal, Petition for Writ of Certiorari, and Application for Post Conviction Relief

iii. _____

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

Order vacating the judgment of conviction and 25 year sentence and directing the State to offer me the 5-year plea bargain offer made prior to trial.

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

No

APPENDIX 12

STATE OF SOUTH CAROLINA)

County of McCormick)

VERIFICATION

I, Devon Miles Brown, 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.

Devon Brown

SWORN to and subscribed before me this 22
day of Oct, 2012

J. C. Adkins
Notary Public

(L.S.)

My Commission Expires: 12-16-2019

APPENDIX 13

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

I, Devon Miles Brown, 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.

Devon Brown

Applicant

SWORN or affirmed to and subscribed before me this

22 day of OCT, 2017

J. J. Hankler

Notary Public

My Commission Expires:

12-16-2017

APPENDIX 14

The State of South Carolina

In the

Court of Common Pleas

COUNTY OF YORK

Case No. 2008-GS-46-00406 - Lee S. Alford, Circuit Court Judge

Devon Miles Brown

v.

State of South Carolina

FILED-RECEIVED
2012 OCT 24 PM 3:14
DAVID M. MILLER
CLERK OF COURT
COUNTY OF YORK, SC

PROOF OF SERVICE

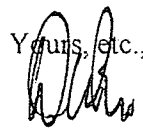
I certify that I have served the Verified Application for Post-Conviction Relief on the State by depositing a copies of it in the United States Mail and/or Private Mail Delivery Overnight Mail, postage prepaid on October 23, 2012 and addressed to:

ALAN WILSON
Attorney General
MARK FARTHING
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, South Carolina
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit
Moss Justice Center
1675 York Highway, Suite 1-A
York, South Carolina 29745
(803) 628-3020

Dated: October 23, 2012

Yours, etc.,


DALE LIONEL SMITH, ESQ.
99 Park Avenue, Suite 1600
New York, New York 10016
(212) 219-1000
law-smith.com

State of South Carolina.,)
)
)
)
)
 County of York.,)

In the Common Pleas
Court of York

Case No.: 2012-CP-46-03762

Devon Miles Brown.,)
)
 Applicant.,)
)
 -vs-)
)
 State of South Carolina.,)
)
 Respondent.)
 _____)

Transcript of Record

December 12, 2013
York, South Carolina

B E F O R E:

The Honorable John C. Hayes, III, Judge.

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

Mr. Dale Lionel Smith
99 Park Avenue, Suite 1600
New York, New York 10016
212-219-1000
For the Applicant

Mr. Rutledge Johnson
Assistant Attorney General
South Carolina Attorney General's Office
Rembert C. Dennis Building
P.O. Box 11549
Columbia, South Carolina 29211-1549
803-734-3970
For the Respondent

Wanda Nelson, CVR-M
Official Court Reporter
Sixteenth Judicial Circuit
To the Honorable John C. Hayes, III

Wanda Nelson, CVR-M
Official Court Reporter
Sixteenth Judicial Circuit
To the Honorable John C. Hayes, III

APPENDIX 16

-2-

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I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

WITNESS

BY:

PAGE NO.

APPENDIX 17

-3-

1

I-N-D-E-X - CON'T

2

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

3

NO.

DESCRIPTION

ID.

EV.

4

App.1

Trial Transcript

5

9/26/1994

6

App.2

Trial Transcript

7

9/20/1996

8

App.3

Letter to Devon Brown

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1/24/2008

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APPENDIX 18

-4-

1 (COURT IN SESSION IN THE MATTER OF DEVON MILES BROWN
2 V. STATE OF SOUTH CAROLINA ON THURSDAY, DECEMBER 12, 2013.)

3 (APPLICANT DEVON BROWN, BLACK MALE ENTERS COURTROOM AT
4 10:11 A.M..)

5 (ON THE RECORD AT 10:16 A.M..)

6 THE COURT: Good morning. Thank you. You may take
7 your seats.

8 Mr. Johnson.

9 MR. JOHNSON: May it please the Court, Your Honor.
10 This is the case of Devon Miles Brown versus State of South
11 Carolina. It's Case Number 2012-CP-46-3762.

12 Mr. Brown was indited by the January 2008 term of the
13 York County Grand Jury for trafficking marijuana.

14 Dave Cook represented him. On March 19th 2008, he
15 proceeded to trial pursuant to which he was found guilty of
16 trafficking marijuana ten to a hundred pounds, third
17 offense.

18 The Honorable Lee S. Alford sentenced him to
19 confinement for twenty-five years for the trafficking
20 marijuana, third offense.

21 A notice of appeal was filed on his behalf and the
22 appeal was perfected.

23 The South Carolina Court of Appeals affirmed his
24 conviction and since, on June the 7th, 2011, the remittur
25 was issued on June the 23rd, 2011.

APPENDIX 19

-5-

1 Appellant counsel filed a Motion to Recall the
2 Remittur and reinstated on August 25th 2011. The Court of
3 Appeals denied that. He then filed a Motion to Extend the
4 Time with the South Carolina Supreme Court in a
5 letter/order dated October 25th 2011. The South Carolina
6 Supreme Court let Mr. Brown know there was no jurisdiction
7 for the Appellant Courts to hear the appeal.

8 On October 24th, 2012, he filed a post-conviction
9 relief application and the State filed it's Return and
10 Motion to Dismiss on February 15th, 2013, alleging that he
11 was - because the letter was issued from the Court of
12 Appeals on June the 24th, 2011, he was beyond the statute
13 of limitations to file a post-conviction leave application.
14 That is still our motion today but I will turn this over to
15 Mr. Dale Smith, who represents Mr. Brown.

16 THE COURT: All right. Good morning.

17 MR. SMITH: Good morning, Your Honor. Dale Lionel
18 Smith on behalf of Mr. Brown who is in custody and present.

19 Your Honor, I'm going to try and narrow the issues for
20 the Court at this point.

21 One of the issues raised by my colleague, Mr. Johnson,
22 I think will be moot because we are focused on the Lafler
23 Lafler being Lafler versus Cooper, cited at 132 Supreme
24 Court 1376, a 2012 case. And I believe Mr. Johnson will
25 agree with me that if that is the only issue we are

APPENDIX 20

-6-

1 pursuing, that is a timely motion --

2 THE COURT: What's that cite again?

3 MR. SMITH: It is 132 Supreme Court Reports, Page
4 1376, a 2012 case.

5 THE COURT: Okay.

6 MR. JOHNSON: I'll agree with that, but the State's
7 motion for a statute of limitations is to bar any of the
8 other issues that were raised in his original application,
9 but certainly I will agree with Mr. Smith that that was
10 because it overturned precedent in the United States, he is
11 timely filing under Lafler v. Cooper, we ask that that be
12 the only issue that he proceeds on today.

13 THE COURT: He indicated that was so we'll go forward.

14 MR. JOHNSON: Thank you, Your Honor.

15 THE COURT: All right. You want to call your first
16 witness?

17 MR. SMITH: Yes, Your Honor. We'll call Devon Miles
18 Brown to the witness stand.

19 MADAM CLERK: Mr. Brown, if I can have you stop here.
20 Place your left hand on the Bible and raise your right as
21 far as you can.

22 (WHEREUPON, DEVON MILES BROWN,
23 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

24 MADAM CLERK: Thank you. Come around and have a seat.

25 MR. SMITH: May it please the Court. Your Honor, do

APPENDIX 21

DEVON MILES: DIRECT BY MR. SMITH

-7-

1 you have a preference as to where you would like for me to
2 stand?

3 THE COURT: Wherever you are comfortable.

4 MR. BROWN: Here is fine.

5 THE COURT: That's fine. Quite frankly when I
6 practiced I liked to stand at the desk too. Go ahead.

7 DIRECT EXAMINATION

8 DEVON MILES BY MR. SMITH:

9 Q. Mr. Brown, can you hear me?

10 A. Yes, sir.

11 Q. Can you please give your full name for the record?

12 A. Devon Miles Brown.

13 Q. All right. You are going to have to speak louder.
14 Okay?

15 A. Devon Miles Brown.

16 Q. All right. Mr. Brown, where do you currently reside?

17 A. McCormick Correctional Institution.

18 Q. And why are you there?

19 A. I'm serving a sentence of twenty-five years.

20 Q. Okay. Mr. Brown, I know the microphone is over to
21 your left, but can you try and face me and so the Judge can
22 see your face when you testify. Do you understand?

23 A. Yes.

24 Q. All right. What - You said you are serving a sentence
25 of twenty-five years?

APPENDIX 22

DEVON MILES: DIRECT BY MR. SMITH

-8-

1 A. Yes.

2 Q. What were you convicted of?

3 A. Trafficking marijuana.

4 Q. Did you take a plea?

5 A. No. I took a trial.

6 Q. All right. When were you arrested for that offense?

7 A. September 2007.

8 Q. And did you retain counsel?

9 A. Yes.

10 MR. SMITH: Your Honor, I have an application to
11 sequester the witnesses.

12 THE COURT: All right. We'll do that.

13 MR. SMITH: Thank you.

14 THE COURT: Mr. Cook, you can take a seat --

15 MR. COOK: Yes, sir.

16 (ATTORNEY DAVID COOK LEAVES COURTROOM.)

17 BY MR. BROWN:

18 Q. Did you so retain counsel to represent you in that
19 case?

20 A. Yes.

21 Q. All right. What date in 2007 were you arrested?

22 A. September 20th, 2007.

23 Q. And did there come a time that you were released from
24 custody?

25 A. Yes.

APPENDIX 23

DEVON MILES: DIRECT BY MR. SMITH

-9-

1 Q. And tell us when did you speak with your attorney for
2 the first time?

3 A. About a month later after I got arrested.

4 Q. All right. Did you personally retain the attorney?

5 A. Yes.

6 Q. What is the lawyer's name?

7 A. David Cook.

8 Q. And what date was it that you first spoke with him?

9 A. I don't recall the date, but it was in October.

10 Q. Now during the first conversation that you had with
11 him, how long did that conversation last?

12 A. A phone conversation for about ten minutes to retain
13 him.

14 Q. Okay. During that phone conversation did Mr. Cook
15 agree to represent you in the case?

16 A. Yes.

17 Q. All right. After that initial conversation, when was
18 the next time you spoke with Mr. Cook?

19 A. A month later.

20 Q. During that conversation that took a month later, how
21 long did that conversation take place?

22 A. Twenty-five minutes.

23 Q. All right. And a month later would be in October,
24 maybe early November, you spoke with Mr. Cook?

25 A. Yes.

APPENDIX 24

DEVON MILES: DIRECT BY MR. SMITH

-10-

1 Q. Do you recall what date you went to trial on your
2 case?

3 A. March 17th.

4 Q. Of what year?

5 A. 2007.

6 Q. So you got arrested September --

7 THE COURT: It says March of 2008 according to the
8 transcript.

9 A. I'm sorry. 2008.

10 THE COURT: That's fine.

11 MR. BROWN: Thank you, Your Honor.

12 Q. Now, between the date of your arrest in September of
13 2007 and March 2008, how many times did you speak with your
14 attorney Mr. Cook?

15 A. Three times.

16 Q. Now, the first conversation you had with him lasted
17 you said about ten minutes?

18 A. Yes.

19 Q. All right. The second conversation you said you had
20 with him a month later lasted how long?

21 A. Twenty-five minutes.

22 Q. And when did the third conversation that you had with
23 him take place?

24 A. A month later.

25 Q. A month later from what date? Just give the month and

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DEVON MILES: DIRECT BY MR. SMITH

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1 year you think you had the conversation with him.

2 A. December.

3 Q. So that's three conversations. Did you have any
4 subsequent conversations after December?

5 A. No.

6 Q. When you went to trial in March, you must have spoken
7 with him just before you went to trial.

8 A. Yes.

9 Q. The December meeting that you had with him which would
10 constitute the third conversation, how long did that
11 conversation take place?

12 A. Thirty minutes.

13 Q. So you had a ten-minute conversation and two thirty-
14 minute conversations?

15 A. Yes.

16 Q. All right. Was there a fourth conversation that you
17 may have had with him if you recall?

18 A. No.

19 Q. Now, during the conversations that you had with him,
20 did Mr. Cook explain to you what you were being charged
21 with?

22 A. Yes.

23 Q. And did you receive a copy of the indictment?

24 A. Yes.

25 Q. Did Mr. Cook ever say to you that - Withdraw it.

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1 Did you discuss whether or not you would take the case
2 to trial with Mr. Cook?

3 A. Yes.

4 Q. When did that conversation take place?

5 A. I don't recall.

6 Q. Are you okay? Just relax and keep your voice up,
7 okay. Did there come a time before your case went to trial
8 that there was a bench warrant issued for your arrest?

9 A. No.

10 Q. Did there come a time that - Withdrawn.

11 Were you out on bail when you - after you got
12 arrested?

13 A. Yes.

14 Q. Now, before you went to trial, were you placed in
15 custody?

16 A. No.

17 Q. All right. So you were out on bail even during the
18 trial?

19 A. I was placed in custody actually the pre-trial -
20 during - before my pre-trial.

21 Q. What are you calling your pre-trial? The suppression
22 hearing?

23 A. Yes.

24 Q. All right. So there was a suppression hearing in this
25 case?

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1 A. Yes.

2 Q. Did you speak to Mr. Cook about the suppression
3 hearing?

4 A. Yes.

5 MR. JOHNSON: Objection. We're here only on the plea
6 offer; not the suppression hearing.

7 THE COURT: I'm going to let him go into what he wants
8 to. This is his only shot.

9 MR. JOHNSON: All right.

10 BY MR. SMITH:

11 Q. Now, of all the conversations you had with Mr. Cook
12 about your case, did Mr. Cook ever say to you that if you
13 went to trial and lost your trial, that you would get
14 twenty-five years in prison?

15 A. No.

16 Q. Did Mr. Cook at any point communicate to you what if
17 any offers the State had made to you?

18 A. Will you say that again?

19 Q. Do you know what a plea bargain is?

20 A. Yes.

21 Q. Is it your understanding that you were offered a
22 particular sentence if you were to plead guilty?

23 A. I was offered three to five years.

24 Q. All right. And before you proceeded to trial, you
25 knew that you could take a guilty plea and get five years.

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DEVON MILES: DIRECT BY MR. SMITH

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1 Right?

2 A. Yes.

3 Q. Did Mr. Cook say to you at the time that he
4 communicated to you that you could get five years - First
5 of all withdrawn.

6 Did Mr. Cook advise you to take the five years?

7 A. Yes.

8 Q. Now, at the time that he advised you to accept five
9 years, did he also say to you that if you don't take the
10 five years and you lost the trial, then you would get
11 twenty-five years?

12 A. No.

13 Q. What was your sentence?

14 A. Twenty-five years.

15 Q. Now, do you have an understanding as to whether or not
16 the judge who sentenced you to twenty-five years had any
17 discretion at all in - Do you understand by discretion
18 whether or not the judge if he wanted to could give you
19 less?

20 A. No.

21 Q. So it's your understanding that you had to get twenty-
22 five years?

23 A. Yes.

24 Q. Now, sir, if you knew that if you lost your trial that
25 you would get twenty-five years, would you have accepted

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DEVON MILES: DIRECT BY MR. SMITH

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1 the five year plea bargain offer?

2 A. Yes.

3 Q. Did you discuss with Mr. Cook prior to the decision to
4 go to trial what his strategy was for winning your case?

5 A. I had a Fourth Amendment violation.

6 Q. Listen to the question. Did you discuss with Mr. Cook
7 what his strategy was for winning the case? Yes or no.

8 A. Yes.

9 Q. All right. What did he say to you was his strategy
10 for winning the case?

11 A. My Fourth Amendment violation.

12 Q. Was there a Fourth Amendment violation hearing prior
13 to your trial?

14 MR. JOHNSON: Objection. It's outside the scope of
15 the hearing, Your Honor.

16 THE COURT: All right. I'm going to allow him to go
17 ahead.

18 BY MR. SMITH:

19 Q. Was there a Fourth Amendment hearing?

20 A. Yes.

21 Q. Do you know the result or the ruling that the judge
22 made on your Fourth Amendment application?

23 A. Yes.

24 Q. What was the ruling?

25 A. That the evidence was admissible.

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DEVON MILES: DIRECT BY MR. SMITH

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1 Q. All right. So now after the judge's ruling that the
2 evidence was admissible, did Mr. Cook discuss with you what
3 his strategy was for winning the actual trial? Not the
4 suppression hearing, but the trial itself.

5 A. No.

6 Q. Did you know before you went to trial what his
7 strategy would be?

8 A. Yes.

9 Q. What was the strategy going to be?

10 A. A Fourth Amendment violation.

11 Q. No, no, no. After you had already lost that.

12 A. No. No.

13 Q. So you never had any discussions with Mr. Cook
14 regarding what the defense at trial would be?

15 A. No.

16 Q. Did Mr. Cook, after you lost the suppression issue,
17 advise you or discuss with you the plea offer of five
18 years?

19 A. No.

20 Q. Did you know that after you lost this - do you know -
21 Withdrawn.

22 Do you know whether or not the option was still
23 available to you to accept five years rather than risk
24 going to trial and losing?

25 A. No.

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1 Q. It was never discussed with Mr. Cook?

2 A. No.

3 Q. And you said Mr. Cook never told you what his strategy
4 for the actual trial would be?

5 A. Yes.

6 Q. After you lost the suppression hearing, would you have
7 accepted five years if it had been told to you that you
8 could?

9 A. Yes.

10 Q. Would you have gone to trial?

11 A. No.

12 Q. In your view, was the case that the State had against
13 you as it pertains to the trial itself, was it in your view
14 a strong case or a weak case?

15 A. Strong.

16 Q. Is it your view that you were more than likely going
17 to lose an actual trial as it relates to whether or not you
18 possessed marijuana?

19 A. Yes.

20 Q. And you said you had no discussions with your lawyer
21 about what the trial strategy would be. Right?

22 A. No.

23 Q. Now, during the conversations that you had with Mr.
24 Cook, did he say to you what if any strategy he had to try
25 and keep out - Withdrawn.

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1 It was — You were sentenced on the day the jury came
2 back with the verdict?

3 A. Yes.

4 Q. Do you know if Mr. Cook had asked for additional time
5 as it relates to your sentencing issues?

6 A. No.

7 Q. Did Mr. Cook ever discuss with you your prior
8 convictions in New York?

9 A. No.

10 Q. Did he ever ask you whether or not you were
11 represented by counsel on any of those cases in New York?

12 A. No.

13 Q. Did he ask you about the facts of any of those
14 convictions that took place in New York?

15 A. No.

16 Q. Did he ever say to you that he would research those
17 cases in New York to see if those convictions were valid?

18 A. No.

19 Q. Did he discuss those prior convictions at all with
20 you?

21 A. No.

22 Q. And never informed you about a strategy to contest or
23 keep out those convictions?

24 A. No.

25 Q. You understood that you were charged with trafficking,

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DEVON MILES: DIRECT BY MR. SMITH

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1 third offense?

2 A. Yes.

3 Q. And that is a result of the September 2007 arrest.

4 Right?

5 A. Yes.

6 Q. Have you ever been - Prior to that arrest, had you
7 been convicted of trafficking in marijuana in South
8 Carolina?

9 A. No.

10 Q. Had you - Did you have any prior drug convictions in
11 South Carolina?

12 MR. JOHNSON: Objection to relevance, Your Honor.

13 THE COURT: I'll allow it.

14 MR. SMITH: State of mind.

15 Q. Did you - Do you have any prior convictions in the
16 State of South Carolina?

17 A. No.

18 Q. Did Mr. Cook ever explain to you the significance of
19 the charge, that it was a third offense?

20 A. No.

21 Q. And did you have at the time, going back to 2007 and
22 2008, did you have an understanding why it was your third
23 offense?

24 A. No.

25 Q. Now, the incident that took place in September in

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DEVON MILES: DIRECT BY MR. SMITH

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1 2007, that was not your only indictment; is that correct?

2 A. Yes.

3 Q. You were also being charged with a young woman also
4 known as Minnie Jackson for an August 2007 marijuana
5 offense. Right?

6 A. Yes.

7 Q. And that was for trafficking marijuana?

8 A. No.

9 Q. What was that charge?

10 A. Conspiracy.

11 Q. Did it involve marijuana?

12 A. Yes.

13 Q. Did you have an understanding as to whether or not
14 that was a first, second, or third offense for marijuana
15 that you were being charged with?

16 A. No.

17 Q. Did Mr. Cook ever explain to you the significance of
18 that particular charge?

19 A. No.

20 Q. Now, you said you had three conversations with Mr.
21 Cook over a period of time from September up until March of
22 the trial. Is that accurate?

23 A. Yes.

24 Q. And you said at least two or three of them took maybe
25 thirty minutes?

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DEVON MILES: DIRECT BY MR. SMITH

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1 A. Yes.

2 Q. Do you recall the subject matter of the conversations
3 that you had with Mr. Cook during those three
4 conversations?

5 A. No.

6 Q. Well, did you have an agreement with Mr. Cook
7 regarding how much money you were going to pay him?

8 A. Yes.

9 Q. What was the agreement?

10 A. Five thousand.

11 Q. When was the agreement made?

12 A. On the second consultation.

13 Q. The second consultation, referring to October of 2007?

14 A. Yes.

15 Q. So between September 20th when you got arrested to
16 October, did you pay him, him being Mr. Cook, any money?

17 A. Yes.

18 Q. When did you pay him?

19 MR. JOHNSON: Your Honor, this is completely
20 irrelevant. How much he paid Mr. Cook, when he paid him is
21 completely irrelevant as to whether or not there was a plea
22 offer conveyed to Mr. Brown.

23 THE COURT: Again, I'm going to let him make a full
24 record.

25 MR. SMITH: Right. Just so counselor will know, just

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DEVON MILES: DIRECT BY MR. SMITH

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1 so the nature of the discussions that took place so as to
2 explain the event.

3 Q. During the conversations with Mr. Cook, did you
4 discuss money?

5 A. Yes.

6 Q. All right. What was the nature of the conversations?

7 A. To have a retainer fee of Five Thousand Dollars.

8 Q. Did you pay him all the money?

9 A. No.

10 Q. Was he asking you for money?

11 A. Yes.

12 Q. Now, . . .

13 MR. SMITH: May I have a minute please, Your Honor?

14 THE COURT: Yes.

15 (PAUSE.)

16 Q. During the conversations that you had with Mr. Cook
17 starting in September up until the time that you went to
18 trial, was anyone else present with you when those
19 conversations occurred?

20 A. Yes.

21 Q. Who?

22 A. Daniels.

23 Q. Who is Ms. Daniels?

24 A. My ex-girl friend.

25 Q. At the time - Withdrawn.

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DEVON MILES: DIRECT BY MR. SMITH

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1 At the time that Ms. Daniels was your girlfriend was
2 she residing with you?

3 A. Yes.

4 Q. Was she at all familiar with your arrest?

5 A. Yes.

6 Q. And during the time - During the period of time
7 between September 2007 and March of 2008 when you went to
8 trial, did you discuss your case with Ms. Daniels?

9 A. Yes.

10 Q. And did Ms. Daniels discuss your case with you and Mr.
11 Cook?

12 A. Yes.

13 Q. And did Mr. Cook advise you or speak to you in the
14 presence of Ms. Daniels?

15 A. Yes.

16 Q. Now, other than discussions about money, what other
17 discussions did you have with Mr. Cook during the period of
18 time from September to March?

19 A. Just about my defense.

20 Q. When you say your defense, are you referring to the
21 Fourth Amendment issue?

22 A. Yes.

23 Q. Would it be accurate to say that there was no defense
24 discussed about the trial itself?

25 A. Yes.

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DEVON MILES BROWN: CROSS BY MR. JOHNSON

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1 MR. SMITH: I yield the witness, Your Honor.

2 THE COURT: Okay.

3 MR. JOHNSON: The Court's indulgence, Your Honor.

4 MR. SMITH: Your Honor, may I have just a moment so I
5 can make certain that a potential witness is sequestered?

6 THE COURT: Sure.

7 (PAUSE.)

8 MR. SMITH: That's fine. Excuse me. Thank you.

9 THE COURT: All right.

10 CROSS-EXAMINATION

11 DEVON MILES BROWN BY MR. JOHNSON:

12 Q. Mr. Brown, just briefly. You were convicted of
13 trafficking over fifteen pounds of marijuana into South
14 Carolina. Correct?

15 A. Yes.

16 Q. That's through a UPS box?

17 A. Yes.

18 Q. Okay. And during the sentencing, two convictions from
19 New York were presented to enhance your sentence to make it
20 twenty-five years; isn't that correct?

21 A. Yes.

22 Q. Those were certified convictions out of New York for
23 possession of marijuana fourth degree and possession of
24 marijuana fifth degree?

25 MR. SMITH: Objection as to form regarding this

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DEVON MILES BROWN: CROSS BY MR. JOHNSON

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1 certified what?

2 MR. JOHNSON: Just a moment, Your Honor.

3 THE COURT: All right.

4 MR. JOHNSON: Page 380, the Court says "Of course the
5 convictions themselves are certified records." That was
6 the premise on which I made that question, Your Honor.

7 THE COURT: Okay.

8 MR. JOHNSON: This is certified records of
9 convictions.

10 Q. That's what was used to enhance your conviction for
11 this case. Correct?

12 A. Yes.

13 Q. So that would be considered the possession, fourth
14 degree, one. Correct? That would be your first
15 conviction?

16 A. Yes.

17 Q. The possession of marijuana, fifth degree, that would
18 be your second conviction. Correct?

19 A. Yes.

20 Q. And therefore this trafficking would be your third
21 conviction. Correct?

22 A. Yes.

23 Q. Okay.

24 MR. JOHNSON: That's all I have for this witness, Your
25 Honor.

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DEVON MILES BROWN: REDIRECT BY MR. SMITH

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1 THE COURT: Okay. Any redirect?

2 MR. SMITH: Just one minute please, Your Honor.

3 THE COURT: Yes, sir.

4 (PAUSE.)

5 MR. SMITH: Your Honor, I have two documents I would
6 like to have marked. I handed the Assistant Attorney
7 General a copy.

8 WHEREUPON, APPLICANT'S EXHIBIT
9 NUMBER ONE AND TWO PREMARKED FOR IDENTIFICATION.)

10 REDIRECT EXAMINATION

11 DEVON MILES BROWN BY MR. SMITH:

12 Q. Mr. Brown, you were just asked questions about your
13 convictions in New York. I am going to show you a
14 document, Applicant's Exhibit One, and if you will take
15 your time and read through the document. To yourself; not
16 out loud.

17 A. Okay.

18 (PAUSE AT 10:46 A.M., WITNESS READING DOCUMENT.)

19 Q. You've read the document?

20 A. Yes.

21 Q. Do you know what it is?

22 A. Yes.

23 Q. What is it?

24 A. Class A Misdemeanor.

25 Q. No. The document that you read, is it related to any

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DEVON MILES BROWN: REDIRECT BY MR. SMITH

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1 of your prior convictions?

2 A. Yes.

3 Q. What is it then?

4 A. Marijuana possession.

5 Q. No. Is this a proceeding that took place in court?

6 A. Yes.

7 Q. Your prior convictions, were they guilty pleas or
8 trials?

9 A. Guilty pleas.

10 Q. All right. Is Exhibit One a transcript of your guilty
11 plea?

12 A. Yes.

13 Q. All right. I'm going to show you Exhibit Two,
14 Applicant's Exhibit Two, and see if you recognize that one.
15 It's much shorter.

16 (WITNESS REVIEWING DOCUMENTS.)

17 Q. Is Applicant's Exhibit Two the guilty plea in your
18 other misdemeanor?

19 A. Yes.

20 Q. And these are the guilty pleas that actually enhanced
21 your sentence up to twenty-five years?

22 A. Yes.

23 MR. SMITH: Your Honor, with the Court's permission, I
24 move these, Applicant's Exhibit One and Applicant's Exhibit
25 Two, into evidence.

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DEVON MILES BROWN: REDIRECT BY MR. SMITH

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1 MR. JOHNSON: No objection.

2 THE COURT: In without objection.

3 (WHEREUPON, APPLICANT'S EXHIBIT ONE AND TWO MARKED AND
4 IDENTIFIED, RECEIVED INTO EVIDENCE.)

5 BY MR. SMITH:

6 Q. Just a few more questions, Mr. Brown.

7 During the period of time that you were represented by
8 Mr. Cook between September 2007 and March 2008, did he ever
9 discuss with you obtaining transcripts of your guilty plea
10 in New York?

11 A. No.

12 Q. Did Mr. Cook ever discuss with you obtaining any
13 records from New York in connection with your prior
14 convictions?

15 A. No.

16 Q. Did there come a time during the trial that there was
17 a discussion about your prior convictions in New York?

18 Do you recall?

19 A. No, I don't recall.

20 Q. Well, do you know when was the first - If you know, do
21 when Mr. Cook first sought any documents about your
22 criminal history in New York?

23 MR. JOHNSON: Objection; speculation.

24 MR. SMITH: If you know.

25 MR. JOHNSON: There is no personal knowledge, Your

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DEVON MILES BROWN: REDIRECT BY MR. SMITH

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1 Honor, when Mr. Cook --

2 THE COURT: I'll let him go ahead and answer.

3 A. State the question again.

4 Q. Did there come a point at any time during your
5 relationship with Mr. Cook that you saw that he --
6 Withdrawn.

7 Did the prosecutor give Mr. Cook your criminal
8 history?

9 A. During the trial, yes.

10 Q. Based on your observation, did it appear to you that
11 that was the first time Mr. Cook actually saw documents
12 related to your criminal history?

13 A. Yes.

14 MR. SMITH: I have no further questions, Your Honor.

15 MR. JOHNSON: No follow up, Your Honor.

16 THE COURT: You may step down and have a seat with
17 counsel.

18 (WITNESS LEAVING WITNESS STAND.)

19 MR. SMITH: Your Honor, how --
20 May we approach?

21 MR. JOHNSON: May we approach?

22 THE COURT: Sure.

23 (BENCH CONFERENCE OFF THE RECORD AT 10:54 A.M..)

24 MR. SMITH: Actually may I have a three minute break?

25 THE COURT: Yeah. We'll take about a ten minute

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DAVID COOK: DIRECT BY MR. JOHNSON

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1 break.

2 MR. SMITH: Thank you.

3 (COURT IN RECESS AT 10:55 A.M.)

4 (COURT BACK IN SESSION AT 11:09 A.M.)

5 THE COURT: Thank you. Take your seats.

6 (APPLICANT DEVON MILES, BLACK MALE, REENTERS
7 COURTROOM.)

8 MR. SMITH: Your Honor, I spoke with my colleague, Mr.
9 Johnson. One of my witnesses is not here and we've agreed
10 to take Mr. Cook out of turn.

11 THE COURT: Okay.

12 MR. SMITH: After he has completed his testimony, if
13 my witness, isn't here, I'll rest at that time. So if it's
14 okay with you, I'd like to proceed that way.

15 THE COURT: Sure. We're flexible.

16 (WHEREUPON, DAVID COOK, BEING
17 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

18 MR. JOHNSON: May it please the Court, Your Honor.

19 THE COURT: Yes, sir.

20 DIRECT EXAMINATION

21 DAVID COOK BY MR. JOHNSON:

22 Q. Mr. Cook, first of all, good morning.

23 A. Good morning.

24 Q. Second of all, how long have you been practicing law?

25 A. Eight years now.

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DAVID COOK: DIRECT BY MR. JOHNSON

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1 Q. And how -- And that's all in criminal law?

2 A. The overwhelmingly majority of it. I do some civil
3 litigation, primarily criminal.

4 Q. And have you handled drug cases before?

5 A. Yes, several.

6 Q. And have you handled trafficking in this amount?

7 A. I have. I've won a jury trial where the client was
8 charged with trafficking this amount.

9 Q. And how did you become involved in Mr. Brown's case?

10 A. He contacted me to represent him.

11 Q. Was that via phone or was that in your office?

12 A. Yes. Yes, sir. If my recollection serves correct, I
13 believe he called me on the telephone and I brought him
14 into the office for a face to face meeting.

15 Q. And at that point did you being a client -- attorney-
16 client relationship?

17 A. I did. We signed a contract and I sent him a letter
18 of representation, motions for discovery of evidence and
19 started on the case. He informed me the nature of the
20 charges, what his current offer was at the time.

21 Q. What was that offer?

22 A. I can't remember right now. I think that his first
23 offer may have been twelve years. And then I spoke with
24 the solicitor, Jenny Dash, numerous occasions back and
25 forth after I reviewed all of the evidence. I went down to

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DAVID COOK: DIRECT BY MR. JOHNSON

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1 the evidence room and looked at the evidence, the chemical
2 analysis reports, the chain of evidence, and I noticed that
3 there was some cloud in the chain of evidence. One of the
4 officers didn't sign the sheets correctly that was
5 transporting the evidence. Through those - Through that
6 discovery I negotiated a lot more with the Solicitor and
7 got her down to a five-year offer. She informed me that
8 that was the best that the offer was ever going to get.

9 Q. Just to back up, how many times did you meet with Mr.
10 Brown during this case?

11 A. In person in my office, probably somewhere between
12 three, five - three to five times. I spoke with him on
13 numerous occasions on the telephone. Probably well over
14 twenty just to quantify it. I asked him to come to my
15 office numerous other occasions, but for one reason or
16 another at the time he was unavailable. He was living in
17 Columbia at the time.

18 Q. And just to catch up, he has testified that you only
19 met with him three times prior to trial. Would that be an
20 accurate number?

21 A. No. That would not be accurate.

22 MR. SMITH: Object. Excuse me. I'm objecting to the
23 form --

24 THE COURT: Don't lead. Rephrase your question.

25 MR. JOHNSON: Yes, sir.

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DAVID COOK: DIRECT BY MR. JOHNSON

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1 Q. So you met with him in your office how many times?

2 A. Yes. As I stated you know in my first question, three
3 to five times in person. But I would try to get him to
4 come more and he lived in Columbia. I mean, I can remember
5 some specific times when we were getting towards the eve of
6 the trial, I was imploring him to watch the video.

7 I was telling him that my research - through my
8 research, I did not think that I could suppress that video
9 in evidence and I explained to him the entire procedure
10 with York County and their pre-trial motions are right
11 before the trial and any suppression hearings after - you
12 know the offer is taken off the table, I should say, before
13 the suppression hearing, so if you are going to the
14 suppression hearing, then you are going to the trial.

15 And I told him that I didn't think I could get it
16 suppressed. I had some grave concerns about his chances at
17 winning this trial. I asked him to come up to the office
18 on several occasions to watch the video with me; he
19 wouldn't. I mailed it to him, I believe or - I think in
20 one of the occasions that we were meeting in person he
21 didn't want to stay and watch it so I gave it to him and
22 told him to take it home and to watch it. And I called him
23 the week after that and asked him if he had watched it and
24 he said he did not. It caused me great concern because I
25 was thinking that if he saw that video and saw what the

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DAVID COOK: DIRECT BY MR. JOHNSON

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1 jury was going to see, it might change his mind on taking
2 this offer that I was again adamant that I was trying to
3 explain to him that the five year offer was not going to
4 get any better and that his deadline to accept it was
5 approaching fast, he had to watch this video, he had to
6 come up to the office to talk with me.

7 He would tell me that he was discussing the case with
8 his friends in Columbia. He would tell me the type of
9 advice that they were giving him. That he shouldn't take
10 the plea offer and he needs to try it and he would bring up
11 a lot of issues that weren't germane to his case. Weren't
12 procedurally correct. I was really concerned with him that
13 he was taking the advice of his friends instead of from his
14 attorney and I expressed that to him personally and on the
15 telephone on numerous occasions.

16 He would tell me that he had a five - that he had a
17 daughter and he didn't want to take the five year offer. I
18 explained to him the trafficking statute that there was a
19 twenty-five year sentence. There was no discretion in that
20 sentence. The judge would have to render that sentence if
21 he were found guilty and that if he had a daughter, I would
22 try to make the argument you would rather see her in five
23 years than in twenty-five years. I made that to him on
24 several occasions.

25 Q. So you did in fact relay this offer to Mr. Brown?

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DAVID COOK: DIRECT BY MR. JOHNSON

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1 A. I relayed the offer to Mr. Brown on numerous
2 occasions, practically, practically begging him to take it
3 because I didn't see any presentable defense at the trial.
4 And its such a huge discrepancy between five years and
5 twenty-five years. I would have conversations with him,
6 you know, what were you doing twenty years ago. That's how
7 long you are going to spend in jail if you don't take this
8 offer over and above the five years, trying to make him
9 realize the severity of the situation.

10 Q. And whose decision was it to reject that plea offer?

11 A. It was entirely his decision.

12 Q. Did you ever force or threaten him to take that offer?

13 A. Absolutely not. When I said begging him, I used the
14 word practically. I mean, I was adamant that my advice was
15 to take this five year offer. I told him on numerous
16 occasions that if he forced me into the trial by not - you
17 know, if he went to the trial by not accepting the offer
18 that I would try to do all I could to win that trial and I
19 maintain that I did do all I could to try to win that
20 trial.

21 Q. And were you prepared to try this case?

22 A. Highly prepared.

23 Q. Did you discuss any strategy, trial strategy, with Mr.
24 Brown?

25 A. On numerous occasions. The only real strategy that I

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1 saw was to try to blur the prior bad acts and the other
2 woman that was involved with the case and to say that we
3 didn't know - Through him, he had been telling me, I don't
4 know her.

5 That's when the video came into play. I kept asking
6 him to watch the video and maybe he could present to the
7 jury that he didn't have any association but he would have
8 to explain why he went to pick that package up that
9 particular day and the video showed the officers following
10 him from the FedEx Store. They arrested him for an
11 improper lane change I think in the gas station parking lot
12 and pulled out the marijuana on the video and placed it on
13 the hood.

14 And I was worried that you might be able to separate
15 yourself from your prior bad acts, but you're not going to
16 be able to separate yourself from that video.

17 And of course, I'm fairly certain that I brought up
18 the chain of evidence issue in the trial, but it's one of
19 those issues that is not fatal. It doesn't bring about a
20 dismissal of the action. The defense attorney can only
21 bring up the cloud in their closing arguments and try to
22 convince the jury that the drugs that are in the courtroom
23 are not the drugs that were taken on the scene, which was
24 not a very convincing argument.

25 Q. Just specifically, if in your practice if you do take

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1 a case to trial, what happens if there is a plea offer to
2 that offer?

3 A. Well, I explained to the client in this county --

4 MR. SMITH: Objection as to what he does in his
5 practice.

6 THE COURT: Well, he would know the practice of the
7 solicitor. I think the question was not what Mr. Cook did.
8 And you're right, that would not be relevant but the
9 practice of the Solicitor would I think.

10 So go ahead.

11 A. Yes, in this particular case with this solicitor, and
12 quite frankly with all of the solicitors from this county,
13 if they begin preparing for a trial and they are going to
14 expend resources and energy they give you a deadline, they
15 are adamant that if you don't accept the offer before that
16 deadline, the offer is off the table. They have already
17 expended their resources and they are going to take you to
18 a trial and that's when you have your pre-trial motions.

19 Not at the time, but now the practice is that they
20 even make you come and reject the offer on the record.

21 Q. So did you proceed to a suppression hearing in this
22 case?

23 A. Yes, I did.

24 Q. And at that point, what happened to the offer of five
25 years?

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1 A. The offer was off the table a week before -- ten days
2 before the trial started, I think.

3 Q. Did you explain that to Mr. Brown?

4 A. Yes, I did. I can have a specific memory. I was in
5 the Wendy's drive-through parking lot asking him to come
6 and talk with me in person about this; it's such a big
7 decision.

8 He would say things like, I'm not trying to hear that
9 offer. And I would say things like, it doesn't matter
10 whether you are trying to hear it or not; that's the offer,
11 it's going to expire. I want to be very clear with you. I
12 want you to come talk with me about it.

13 I said this phrase, this is the last dance. And he
14 said, so this is the last dance? I said, this is the last
15 time that you and I are going to have this conversation
16 about whether you take this offer or not. To me it seemed
17 like we had discussed it at nauseam and I was trying to say
18 over the phone whatever I could to make it crystal clear in
19 his mind that this was the last conversation we were having
20 about this.

21 Then he says, I'm not taking the offer. And I said,
22 you realize that you are going to go to a trial then.

23 He said, I realize that. I had told him on numerous
24 occasions and in this conversation in the Wendy's drive-
25 through, that you are looking at twenty-five years. The

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1 difference is twenty years. The judge has no discretion.

2 I don't think you're going there.

3 Q. And in your opinion, did Mr. Brown understand those
4 conversations?

5 A. He did. He would say things to me that would indicate
6 that he understood the conversation. He didn't never say
7 any indication that he wanted to take the five year offer.
8 Again, he would talk a lot about his child, his daughter.
9 He's got a daughter. He wants to - He can't go to jail for
10 that long, for five years, that I have to win this trial.

11 Q. Skipping ahead, did you ever discuss his prior
12 convictions from New York with Mr. Brown?

13 A. I did. I explained to him that that would enhance his
14 charges to a third offense. There is an orange book called
15 *South Carolina Drug Litigation* in South Carolina. I read
16 to him from the book to explain to him the nuances about
17 whether he was represented. Whether the charges would
18 cause him to be enhanced to a third offense and that I saw
19 the paperwork from the solicitor on the convictions.

20 Q. Did you research those convictions to see if they were
21 valid?

22 A. No, not personally. I didn't. I didn't personally
23 call the New York agency, but I did see the paperwork from
24 our solicitor and that was sufficient for me.

25 Q. Would it matter if it was a misdemeanor or a felony

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1 --

2 A. No.

3 Q. --- for enhancement purposes?

4 A. And I explained that to him. I would say things to
5 him that you have found yourself in South Carolina and our
6 drug laws are entirely different than New York and that -
7 He was amazed that he would say - He would say things to me
8 like, that was just a joint in Central Park. And I said,
9 yes I understand, but you were convicted of it and it
10 counts as a drug offense and that's when I read him the
11 definition from the orange book from the case law.

12 Q. Do you feel that you could have kept those convictions
13 out as far as enhancement purposes?

14 A. No, I don't. They were convictions.

15 MR. JOHNSON: The Court's indulgence, Your Honor.

16 Q. When is the first time, if at all, did you see Mr.
17 Brown's prior record?

18 A. Hum. Well, I mean, when I received the discovery from
19 the solicitor's office his rap sheet was in there, so
20 probably a couple of weeks after I sent him a letter of
21 representation. I can only imagine it came in. I can
22 check my file to see if my paralegal marked received on it.
23 I doubt that she did. That wasn't our practice at the
24 time, but - so the letter of representation to give you
25 kind of a date certain went out in November of 2007, so I

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1 can only imagine that I would have received his rap sheet,
2 which I'm looking at right here in the discovery, had that
3 talk with him early December of 2007. It's the main
4 parameters of this case. It's the crux of this case, that
5 you're looking at a third offense and so the first thing I
6 have to do is to look into those convictions to see if they
7 are enhanceable.

8 Just the severity of the situation whenever you are
9 representing somebody that is looking at that much time,
10 you want to drill home to them how serious this case is. I
11 don't think that he ever took it seriously but it wasn't
12 because I didn't try to explain it to him.

13 Q. So would it be safe to say that you knew well in
14 advance of the trial about his prior criminal history?

15 A. Oh yes. I knew well in advance of the trial what his
16 convictions were, where they occurred and that they would -
17 I did my research. I didn't - I did think that they would
18 cause an enhancement in his case and I explained it to him
19 in detail.

20 Q. Did you ever have any discussions with anybody other
21 than Mr. Brown about the offer in this case?

22 A. He had a girlfriend at the time and he had his child's
23 mother and I remember talking with them. I'm not sure if I
24 discussed - yeah. You know, I don't have a definite memory
25 like I do driving through the Wendy's parking lot, but I

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1 definitely remember talking with him about money because he
2 told me that they were going to finish paying the rest of
3 my fee and that's who I needed to talk to about money.

4 And yes, now I just talking about it, I have a
5 recollection - I have a definite recollection of talking
6 with his girlfriend because I was trying to get her to
7 explain to him, do you realize he's got an offer of five
8 years, that I've done all I can to get that down from
9 twelve.

10 I was rather, to be entirely honest, proud of myself
11 that I got that five year offer and in this County that's a
12 huge for trafficking, third offense. I've never seen an
13 offer that good since then in any case that I've dealt with
14 and I was trying to explain to them and I was trying to use
15 her influence with him to explain to him the importance of
16 the offer, so I definitely had a discussion with her about
17 that offer.

18 Q. One final question. After the suppression hearing had
19 finished and Judge Alford had denied the suppressing of the
20 evidence, ---

21 A. Uh-huh.

22 Q. --- did you have any other discussion with Mr. Brown
23 about the offer being off the table?

24 A. Well, to be clear, the suppression hearing occurred
25 right before the trial, so after the suppression hearing

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1 and before the trial, maybe a minute lapsed. At that point
2 the offer was off the table.

3 I'm sorry. Let me ask you to repeat your question
4 again.

5 Q. Let me rephrase my question if you don't mind. At the
6 suppression hearing, did you ever try to go to the State
7 and ask them if they would offer or keep that five year
8 offer if he could accept it at that point?

9 A. I don't have a specific memory of it, but I'm, you
10 know, sure that I did.

11 MR. SMITH: Objection. I would just ask that that be
12 the answer since he doesn't remember and rather than
13 speculate.

14 THE COURT: I agree. You can't just speculate so any
15 speculation is of no value.

16 BY MR. JOHNSON:

17 Q. Do you have any specific recollection of seeking
18 whether or not the State would re-offer the five years?

19 A. I did not have a specific, concrete recollection. I
20 have a vague memory of looking over to Jenny Desch and so
21 nothing that would hold up as far as any concrete evidence.
22 No, I don't have a specific recollection. I made puppy
23 dogs to her and she shook her head no and we went forward
24 and I didn't expect her to - she never has put an offer on
25 the table at that point.

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1 Q. In your dealings with the solicitor, after a
2 suppression hearing, have they ever re-offered that same
3 offer?

4 A. Never.

5 MR. SMITH: Objection as to the form and relevance.

6 THE COURT: Rephrase it.

7 MR. JOHNSON: Court's indulgence, Your Honor.

8 A. I can be clear and say that Jenny Desch did not --

9 MR. SMITH: Objection.

10 THE COURT: Wait just a minute. He's gonna ask
11 another question.

12 BY MR. JOHNSON:

13 Q. In your experience, after a suppression hearing, how
14 does the solicitor's office react?

15 A. They never put ---

16 MR. SMITH: Objection.

17 A. --- an offer on the table.

18 THE COURT: What was the question and what was the
19 objection?

20 MR. JOHNSON: How does the solicitor's office react
21 after a suppression hearing has been denied.

22 THE COURT: The question would be how did they act in
23 this case ---

24 MR. JOHNSON: Correct.

25 THE COURT: --- not how they generally - He wouldn't

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1 know how they act in all of them cause he' s not in all of
2 them.

3 BY MR. JOHNSON:

4 Q. How did they react in this case?

5 A. They did not put an offer on the table. There was no
6 indication. She made it clear to me that if we went to the
7 suppression hearing, the offer was off the table ten days
8 before the suppression hearing because she had to start
9 preparing for the trial.

10 MR. JOHNSON: That's all I have at this time, Your
11 Honor.

12 MR. SMITH: May I, Your Honor?

13 THE COURT: Yes, sir.

14 CROSS-EXAMINATION

15 DAVID COOK BY MR. SMITH:

16 Q. Good afternoon.

17 A. Good afternoon, sir.

18 Q. You graduated law school in May of 2006. Right?

19 A. That's correct.

20 Q. And you were admitted to the South Carolina Bar in
21 November of 2006?

22 A. That's correct.

23 Q. And prior to your admission, you were not admitted to
24 any other bar. Right?

25 A. That's correct.

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1 Q. So it would be accurate to say that when you agreed to
2 take on Mr. Brown's case in September 2007, ---

3 A. Uh-huh.

4 Q. --- you had been a member of the Bar for less than one
5 year.

6 A. That's correct.

7 Q. Right?

8 A. That's correct.

9 Q. Now, sir, when you got out of law school and you got
10 admitted, you started your own firm. Right?

11 A. Eight months after I got admitted. I was a public
12 defender for a while.

13 Q. Right. In what county?

14 A. This county.

15 Q. All right.

16 A. York County.

17 Q. Now, what kind of cases have you seen as a public
18 defender during the period of time that you got out of law
19 school up until the time that you started your practice?

20 A. Well as I mentioned, I had won a trial that somebody
21 was looking at trafficking for this amount of weight and
22 this amount of time.

23 Q. So you represented someone for -- that was exposed to
24 twenty-five years?

25 A. Yes.

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1 Q. Less than one year out of law school?

2 A. I did. I clerked with the public defender in Richland
3 County during law school the entire time. His name is Doug
4 Strickler. He gave me a really good reference to Harry
5 Dest, my boss here. I immediately started trying felony
6 cases and I had - You know there was co-counsel from the
7 public defender's office in this trial that I'm referencing
8 that I won and so I - in my opinion, when I won that trial,
9 that's when I decided to hang a shingle.

10 Moreover, I had a definite discussion with Mr. Brown
11 about my trial experience before he signed the contract and
12 I explained to him what trials I had had and what
13 experience I had had and how long I had been practicing and
14 I made it clear - I make it a point to do that with
15 everyone.

16 Q. Now, in September 2007, when you agreed to take on Mr.
17 Brown's case, did you come to an agreement as to what the
18 fee would be?

19 A. I'm sure I did.

20 Q. And the fee you quoted him was Five Thousand Dollars?

21 A. You know, I'll be entirely candid, I don't have a
22 specific recollection of the amount, but that sounds about
23 right.

24 Q. You said you have your file with you. Right?

25 A. I do.

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1 Q. And you said that you had him sign a retainer
2 agreement.

3 A. Yes. Five Thousand Dollars, November 12, 2007. I'm
4 looking at my retainer agreement now.

5 Q. All right. And when was the first time that you
6 received any money from Mr. Brown or anyone on his behalf?

7 A. You know, I don't have a recollection of that. I have
8 an accounts receivable department in my law firm and I
9 really don't like to get into money between me and my
10 clients, so I don't know your answer.

11 I know that he probably paid me - I don't get started
12 on anything until you give me a thousand dollars. I have
13 no idea how much money he gave me. I know that - I do know
14 that he didn't pay me everything before his trial and he
15 was telling he was going to wire me the money that day and
16 that - I showed up to the trial anyway.

17 Q. Now, let me ask you a question. Mr. Johnson asked you
18 when you learned or had knowledge of the prior convictions
19 and you said as early as 2007. Right?

20 A. Yeah. I said I didn't have a specific recollection,
21 but I looked in my file and I saw that I sent out my letter
22 of representation and motions for discovery in late
23 November and I said there is usually a two week turnaround.
24 I can imagine that I got his rap sheet that I was looking
25 at in the file two weeks after that, so probably in early

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1 December.

2 Q. Now, did you ask Mr. Brown whether or not he was
3 represented by counsel on both of those prior convictions?
4 Yes or no.

5 A. Yes.

6 Q. And what was his response?

7 A. I think that he said that he had a lawyer on one and
8 couldn't remember on the other, but I don't have a clear
9 memory of that conversation.

10 Q. Okay. Now you do know, sir, that a conviction where a
11 defendant is not represented by counsel cannot be used to
12 enhance a sentence? Did you know that, yes or no? And at
13 the time that you were representing him, did you know that?

14 A. At the -- When I started to take this case, I didn't
15 know that rule. I became aware of it because of this case
16 and when I saw the disposition sheet from the paperwork
17 from the solicitor, in my mind that inquiry was satisfied.

18 Q. What about the disposition sheet that satisfied you?

19 A. I can't remember right off the hand. Maybe it was
20 that I saw that he had a returning for both of them or that
21 satisfied the enhancement criteria at the time.

22 Q. You referred to a rap sheet that you saw as early as
23 2007 and you were present for the trial when the solicitor
24 introduced the actual certificate of conviction. Right?

25 A. Yes.

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1 Q. In fact, I think you objected at the time that the
2 certificates were introduced. Do you recall that?

3 A. Yes. I haven't read the transcript from this trial
4 before this hearing today, but I have a recollection of
5 making that objection.

6 Q. Let me ask you a question. Did you actually read Mr.
7 Brown's PCR application?

8 A. Yes, I did.

9 Q. And so how did you come to read it?

10 A. The Attorney General forwarded it to me as part of the
11 discovery materials.

12 Q. So you --

13 A. The packet.

14 Q. So you knew what the issues would be today?

15 A. Yes. I read every word of it.

16 Q. Did Mr. Johnson ask you for any documents to support
17 any of the claims or statements that you are making here
18 today?

19 A. No. Well, if I may. I received a subpoena from
20 somebody to bring my file.

21 MR. JOHNSON: Your Honor, if I may interject. It is
22 not our burden of proof to prove. It is his burden of
23 proof to show that he is ineffective.

24 THE COURT: I understand.

25 MR. JOHNSON: He does not have to prove anything in

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1 this case.

2 THE COURT: I understand.

3 MR. JOHNSON: Thank you.

4 A. If I may, may I continue.

5 Q. Do you understand the question that I'm asking?

6 A. No, I don't.

7 Q. All right. Let me try and rephrase it. I'll withdraw
8 the question.

9 A. Sure. If I may clarify. I received a subpoena from
10 somebody.

11 Was it you? I'm trying to find it in my file. I
12 received a subpoena from the Attorney General to bring my
13 file because you had asked that he - did the Attorney
14 General ask me to bring any documents to support my claims.

15 MR. SMITH: May I have one minute please, Your Honor?

16 THE COURT: Yes. While you are doing that,
17 Would you hand me the Exhibits?

18 (EXHIBITS RECEIVED UP BY THE COURT.)

19 THE COURT: Thank you.

20 Q. When you got the rap sheet in 2007, did you review the
21 New York Penal Law statute that it referred to?

22 A. No.

23 Q. So you didn't review it. You didn't make a copy or
24 anything to put in your file.

25 A. No.

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1 Q. Right?

2 A. That's correct.

3 Q. Did you order a transcript of the guilty plea?

4 A. No.

5 Q. Do you know whether or not it was a guilty plea or a
6 trial?

7 A. At the time I did. I can't remember standing right
8 here. I think both of them were pleas.

9 Q. You just --

10 A. And the reason I didn't order any of that is because I
11 saw the paperwork from the solicitor that satisfied my
12 inquiry.

13 Q. All right. First of all, describe for the Court what
14 that paperwork was that you saw from the solicitor.

15 A. Well, to be entirely honest, it's been a long time
16 since that trial, so I can't remember the specific
17 paperwork that I saw from the solicitor. I mean, it was
18 disposition sheets. I can --

19 Q. Okay.

20 A. I believe it was what the solicitor ultimately offered
21 at trial so that should be part of the trial record.

22 MR. SMITH: Your Honor, with the Court's permission.

23 THE COURT: Yes, sir.

24 MR. SMITH: Your Honor, with the Court's permission I'm
25 going to see if the witness' recollection can be refreshed

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1 ---

2 THE COURT: Sure.

3 MR. SMITH: --- with the transcript of the proceeding.

4 I am actually going to show the witness, and I've flagged

5 it for Mr. Johnson, a transcript of the trial which is

6 reflected in the record on appeal, Pages 1 and 2.

7 Q. You can read the first and second page to yourself.

8 (WITNESS READING TRANSCRIPT.)

9 A. Okay.

10 Q. Has your recollection been refreshed as to what it was
11 that the solicitor introduced into evidence as it pertains
12 to Mr. Brown's convictions?

13 A. It is.

14 Q. May I have the document please? Thank you.

15 Now that your recollection has been refreshed, sir,
16 what was it that she introduced into evidence?

17 A. She introduced the sentencing sheet and I made an
18 objection that it didn't have any reference on those two
19 drug offenses. And then she entered the New York Code that
20 she got through Lexus that stated that the Section numbers
21 that were cited on the sentencing sheet did reference drug
22 convictions.

23 Q. And that was the extent of the documents that she
24 introduced. Right?

25 A. Correct.

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1 Q. Now, you said that based on those documents that you
2 were satisfied that these convictions were okay. Right?

3 A. That's correct.

4 Q. And in fact you know as an attorney you have an actual
5 duty to conduct adequate investigations. Right?

6 A. Right.

7 Q. And as you understand now after practicing for eight
8 years, that includes the duty to conduct an adequate
9 investigation into your client's criminal history. Right?

10 And prior convictions. Right?

11 A. Right.

12 Q. Because you know also, sir, that an unconstitutional
13 conviction cannot be used to enhance a sentence. Right?

14 A. Right.

15 Q. And so, are you familiar with the case of *Boykin*
16 *versus Alabama*?

17 A. No.

18 Q. All right. You do know that a conviction based on a
19 guilty plea has to be knowing, intelligent and voluntary.

20 A. Yes.

21 Q. You do know that?

22 A. Uh-huh.

23 Q. In fact, that's something that they teach very early
24 on in the public defender's office. Right?

25 A. Correct.

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1 Q. And as you sit here today with eight years of
2 experience, you know that the way for any attorney to
3 conduct an investigation as to whether or not a plea is
4 adequate is to obtain a transcript of the plea. Right?

5 A. Well --

6 Q. Yes or no?

7 A. No.

8 Q. All right.

9 MR. JOHNSON: May he be allowed to explain that?

10 A. Yeah.

11 BY MR. SMITH:

12 Q. Yes. Go ahead and explain your answer.

13 A. Sure. I mean, you are asking me a lot of leading
14 questions and you are asking me to give you yes or no
15 answers and so I'm trying to do the best I can, but I would
16 like to explain this that - There are numerous ways to
17 determine whether the convictions were constitutional or
18 not. I did not look into the - Apparently from what I am
19 seeing with my recollection refreshed with your
20 questioning, I would maintain that I can't remember right
21 now on this stand eight years later, five years later, but
22 something made me think that I had adequately researched
23 that.

24 Now, I'm not quite sure and what your line of
25 questioning is in regards to and I can't ask you questions,

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1 so that's how I'll answer the question that you just asked
2 me.

3 Q. Did you obtain a transcript of the guilty pleas?

4 A. No, I did not.

5 Q. At the time that you were advising Mr. Brown about his
6 case, did you have any discussion with him ---

7 A. Yes.

8 Q. --- about how you would attack the prior convictions,
9 if at all?

10 A. Now, I remembered and I wanted to interrupt you but I
11 didn't. I had several conversations with Mr. Brown about
12 his convictions in New York and through those
13 conversations, without researching granted, I determined
14 that they were constitutional; that they were knowingly,
15 voluntarily and intelligently made.

16 Q. Now, the conclusion that you are right, that, that
17 they were knowing, intelligent and voluntary, what was that
18 based on?

19 A. I'm pretty sure that he told me that he had lawyers.

20 Q. So it is your contention that once you determine that
21 he was represented, that there was no possible way that his
22 plea was not knowing, intelligent and voluntary?

23 A. I'm sorry. Could you state that again?

24 Q. You came to the conclusion that his plea was
25 constitutional. Right?

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1 A. Yes.

2 Q. And you said it was based on your discussion with Mr.
3 Brown when he told he had a lawyer. Right?

4 A. I mean, I don't have a -- yes. I don't have a specific
5 memory but of --

6 Q. Okay. Can we agree that you didn't order the
7 transcript?

8 A. Yes. We can agree I didn't order the transcript.

9 Q. Can we agree that you never read a transcript from
10 anywhere that would permit you to infer or conclude that
11 the plea was knowing, intelligent and voluntary?

12 A. That's a complex question. I agree that I never read
13 a transcript and that the transcript on its face value
14 would permit me to know those things you are implying, but
15 yes I agree to that. I'm saying that reading a transcript
16 is not the only way to determine whether the convictions
17 were constitutional however.

18 Q. I understand that.

19 A. Yeah.

20 Q. And what way did you utilize to determine whether or
21 not it was constitutional?

22 A. Through discussions with my client. Through looking
23 at the conviction sheets and looking them up with the
24 statutes that said that they were drug convictions.

25 Q. All right. Now, do you still do criminal defense

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1 work?

2 A. Uh-huh.

3 THE COURT: You need to answer.

4 A. Yes, sir. I do.

5 Q. And have you ever ordered the transcript of a prior
6 conviction for a client?

7 A. No, I haven't.

8 Q. So whenever - You knew very early on in this case that
9 Mr. Brown was facing twenty-five years. Right?

10 A. Right.

11 Q. And you knew that sentence was mandatory. Right?

12 A. Yes.

13 Q. You knew that even if the judge liked him and if he
14 was convicted, that he would get twenty-five years. Right?

15 A. I never took into consideration whether the judge
16 liked him or not.

17 Q. All right. But you knew he had to get twenty-five?

18 A. Yes.

19 Q. And you didn't order the transcript of either plea.
20 Right?

21 A. Correct.

22 Q. Did you ask the solicitor if she have a copy of the
23 transcript? Well just yes or no.

24 A. I'm trying to recollect.

25 Q. Oh.

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1 A. I had numerous - I had several conversations with the
2 solicitor on this point. I cannot remember whether she
3 specifically - When you say transcript, do you mean a
4 transcript of the plea itself?

5 Q. Yes. The colloquy.

6 A. No. She never showed me any transcript of the plea
7 itself.

8 Q. All right. And would your answers change based on now
9 your present understanding of what I was referring to?

10 A. I'm not certain that there would even be a transcript.
11 That was in central - that was a magistrate charge from New
12 York eight years before this trial. But to be entirely
13 honest with you so I'm not - are you - I'm not certain that
14 a transcript existed for me to review.

15 I know that in our state magistrates don't keep
16 transcripts past five years, and even then it is on a tape.
17 It's never written down. No, I didn't look into it whether
18 I should or not, but I'll be honest with you, the thought
19 never crossed my mind that that's the only way I can
20 confirm whether he's - I assumed that if he had an attorney
21 and they were convictions and I saw the sentencing sheet
22 and I saw the code that referenced that they were drug
23 convictions, that that would be adequate for the state to
24 enhance. I tried to object as best I could during his
25 trial as you pointed out on the transcript.

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1 Q. You acknowledged earlier when I questioned you that
2 you know a lawyer has a duty to investigate?

3 A. Sure, but I'm not sure that duty includes that he's
4 mandatory that he has to read the transcripts of all prior
5 convictions of his client.

6 Q. Even if he is looking at twenty-five years?

7 A. I'm not sure that's mandatory but I do that to be
8 effective - to provide effective assistance of counsel.

9 Q. All right. What did you do to determine whether or
10 not the prior pleas were valid?

11 A. Well, I've already stated that several times. I saw
12 the disposition paperwork from the solicitor. I saw the
13 code that linked it up. And I talked with my client. He
14 said that he was represented and I think, but I'm not sure,
15 that I have a recollection of the solicitor telling me that
16 she confirmed he was represented as well.

17 Q. Okay. Just so that we have an understanding, you
18 made reference to the fact that he was represented by
19 counsel and so you do know that if he is not, that would be
20 just one basis to challenge the prior conviction. Right?

21 A. Correct.

22 Q. But you also know that there are other reasons a
23 guilty plea could be unconstitutional having nothing to do
24 with counsel. Right?

25 A. Right.

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1 Q. Right. You understand as an experienced criminal
2 defense lawyer what a guilty plea is. Right?

3 A. Yes, but I'm not sure where you are going with this
4 line of questioning.

5 Q. But you do understand what a guilty plea is. Right?

6 A. I do understand what a guilty plea is.

7 Q. You understand that it's a waiver of the right to a
8 trial. Right?

9 A. Right.

10 Q. And so you also understand that if a defendant is
11 coerced into a guilty plea, it's not valid. Right?

12 A. I understand that.

13 Q. And you do know that whether or not -- withdrawn.

14 By the way, you've taken a number of guilty pleas with
15 clients. Right?

16 A. Yes.

17 Q. And you know that the judge goes through a particular
18 colloquy to determine whether or not the guilty plea is
19 knowing, intelligent and voluntary. Right?

20 A. And I've had numerous clients that have maintained
21 that I coerced them into a plea after they maintain on the
22 record that I didn't.

23 Q. You do know, sir, that the judge goes through a
24 particular colloquy to ascertain to ensure that the guilty
25 plea is knowing, intelligent and voluntary. Right?

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1 A. Correct.

2 Q. And you do know that normally the judge would say,
3 "Mr. Defendant, you have a right to a trial. Do you
4 understand that?" Right?

5 A. Uh-huh. Yes.

6 Q. You know that by giving up - by pleading guilty, you
7 are giving up the right to a trial. Right?

8 A. Right.

9 Q. And you know that those questions and the answers that
10 are given are used to determine whether or not a guilty
11 plea was entered knowingly, intelligently and voluntarily.

12 Right? You do know that?

13 A. As one method.

14 Q. Oh. And so one method to actually fulfill your duty
15 and obligation to ascertain whether or not your client has
16 grounds to challenge a conviction is to order the
17 transcript. Right?

18 A. Right. That's one method.

19 Q. And you didn't order the transcript?

20 A. No, I didn't.

21 Q. Okay. You would agree that if the transcript showed,
22 for example, that the plea was invalid that you would be
23 deficient. Right?

24 A. No.

25 Q. Why not?

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1 A. State your question again please, sir.

2 Q. I said, you do know that the endorsed transcript of
3 the guilty plea of Mr. Brown's prior convictions were
4 obtained and they show that his pleas were not knowing,
5 intelligent and voluntary and you didn't challenge it ---

6 A. Uh-huh.

7 Q. --- that you would be deficient. Right?

8 A. Right.

9 Q. Okay. Because you conducted no investigation at all
10 into the prior convictions. Right?

11 A. Right, but I do retract my answer. I don't agree
12 earlier when you said right and I said right, that if his
13 New York convictions - if the transcript showed that they
14 were unconstitutional, my line of thought would be that the
15 judge in New York wouldn't have taken the plea it seems
16 like.

17 Q. You do know that there are unconstitutional pleas.
18 Right?

19 A. Yes. I mean, in theory. I've never seen one but I've
20 heard about 'em.

21 Q. You've also read cases where the Supreme Court of
22 South Carolina, the United Supreme Court has actually
23 invalidated guilty pleas.

24 A. Uh-huh.

25 Q. And those were --

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1 THE COURT: You have to say - -

2 A. Yes. I'm sorry, Your Honor.

3 Q. And those were pleas that were taken before judges.

4 A. Yes.

5 Q. Now, --

6 MR. SMITH: May I approach, Your Honor?

7 THE COURT: You may.

8 MR. SMITH: Thank you. And if I can have Applicant's
9 One and Two.

10 Q. Sir, I am going to show you Applicant's Exhibit Number
11 Two.

12 MR. JOHNSON: And just for the record, Your Honor.
13 Today is the first day I've ever seen these transcripts.
14 He had not provided them to me during - and even though I
15 do not object to their coming in, this is a complete
16 surprise. I have not seen these transcripts.

17 THE COURT: Well their in the record now.

18 MR. JOHNSON: Correct. I understand. Just trying to
19 cover my bases, Your Honor.

20 THE COURT: Okay. They're covered.

21 Which exhibit is that? Two?

22 MR. SMITH: Yes.

23 A. Okay. I have read the transcript you have handed to
24 me, sir.

25 Q. All right. Now, Applicant's Two, is that a transcript

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1 - By the way, if you look at the first page, is there
2 what's called a docket number on that?

3 A. There is.

4 Q. What is the docket number on Applicant's Two?

5 A. 96-X-054710.

6 Q. And so is that the docket number that corresponds to
7 one of Mr. Brown's convictions that was used to enhance the
8 sentence?

9 A. You would have to show me a copy of the plea
10 transcript again, but I think that it is.

11 Q. I think you have the plea transcript in your hand.

12 A. You asked if this corresponds to one of the
13 convictions that resulted in his enhancement and I would
14 need the transcript from his trial, I meant to say, to
15 confirm that. You showed it to me just a moment ago.

16 Q. Oh, okay. I'm sorry.

17 A. I'm not trying to be difficult, but I don't see
18 anything in the material that you handed me that
19 corresponds with this docket number.

20 Q. That's fair. What about you said earlier in your
21 testimony that as early as 2007 you had the rap sheet. Do
22 you have it in your file still?

23 A. Yes. Would you like for - Yes, I do have it in my
24 file still and I am looking to see if it indicates that
25 this docket number is the same. Yes it's the same docket

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1 number as one of his convictions.

2 Q. So contrary to what you said earlier, you see that
3 there is actually a transcript in existence today. Right?

4 A. I understand, yeah.

5 Q. All right.

6 A. Nothing in this transcript shows me at face value that
7 I've seen yet that this plea is unconstitutional.

8 Q. All right. That's fair. You said earlier that you
9 know as an experienced criminal defense lawyer that a
10 guilty plea is a waiver of a right to a trial. Right?

11 A. Yes.

12 Q. All right. So if we can go over the Applicant's Two
13 that you have, you can point to the transcript where Mr.
14 Brown is aware of his right to a trial and he waives it.

15 A. I'm sorry. Did you ask me a question?

16 Q. Yes.

17 A. Could you repeat it?

18 Q. You review Applicant's Two, the transcript, you can
19 tell the Court where in that transcript Mr. Brown is made
20 aware of his right to a trial and he waives or he gives it
21 up.

22 A. Well, his attorney waives the reading of the rights.
23 I assume that Mr. Raskin is his attorney in this hearing
24 and the court asks do you waive your reading of the rights
25 but not the rights thereunder and Mr. Raskin says yes.

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1 Does that answer your question?

2 Q. No, it doesn't.

3 A. I'm sorry then. Are you asking me is there anywhere
4 in this transcript that shows that Mr. Brown waived his
5 right to a trial?

6 Q. Yes.

7 A. If you don't think that my last answer sufficed, then
8 - Well, I want to maintain that I think that his attorney
9 right here waived those rights for him.

10 Q. Okay. So you are saying to this court had you
11 obtained a copy of this transcript, you would not have
12 challenged Mr. Brown's prior convictions?

13 A. I mean, I would have challenged Mr. Brown's prior - I
14 did challenge Mr. Brown's prior convictions didn't I? I
15 would have challenged them as hard as I could have even had
16 I seen this but you are asking me a different question. As
17 an attorney do I think that this transcript shows that any
18 constitutional defects on his previous convictions no.

19 Q. No. That's not my question.

20 A. But I still would have used it to try to - I'm not
21 sure at the time that it would have occurred to my mind
22 like it has occurred to your's, that this sentence proves
23 that he didn't get a chance to waive his right to a trial.

24 Q. I'm gonna show you Applicant's Exhibit One and can you
25 say - Can you read the docket number on Applicant's One?

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1 A. Yes, sir. It's 94X041963, which corresponds with the
2 other enhanceable offence from his rap sheet which lists
3 that same docket number.

4 Q. All right. Thank you.

5 MR. SMITH: May I have one moment, please, Your Honor?

6 THE COURT: Yes.

7 Q. During the period of time that you represented Mr.
8 Brown between September through March - September 2007 to
9 March 2008, you said when you were questioned by Mr.
10 Johnson that numerous times you told him that he was
11 exposed to or that he was facing twenty-five years. Right?

12 A. Uh-huh. Yes.

13 Q. Did you, sir, write Mr. Brown any letters conveying
14 that information?

15 A. If I may review the file.

16 Q. Yes, sir.

17 A. Yes. Well, when did you say his trial date was?

18 Q. March 17th or 18th of 2008. Yeah, prior. Remember
19 the period of time is September to March of 2008.

20 A. No. I don't have a letter in my file. No.

21 Q. All right. Now, was there a time that there was an
22 offer to Mr. Brown of ten years, if you recall?

23 A. Ten years? I don't have a specific recollection. I
24 know that there was one that was more than eight years and
25 at first I talked Solicitor Desch down to eight years and

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1 then I talked her down to five.

2 Q. All right. When --

3 A. I thought his first offer was twelve that I said
4 earlier. It might have been ten.

5 Q. Do you have any indication the month and year that the
6 offer of five years was made to Mr. Brown?

7 A. The month?

8 Q. Which month? The five year offer was made very close
9 to the time of the trial. Correct?

10 A. No, no. It was made probably a month or two before
11 the trial. Maybe around February.

12 Q. There came a time that Mr. Brown was remanded or put
13 into custody just before the trial. Right?

14 A. I think so, yes.

15 Q. And while the trial was going on, he was in custody.
16 Right?

17 A. Right.

18 Q. Just prior to the start of trial and before the
19 suppression hearing, was there an offer of five years for
20 Mr. Brown to plead guilty of?

21 A. Yes, there was just before -- Well, no. I would say
22 that when I -- She, Solicitor Desh pulled that offer
23 probably about five to ten days before the suppression
24 hearing.

25 Q. Okay.

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1 A. I had discussions with him for at least two months
2 before that trial, if my memory serves me correct, asking
3 him to take that five year offer.

4 MR. SMITH: Your Honor, with the Court's permission I
5 will have this document deemed marked Applicant's Three. I
6 am not going to admit it. I don't know.

7 (WHEREUPON, APPLICANT'S EXHIBIT NUMBER THREE REMARKED
8 FOR IDENTIFICATION.)

9 Q. Sir, if you will read that over.

10 MR. JOHNSON: And just for the Court's record, there
11 is a date written on that, however he cannot authenticate
12 it. And that just seems to be a piece of paper with typing
13 on it but a written date. So if he is going to reference
14 to any date that was sent, I would object to that.

15 MR. SMITH: No, I'm not going to do that.

16 A. All right, I see this document you handed me.

17 Q. All right. Do you know what that document is?

18 A. Actually, I don't. It looks like - Is it a printout
19 from an email?

20 Q. I don't know. You tell me.

21 A. I'm not sure. You might have gotten it from my file.

22 Q. Do you recall receiving such an email?

23 A. No.

24 Q. All right.

25 MR. SMITH: And may I have this marked as Applicant's

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1 Four, I guess?

2 MADAME COURT REPORTER: Is three in?

3 MR. SMITH: No. So we'll have this marked as three
4 with the Court's permission.

5 THE COURT: In without objection.

6 Without objection?

7 MR. SMITH: No, I didn't move it in yet.

8 THE COURT: I'm sorry.

9 (WHEREUPON, APPLICANT'S THREE PREMARKED FOR
10 IDENTIFICATION.)

11 MR. SMITH: With the Court's permission, I'll approach
12 the witness handing him Exhibit Three.

13 Q. Do you recognize that, sir?

14 A. Uh-huh. Yes, I do. Well, I just started reading it.
15 Let's see.

16 (PAUSE.)

17 A. Okay, I've read that letter.

18 Q. Now, do you recognize Applicant's Three?

19 A. Yes. It's a letter that I sent to Mr. Brown on
20 January 24th of 2008.

21 Q. All right. And is that your signature on the bottom?

22 A. That's my paralegal's signature at the time, yes.

23 Q. But it came - It's on your letterhead?

24 A. It's on my letterhead.

25 MR. SMITH: Your Honor, I move Applicant's Three into

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1 evidence.

2 MR. JOHNSON: No objection, Your Honor.

3 THE COURT: Without objection.

4 (WHEREUPON, APPLICANT'S EXHIBIT NUMBER THREE,
5 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

6 MR. SMITH: Your Honor, with the Court's permission, I
7 would ask the witness to read the letter into the record.

8 A. Okay. "Dear Devon, I've tried to help you as much as
9 possible but there is currently a bench warrant out on you
10 for failure to appear at your bond returnable date. I
11 tried to call regarding this date but the phone has been
12 disconnected.

13 I have an offer from the solicitor but I can't give it
14 to you until I get paid. I will give you two days to call
15 me after receipt of this letter but if I haven't heard from
16 you by then, I'll be forced to make a Motion to be Relieved
17 as Counsel. If you remember, I sent in the papers on you
18 already with the understanding that you were going to pay
19 me and the reason you haven't had a bench warrant until now
20 is because I've been holding the solicitors at bay.

21 If you contact me, I can get the bench warrant lifted.
22 You know I will work with you on payments obviously but as
23 of now I haven't received a penny. Please call as soon as
24 you get this letter and let me know what is going on.
25 Sincerely, David Cook."

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1 Q. On Applicant's Three, did you copy that letter to
2 anyone?

3 A. It says it was copied to the York County Solicitor's
4 office, but I doubt very seriously that it was because
5 that's not a letter normally that I would copy to the
6 solicitor's office and that paralegal was new in those
7 days.

8 Q. Now, is that letter dated?

9 A. January 24th, 2008.

10 Q. All right. So according to Applicant's Three, January
11 2008, Mr. Brown did not give you any money?

12 A. That's correct.

13 Q. And, sir, according to that letter, there was a
14 pending bench warrant for Mr. Brown's arrest. Right?

15 A. According to the letter.

16 Q. And, sir, according to this letter you were also as
17 late as January 2008, two months before the trial, trying
18 to collect money from Mr. Brown. Right?

19 A. Right.

20 Q. Now, in that letter did you say to Mr. Brown that he
21 was facing twenty-five years?

22 A. No, I didn't. But I told him on numerous occasions in
23 conversations in face and over the phone.

24 Q. But there isn't a single written correspondence you
25 have reflecting --

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1 A. No, unfortunately there is not.

2 Q. In fact, there is not even a notation in your notes
3 that you told Mr. Brown that he was looking at twenty-five
4 years.

5 A. I can imagine --

6 Q. If you understand -- Do you understand the question?

7 A. Yes I understand your question.

8 Q. All right. For example, if you have a meeting with
9 your client in your office ---

10 A. Uh-huh.

11 Q. --- and you are trying to convince him to take a plea
12 -- And by the way, wasn't it your professional opinion that
13 anyone who is refusing a five year offer on a case where he
14 is exposed to a mandatory twenty-five years, he's
15 committing suicide based on the nature of this case that
16 you understood it to be?

17 A. Yes.

18 Q. And you knew that the solicitor had a very strong
19 case. Right?

20 A. I didn't write him a letter. Perhaps I should have.
21 At the time I didn't think that my credibility would be
22 suspect, but I can tell you, certainly under oath, he knew
23 exactly what his offers were throughout the entire pendency
24 of this case.

25 Q. Well, I just object to what he knew as to the form --

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1 Strike that part, Your Honor.

2 THE COURT: I can parse through all that.

3 Q. Would it surprise you to know that - You made
4 reference earlier to Mr. Brown's girlfriend. Right?

5 A. Yes.

6 Q. And you said you spoke with her.

7 A. Uh-huh.

8 Q. Would it surprise you to know that she didn't know
9 that Mr. Brown was exposed to twenty-five years.

10 MR. JOHNSON: Objection to whatever Ms. --

11 A. Yeah. I don't understand your question. I told --

12 THE COURT: Wait, wait, wait, wait, wait. I sustain
13 the objection. He would not know what ---

14 MR. SMITH: I withdraw the question.

15 THE COURT: --- third parties would or would not have
16 - would or would not know.

17 Q. You were obviously in the courtroom when the verdict
18 came back. Right?

19 A. Yes.

20 Q. Did you - And you were in the courtroom when Judge
21 Alford sentenced Mr. Brown. Do you recall the reaction of
22 his girlfriend?

23 A. No.

24 Q. Do you recall the reaction of anyone ---

25 A. No.

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1 Q. --- in the courtroom?

2 MR. SMITH: Just a few more questions, Your Honor.

3 THE COURT: Okay.

4 Q. And, sir, when you tried Mr. Brown's case, this was
5 your second trial that you had?

6 A. Incorrect. It was my second trial for trafficking for
7 thirty years. I had numerous --

8 Q. How many trials had you had before that?

9 A. Well, do you mean in General Sessions court or do you
10 mean in Magistrate court?

11 Q. It doesn't matter. How many jury trials did you have
12 prior to March of 2008?

13 A. I am hesitant to render you a number. Probably fifty.
14 I don't know. I mean, I tried a lot of cases at the
15 Magistrate level and I probably had three, maybe four,
16 General Sessions trials at that point. Again, I told him
17 the extent of my expertise.

18 Q. Now, at the time of the suppression hearing, you told
19 your client, Mr. Brown, that you believed he had a shot at
20 possibly winning the suppression motion. Right?

21 A. No. I never told him that he had a shot at winning
22 anything.

23 Q. Oh, well you earlier expressed the notion that somehow
24 you saw some discrepancy with the chain of custody.

25 A. Right but I - To be clear I said in my earlier

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1 testimony that that's not fatal. A defense attorney can
2 bring that out in closing arguments, but it's not
3 suppressible.

4 Q. Did you discuss with Mr. Brown what the defense at
5 trial would be?

6 A. Yeah. I discussed with him the paucity of defense for
7 his trial.

8 Q. Which was what?

9 A. That he - I guess - I mean, paucity means lack of
10 defense. There's not much of a defense at all, I tried to
11 show him. I said that I would try to blur the lines as
12 much as I could with the prior bad acts.

13 Q. I don't understand. What do you mean prior bad acts?

14 A. With the fact that there was another woman's name
15 mentioned in the discovery. But you need to understand, I
16 told him that I didn't think I would be successful with a
17 trial.

18 Q. So as you testify here today, would it be fair to say
19 that there was no defense in your opinion?

20 A. I don't understand your question. I mean, to a good
21 defense attorney, there is some type of defense in every
22 case. Whether a jury will buy it or not is an entirely
23 different matter.

24 Q. What was your defense?

25 A. You have to understand. My testimony to you was I

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1 conveyed to Mr. Brown I didn't think he should try the case
2 because I didn't think there was a defense. When he made
3 me go to the trial, I tried to blur the lines as much as I
4 could with the search warrant; with the drug dogs; with the
5 prior bad acts; with the chain of custody. You've read the
6 transcript. That's me trying as hard as I can to win a
7 trial.

8 Q. Okay. What was the defense?

9 A. I don't understand your question.

10 Q. All right. You said you read the PCR application.

11 Right?

12 A. Yes.

13 Q. You understand what the issues are in these
14 proceedings. Right?

15 A. Well, just because I read the application doesn't mean
16 I understand what these issues are.

17 MR. JOHNSON: Your Honor, the issues in that that are
18 listed in the application, Your Honor, are outside the
19 statute of limitations is the State's argument. Lafler v.
20 Cooper was only brought up after - or subsequently pleading
21 by Mr. Smith even, so he would not have received a copy of
22 that.

23 MR. SMITH: No, I'm just speaking of the Lafler issue
24 if I misspoke.

25 MR. JOHNSON: And he did not receive a copy of that

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1 those pleadings.

2 MR. SMITH: I did not know that.

3 A. When I refer to the PCR application, I mean the
4 initial PCR application.

5 MR. SMITH: I don't have anything, Your Honor.

6 THE COURT: Is there an amended application? I'm not
7 sure I have an amended - I've got an application in the
8 file, Number 7-2012.

9 MR. JOHNSON: I believe it was a Reply to the
10 Conditional Order of Dismissal. Was this ever filed?

11 MR. SMITH: Right. I'm not referring to the Reply in
12 Opposition to the COD. I'm referring to the actual
13 application. I'll go through it with the witness and we'll
14 see.

15 THE COURT: Well, that's fine but I'm just trying to
16 make sure I have everything. The Lafler issue was raised
17 not in the initial application but in a subsequent
18 application?

19 MR. JOHNSON: To get over the statute of limitations.
20 I don't even have a copy.

21 THE COURT: That's what I'm saying is I don't have
22 that in the file I don't see. It may be.

23 MR. JOHNSON: No. I do not have it.

24 MR. SMITH: Just so I can try and clarify --

25 THE COURT: Yes, I do. I think I do have it here.

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1 Reply in Opposition to Conditional Order of Dismissal.

2 MR. JOHNSON: Yes, sir.

3 THE COURT: I've got it. Okay. Sorry. I'm with you
4 now.

5 MR. SMITH: And with the Court's permission, I think
6 this could be marked as a Court's exhibit because it's the
7 actual application itself.

8 THE COURT: Well it's part of the record anyway.

9 MR. SMITH: Right.

10 THE COURT: I have it. But go ahead if you wish to
11 add it, that will be fine.

12 MR. SMITH: I'm going to show the witness and direct
13 his attention to the application for post-conviction
14 relief, stamped filed with the court October 24th of 2012,
15 Page Three of the application, Item 10.A.

16 Q. And by the way, sir, you can take a look at that and
17 see if that is the application that you read.

18 A. Okay. I've read 10.A and I've read that before
19 today's trial. I've had access to these papers.

20 Q. Right. And now that portion that you just read, it
21 doesn't refer to the case Lafler v. Cooper but it deals
22 with the issue that was raised in that case. Right?

23 A. I don't know.

24 Q. Have you read Lafler v. Cooper?

25 A. No, I have not.

APPENDIX 95

DAVID COOK: CROSS BY MR. SMITH

-81-

1 Q. Okay. Thank you. Let's agree that you gave Mr. Brown
2 sound advice to accept an offer of five years. Can we
3 agree, sir?

4 A. Sure.

5 Q. Okay. And that is in part because the solicitor had a
6 strong case. Right?

7 A. Right.

8 Q. The question is whether or not you made him aware that
9 he was facing a mandatory twenty-five year sentence.

10 A. I don't know how to be more clear about it. I made
11 him crystal clear aware of that throughout the entire
12 representation of his case.

13 Q. Now, at any point throughout the proceedings, did you
14 hear the Court or the Solicitor, or yourself, put on the
15 record that Mr. Brown was facing twenty-five years in
16 prison if he were to go to trial and lose?

17 A. No. Didn't write him a letter either.

18 Q. Oh. You didn't write him a letter --

19 A. Didn't write a letter. Didn't give it -- Just conveyed
20 it to him orally.

21 Q. All right. And you said there is nothing in your file
22 showing that was done.

23 A. Well, if you want, I made -- I didn't include it in my
24 file because you asked for a copy of my file but there may
25 very well be an email, which I've saved every email since

APPENDIX 96

DAVID COOK: CROSS BY MR. SMITH

-82-

1 I've opened my firm, that I've sent to Mr. Brown or the
2 solicitor confirming that I just had a conversation with
3 him yesterday and conveyed the offer. I - you know - But
4 I don't have it to present to you today so all I'm
5 testifying is that I told him that.

6 Q. Well, you do understand whether or not you conveyed
7 the offer to him is not in dispute.

8 A. No, I didn't understand that. I thought that was in
9 dispute. I thought you were alleging that I never told him
10 what the offer was.

11 Q. No. Mr. Brown has testified under oath ---

12 A. Yes.

13 Q. --- you told him about the offer of five years.

14 A. Then I don't know what point you are trying to make,
15 sir. And I'm not trying to be evasive.

16 THE COURT: No he just ask did you ever tell him he
17 was looking at twenty-five years based on the charge. As I
18 understand the question.

19 A. Yes.

20 Q. Right.

21 A. I told him that.

22 Q. And did you tell him that - By the way, you were asked
23 earlier whether or not after the suppression hearing did
24 you turn to Mr. Brown and say, you know what, we've lost
25 the suppressions hearing, and you don't have any chance of

APPENDIX 97

DAVID COOK: CROSS BY MR. SMITH

-83-

1 winning this trial given the video. You should take a
2 plea; otherwise you will get twenty-five years. Did you
3 say that to him?

4 A. No. If you will check, my testimony earlier was that
5 with these solicitors in this County, it's given that if
6 you lose your suppression hearing, you are going to a
7 trial.

8 Q. So --

9 A. And I explained to him before we -- I explained to him
10 ten days before we went into that suppression hearing that
11 if you don't take this offer today, the train is leaving
12 the station it's our last dance. You are not going to win
13 the suppression hearing. You are not going to get an offer
14 on the table between the suppression hearing and the trial.
15 Your trial will start in thirty seconds after the gavel
16 swings on your suppression hearing.

17 Q. So what you are telling this Court is even though that
18 you had -- By the way, do you know how old Mr. Brown was at
19 the time that you represented him?

20 MR. JOHNSON: Objection. That's irrelevant.

21 THE COURT: I'll go ahead and allow it. Probably part
22 of the record anyway.

23 A. Early twenties?

24 Q. And so you had a client in his early twenties facing
25 twenty-five years and based on practice you decided that

APPENDIX 98

DAVID COOK: CROSS BY MR. SMITH
REDIRECT BY MR. JOHNSON

-84-

1 you were not going to make any efforts to try and resolve
2 his case on more favorable terms knowing that the solicitor
3 had a strong case. Is that what you are saying?

4 A. I don't understand your question and I won't - I'm
5 trying to.

6 Q. All right. You made no efforts to try and get him the
7 five years after the suppression hearing. Right?

8 A. I probably made a puppy dog face like I said.

9 Q. Just for the record, what does that mean?

10 A. No. I made no efforts whatsoever to get him the offer
11 back on the table after the suppression hearing because it
12 was my understanding in this area that there is no offer
13 after the suppression hearing.

14 Q. Did Ms. Desch, the solicitor, tell you that?

15 A. Crystal clear on numerous occasions as well as every
16 other solicitor.

17 Q. All right.

18 MR. SMITH: I have no further questions, Your Honor.

19 MR. JOHNSON: Just briefly, Your Honor.

20 REDIRECT EXAMINATION

21 DAVID COOK BY MR. JOHNSON:

22 Q. Mr. Cook, did Mr. Brown explained to you that he had
23 two prior convictions in New York?

24 A. Yes, sir.

25 Q. Did he ever express concern to you about those

APPENDIX 99

DAVID COOK: REDIRECT BY MR. JOHNSON

-85-

1 convictions?

2 MR. SMITH: Objection as to the form and actually I
3 don't even understand the question.

4 THE COURT: All right. Rephrase the question.

5 Q. Did he ever tell you they were un-counseled
6 convictions?

7 A. No.

8 MR. SMITH: Objection.

9 Q. What did he tell you --

10 THE COURT: I overrule the objection.

11 Q. What did he tell you about his prior convictions?

12 A. Sure. Let me recount those conversations, the nature
13 of them, the gist. I would have conversations with Devon
14 that these convictions you have in New York are enhanceable
15 in South Carolina. And he would say something to the
16 effect that that really appears draconian. He didn't use
17 that word, but wow. That's - Really? They can do that to
18 me down here? And I would say, yes they can. They are
19 doing that to you down here. Do you - And I would ask him,
20 did you have an attorney and he said yes and in my mind's
21 eye, I didn't query any further that they would be
22 unconstitutional.

23 Sure, I assumed that if he had an attorney up there
24 that they would be constitutional. Perhaps they weren't.
25 Perhaps he was coerced. I don't know. I don't even think

APPENDIX 100

DAVID COOK: REDIRECT BY MR. JOHNSON

-86-

1 that the record would show that they were coerced. I don't
2 think that -- I wasn't aware of any appeals that he had made
3 to New York or any type of collateral attack on those
4 showing that they were coerced. He didn't bring that up to
5 me in our conversations.

6 He said he had an attorney. They were for a joint in
7 Central Park. And it had just blew his mind that such a
8 small level of possession for weight would enhance
9 something in South Carolina. And I would say things to him
10 like, welcome to South Carolina. This is one of the most
11 stanches states in the union with drug laws and you need to
12 be aware of that. It's my job to tell you these solicitors
13 aren't playing around. They are going to take your offer
14 off the table when they said they were going to take the
15 offer off the table. I don't know why you are acting like
16 you are not going to take it. We would have in-depth
17 conversations about all of this.

18 Q. Did the solicitor give you sentencing sheets from
19 those convictions or at least --

20 A. She showed them to me, yes.

21 Q. And did the judge accept those as certified records of
22 his convictions?

23 A. He did.

24 Q. So was your investigation or lack of investigation
25 based on what your client told you?

APPENDIX 101

DAVID COOK: REDIRECT BY MR. JOHNSON

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1 A. Yes.

2 MR. JOHNSON: No further questions, Your Honor.

3 MR. SMITH: No questions, Your Honor.

4 THE COURT: You can step down. Appreciate your time.
5 Thank you.

6 MR. COOK: Yes, sir, Your Honor. Thank you, Your
7 Honor.

8 (WITNESS LEAVING WITNESS STAND.)

9 THE COURT: Would you hand me those exhibits?

10 THE BAILIFF: Sir?

11 THE COURT: The Exhibits.

12 (EXHIBITS RECEIVED UP BY THE COURT.)

13 THE COURT: Anything else on behalf of the State?

14 MR. JOHNSON: Not on behalf of the State as long as he
15 doesn't have a witness that I can then call Mr. Cook in
16 rebuttal.

17 THE COURT: All right. Anything else on behalf of the
18 Applicant?

19 MR. SMITH: No, Your Honor. We rest.

20 MR. JOHNSON: And the State rests.

21 THE COURT: All right. I'll be glad to hear
22 arguments. I do - I have the propensity to pick up these
23 little quirks and the docket number from the County of
24 Bronx, New York, 96X054710 identifies the defendant Devon
25 Brown but the judge refers to the defendant as a female in

APPENDIX 102

-88-

1 two instances. I don't know that anybody challenges that
2 this is in fact a transcript involving the Applicant but I
3 just read the note that I see on two separate occasions,
4 this defendant is referred to a Ms..

5 MR. SMITH: I have no basis to do so and Mr. Brown did
6 testify and say that this was the transcript of his plea.

7 THE COURT: I have no doubt it does. Just like I say,
8 you don't practice here but I have some odd propensity to
9 pick up those little quirky things.

10 MR. SMITH: Regarding argument, Your Honor, I'm not
11 sure what procedure the Court wants to employ, but one of
12 the reasons the transcripts were introduced was to permit
13 me to argue, which I believe it shows that the pleas were
14 not valid. And so you know I'm prepared to do a written
15 memorandum in support of the invalidity of the plea. And
16 so I'll do whatever the Court wants.

17 THE COURT: I'll be happy to allow you time to do a
18 memorandum. I think I have followed what the issue is and
19 that is while he was counsel - or while he did have counsel
20 in both of these, at least it appears he does, that there
21 is no colloquy between the Court and Mr. Brown.

22 And these two I'm talking about in New York regarding
23 any of his constitutional rights, let alone his right to a
24 jury trial, his right to remain silent, none of these as
25 you mentioned. Boykin versus Alabama, the colloquy takes

APPENDIX 103

-89-

1 place in neither one of these. I acknowledge that.

2 MR. SMITH: Okay. And that being the case, then I
3 think, you know, this is a Sixth Amendment issue so like we
4 put in the application, I think counsel would be deficient
5 and that shows the prejudice to Mr. Brown, (a) in not
6 conducting an adequate investigation to begin with as
7 required by Wiggins - Maryland v. Wiggins I think it is, a
8 recent United States Supreme Court case, and the fact that
9 he had not produced the transcript showing that the guilty
10 pleas were invalid, shows a prejudice based on counsel's
11 deficient performance.

12 Not only that, I think it would be a fair and
13 reasonable inference for the Court to draw that Mr. Brown
14 was not made aware of the potential sentence that he faced.
15 In spite of counsel's testimony to the contrary, I know
16 it's very difficult for an Applicant to prevail in these
17 kinds of instances where there is some discrepancy between
18 what he has said and what his lawyer has said, but I think
19 that given all the evidence in this case it tends to
20 support the Applicant's position that in fact he was not
21 made aware that he was facing twenty-five years.

22 For one, there is nothing in counsel's file written
23 either by letter or anywhere that tends - that shows that
24 he conveyed that information to his client. Given the
25 difference between what he was being offered, which was

APPENDIX 104

-90-

1 five years, versus what he was - it's not even exposed to,
2 Your Honor. It is what he was going to get if he lost.

3 And you heard Mr. Brown's testimony, he didn't think
4 that he had a strong case, so I mean, it was really a one
5 or two day guilty plea and so you tell him - it's one thing
6 to say - You know, I've been practicing for more than
7 twenty years and a client on this - you would have - I
8 would ask the Judge to examine him or at least put on the
9 record that, you know, given the strength of the
10 solicitor's case and an offer of five years, how could you
11 just sit there and allow twenty-five years to just happen
12 with no defense?

13 I don't know if the Court has read the record in this
14 case, but you know, even a lack of knowledge, and we didn't
15 get into any deficiency in terms of the defense put forth
16 at trial, but even the lack of knowledge would have been,
17 you know, a suitable defense and it wasn't raised. And you
18 know, I think a lot of it had to do with Mr. Cook's
19 experience at the time, but there was no defense.

20 So if there is no defense and you can get five years,
21 and you think - I mean, I don't even think it's enough for
22 counsel to say, oh you have a potential sentence of twenty-
23 five years. That was not conveyed what South Carolina's
24 sentencing statute means. It's going to happen. Not that
25 it could happen because if you say to a client, hey, I can

APPENDIX 105

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1 get you five years if you take a plea, most clients will
2 think that after trial, they might get a little more than
3 five years, right, as a penalty for taking up the court's
4 time.

5 I know that, you know, there is a presumption of
6 vindictiveness if you are penalized for exercising your
7 right to trial, but I think most people know that you get
8 more time if you go to trial. So if you say you can get
9 five years, if you don't say it you're gonna get twenty-
10 five years if the jury convicts you, you are deficient and
11 it's not enough just to recommend five years. It's not
12 enough. That is not the claimed deficiency in this case.

13 The claimed deficiency is that he did not make his
14 client aware that he would get twenty-five years after
15 trial. And now he can read the application and he can go
16 back and try to justify his actions, which is fine. It's
17 human instinct. But no where in any letters sent to the
18 client either by his paralegal or by him or any notations
19 to the file that he made his client aware of that.

20 And to the extent that he looked for aid from the
21 solicitor with puppy dog eyes, you could have easily if
22 this was even on his mind because I don't think it was
23 because if your client is looking at twenty-five years and
24 he's going to be enhanced with two convictions in another
25 jurisdiction, it is counsel's duty to investigate it. It

1 is not enough to say, oh, my client told me he was
2 represented by counsel. It is not enough to say, oh, it
3 was eight years ago. It is not enough to say, oh, I saw
4 some of what the solicitor had. It's not.

5 You have to investigate it and it wasn't investigated
6 and you know why? Because it wasn't on his mind. And if
7 it wasn't on his mind, there's no reason to make it part of
8 the client's equation and that is the deficiency, Your
9 Honor. And for all of those reasons, I ask the Court to
10 find that based on the evidence that Mr. Brown was not made
11 aware that he would get a mandatory twenty-five years.

12 THE COURT: Thank you.

13 MR. JOHNSON: Briefly in reply, Your Honor.

14 First, it is clear through counsel's testimony that
15 Mr. Brown was made aware of that. He begged. He was
16 adamant. He tried - He tried to beg him to take the five
17 year plea offer. And according to counsel's testimony, Mr.
18 Brown had a daughter couldn't serve five years but then,
19 you know, this is like gambler's remorse. You're ready to
20 gamble, but then when it was all over, you say whoa, whoa,
21 whoa, I would have taken the five years. That's exactly
22 what this case is.

23 Also, it was counsel's testimony that it was Mr.
24 Brown's decision not to take that five years. While
25 counsel says that he did not receive the transcripts, he

1 received the sentencing sheets and had many conversations
2 with Mr. Brown about his prior convictions and based on
3 what Mr. Brown said, he didn't feel it was necessary to
4 further investigate that.

5 Under Stricklin v. Washington, counsel is certainly
6 more than able and it is permissible for him to - for his
7 actions to be based on what Mr. Brown or his client tells
8 him.

9 Further, this is, as you well know, Mr. Brown's burden
10 of proof. The State's position is that he has not met this
11 burden of proof or shown any prejudice.

12 Just on a side note, this was not part of the record,
13 but based on the amount of marijuana found on him for
14 trafficking, over fifteen pounds, I believe in 2008 it
15 still would have given him a mandatory minimum of twenty-
16 five years. I'll have to look that up, but there would be
17 no prejudice in this case even if counsel, which we do not
18 concede, would be prejudicial.

19 That's the State's argument, Your Honor.

20 THE COURT: Well, I'll take it under advisement.
21 Thank you.

22 MR. JOHNSON: Thank you.

23 THE COURT: Very well presented by both sides and make
24 sure we get these exhibits.

25 (END OF TRANSCRIPT OF RECORD.)

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 12th days of December, 2013.

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

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

My Commission Expires: 1/21/2021

DATE: _____/_____/_____

APPENDIX 109

1

1 CRIMINAL COURT OF THE STATE OF NEW YORK
2 CRIMINAL TERM PART AP3 : COUNTY OF BRONX
3 -----X
4 THE PEOPLE OF THE STATE OF NEW YORK, :
5 : Docket No.
6 -against- : 94X041963
7 :
8 DEVON BROWN, :
9 Defendant. :
10 -----X

215 East 161st Street
Bronx, New York 10451
September 26, 1994

11 B E F O R E: Hon. WILLIAM LEIBOVITZ,
12 JUDGE.

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

14 ROBERT T. JOHNSON, ESQ.
15 District Attorney - Bronx County
16 BY: ALBERT EBANKS, ESQ.
Assistant District Attorney For the

People

17
18 AARON SLAVESKY, ESQ.
19 For the defendant
20
21

APPENDIX 110

22

23

24

Tanya Oliver
Senior Court Reporter

25

Proceedings

2

calendar,

1

COURT OFFICER: Number 42 on the

2

in the matter of Devon Brown

3

MR. SLAVESKY: Aaron Slavesky.

4

MR. EBANKS: Albert Ebanks.

5

At this time, the People have an

6

221.15.

application to reduce the charge 221.25 to

7

THE COURT: What is the title of the

8

reduced charge?

9

MR. EBANKS: Criminal Possession of

10

Marijuana, Your Honor.

11

attached to

THE COURT: It must be a agree

12

that.

13

look it

MR. SLAVESKY: The professor has to

14

up.

15

MR. EBANKS: Fourth.

APPENDIX 111

reduced, 16 THE COURT: Whenever a charge is
section 17 the People are obligated to state not only the
18 of the penal law, but the exact degree.
19 The People are ready?
this 20 MR. EBANKS: The People are ready on
and a two 21 matter. The offer is to the docket, 221.15,
22 hundred dollar fine.
ready 23 THE COURT: I don't think you can be
24 without a laboratory report. Do you have a lab
25 report?

Proceedings

3

September 1 MR. EBANKS: It was filed, uhm,
2 6th, Your Honor, along with a statement of
readiness.
3 THE COURT: I see it.
4 Did you want a motion schedule?
5 MR. SLAVESKY: I would take the
plea,
6 Judge. It is not a good case. They said he
had a

APPENDIX 112

7 brown paper bag. I don't know how. I will
take the
8 plea and finish it. If you want to give him
the fine,
9 I will do it.
10 It's his first offense, give him an
ACD; he
11 has no record.
12 THE COURT: Are the People making
any offer
13 on this?
14 MR. SLAVESKY: They made an offer of
an A
15 and a two hundred dollar fine.
16 THE COURT: That is not really an
offer.
17 MR. SLAVESKY: I thought I get an
ACD.
18 THE COURT: Is your client willing
to plead
19 guilty to the reduced charge with a two hundred
dollar
20 fine?
21 MR. SLAVESKY: If Your Honor wants
to
22 accept the plea bargain.
23 THE COURT: Do you have a copy of
221.15
24 with you? Do you have a penal law?
25 MR. EBANKS: Yes, Your Honor, we do.

APPENDIX 113

Proceedings

4

1 THE COURT: May I look at it?

2 MR. EBANKS: Certainly, Judge.

3 THE COURT: All right, counsel.

4 MR. EBANKS: Yes, Your Honor.

5 THE COURT: Is your client ready to

6 allocute to the possession of two ounces of --
or more

7 of the substance?

8 MR. SLAVESKY: That is an A
misdemeanor,

9 two ounces or more?

10 THE COURT: And I have to fully
allocute

11 him because he has no previous fine.

12 MR. SLAVESKY: And are you willing
to give

13 him the fine?

14 THE COURT: Yes.

15 MR. SLAVESKY: He is willing to
plead

16 guilty to the Possession of Marijuana that is
over two

17 ounces.

18 THE COURT: I'm about to allocute
him on

APPENDIX 114

19 that, all right. Will the fine be paid today?
20 MR. SLAVESKY: Judge, I need some
time.
21 It's only the first time, as far as I know--
sorry,
22 the second time.
23 (Whereupon, the defense counsel talks
with his
24 client.)
25 THE COURT: Sir, your attorney
states that

Proceedings

5

1 you are pleading guilty to a class A
misdemeanor -- I
2 see that the defendant has a previous class A
3 misdemeanor conviction; am I correct? So that
I don't
4 have to fully allocute him, if that is the fact
and it
5 appears to be the fact. Are you pleading
guilty to
6 that charge?

7 THE DEFENDANT: Yes.

8 THE COURT: You have to speak up.

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And are you admitting
that on

APPENDIX 115

11 August 25, 1994, at the area of East 184th
Street and
12 Morris Avenue, in Bronx County, knowingly and
13 unlawfully had in your possession two ounces or
more
14 of marijuana; is that correct?
15 THE DEFENDANT: Yes, sir.
16 THE COURT: And he is waiving
further
17 allocution and ready for sentence?
18 MR. SLAVESKY: Yes, pursuant to the
plea
19 bargaining.
20 THE COURT: Do you wish to say
anything
21 else?
22 THE DEFENDANT: No, sir.
23 THE COURT: Two hundred dollars or
30 days.
24 The surcharges are waived. He has until
November 7th
25 to pay.

Proceedings

6

1 COURT CLERK: Advise the defendant
of his
2 right to appeal.

APPENDIX 116

3 MR. SLAVESKY: Yes.

4 ** ** ** ** ** ** ** ** ** ** ** ** ** **

5 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

6

7 TANYA OLIVER,

8 Official Court Reporter

9

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25

APPENDIX 117

1

1

2

CRIMINAL COURT OF THE STATE OF NEW YORK
CRIMINAL TERM PART AR-3 : COUNTY OF BRONX

3

4

THE PEOPLE OF THE STATE OF NEW YORK,

5

-against-

6

DEVON BROWN,

7

Defendant.

8

9

10

11

B E F O R E: Hon. JOHN BARONE,

12

JUSTICE.

13

14

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

15

ROBERT T. JOHNSON, ESQ.

16

District Attorney - Bronx County

BY: CHRISTINE GRAY, ESQ.

Assistant District Attorney For the

People

17

18

19

LEGAL AID SOCIETY

Bronx County

20

BY: MARVIN RASKIN, ESQ.

For the defendant

21

APPENDIX 118

22

23

24

DAVID RUBENSTEIN
Official Court Reporter

25

Proceedings

2

1 COURT OFFICER: Seventy-one, Devon
Brown.

2 Do you waive the reading of the
rights, but

3 not the rights thereunder?

4 MR. RASKIN: Yes.

5 MS. GRAY: Your Honor, the People
have

6 conveyed a recommendation of a \$50 fine with a
plea to

7 the docket.

8 THE COURT: If she can't pay a fine,
would

9 she rather do community service, two days?

10 MS. GRAY: That would be fine,
Judge.

11 MR. RASKIN: Judge, my client would
enter a

12 plea of guilty to the docket and receive a \$50
fine.

13 THE COURT: All right, Ms. Brown,

APPENDIX 119

did you

14 possess marijuana on September 19, 1006, at
1:30 p.m.,

15 in front of 1081 Sheridan Avenue?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You must pay a \$50 fine
and you

18 have -- there are \$45 in court costs. You have
until

19 November 21st to pay in part AP4, okay.
Failure to

20 pay will result in 15 days jail.

21 * * *

22 I, Tanya Oliver, hereby certify that the
above

23 transcript was typed to the best of my ability.

24 _____
TANYA OLIVER,
25 Senior Court Reporter

APPENDIX 120

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Devon Miles Brown, #327309,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2012-CP-46-3762

ORDER OF DISMISSAL

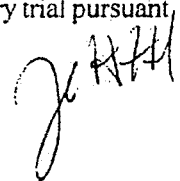
2014 JUN 10 PM 3:21
CLERK OF COURT
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 24, 2012. The Respondent made its Return and Motion to Dismiss on February 15, 2013. An evidentiary hearing into the matter was convened on December 12, 2013, at the Moss Justice Center in York, SC. Dale L. Smith, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Applicant testified on his own behalf. David Cook, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript and the appellate records.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The Applicant was indicted by the January 2008 term of the York County Grand Jury for Trafficking Marijuana (2008-GS-46-0406). David Cook, Esquire, represented him. On March 19, 2008, the Applicant proceeded to a jury trial pursuant



APPENDIX 121

to which he was found guilty of Trafficking Marijuana, 10-100 lbs., 3rd offense. The Honorable Lee S. Alford sentenced the Applicant to confinement for twenty-five (25) years Trafficking Marijuana, 3rd offense.

A Notice of Appeal was filed on the Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Brown, 2011-UP-265 (S.C. Ct. App. filed June 7, 2011). The Remittitur was issued on June 23, 2011.

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

1. Trial counsel rendered ineffective assistance of counsel in violations of the 6th & 14th Amendments to the U.S. Constitution, which guarantees an accused the right to effective assistance of counsel and due process of law, (i) when he failed to inform me that if convicted at trial I would be sentenced to a mandatory 25 years in prison and which caused me to reject a plea offer of 5 years imprisonment and (ii) when prior to and at the sentencing hearing he failed to conduct an adequate investigation and to challenge two prior misdemeanor convictions as unconstitutionally obtained in violation of due process in that they were not knowing, intelligent, and voluntary and thus permitted the use of invalid convictions to unlawfully enhance my sentence to a mandatory 25 years in violation of the laws of South Carolina and the Constitution of the United States."
 - a. "Trial counsel neither informed me of nor made me aware that if I was convicted after trial that the charged offense would represent a third trafficking offense because of my two prior misdemeanor marijuana-related convictions in New York and as a result I would be sentenced to a mandatory 25 years in prison. Had trial counsel made me aware that the charged offense would be considered a third trafficking or marijuana-related offense I would have accepted the State's plea bargain offer of 5 years imprisonment to resolve the case and I would have not proceeded to trial. Moreover, trial counsel neither investigated my criminal history nor did he obtain a record of the transcripts of my guilty plea which would have revealed that the pleas were defective and obtained in violation of the constitution as not knowing, intelligent, and voluntary and further trial counsel failed

to object to the use of the prior invalid convictions to enhance my sentence to a mandatory 25 years as a third trafficking conviction although the two prior convictions were obtained in violation of due process. Accordingly, trial counsel rendered deficient performance both prior to and at the sentencing hearing and as a result of his deficient performance I was prejudiced."

2. "Trial counsel rendered ineffective assistance of counsel in violations of the 6th & 14th Amendments to the U.S. Constitution, which guarantees an accused the right to effective assistance of counsel and due process of law when he failed to make contemporaneous and specific objections (i) to exclude the admission of the marijuana based on the State's failure to present sufficient evidence supporting the police dog's training and reliability in the search warrant affidavit and at the suppression hearing (ii) to exclude the admission of the uncharged crimes evidence of marijuana possession as irrelevant and unduly prejudicial, and (iii) to the trial court's erroneous jury instruction that the uncharged crimes evidence could be used to prove elements of the charged offense and thus trial counsel failed to preserve the issues for direct review on appeal and as a result of his deficient performance I was prejudiced."

- b. "Trial counsel failed to make a contemporaneous and specific objection (i) to exclude the admission of the marijuana based on the State's failure to present sufficient evidence supporting the police dog's training and reliability in the search warrant affidavit and at the suppression hearing (ii) to exclude the admission of the uncharged crimes evidence of marijuana possession as irrelevant and unduly prejudicial, and (iii) to the trial court's erroneous jury instruction that the uncharged crimes evidence could be used to prove the elements of the charged offense and thus he failed to preserve the issues for direct review on appeal and as a result of his deficient performance I was prejudiced."

In its Return and Motion to Dismiss, the Respondent alleged Applicant is barred by the Statute of Limitations and S.C. Code 17-27-20 from bringing his claims. The Applicant filed a Reply in Opposition to the Conditional Order of Dismissal on March 11, 2013, claiming his application was timely filed as he received an Order from the South Carolina Supreme Court dated October 25, 2011, stating the South Carolina Supreme Court had no authority to recall the Remittitur

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from the Court of Appeals as the Remittitur was properly issued. Additionally, in the Applicant's Reply, the Applicant asserts Counsel was ineffective under Lafler v. Cooper, 566 U.S. -, 132 S.Ct. 1376 (2012) (holding counsel ineffective where his advice led defendant to reject a plea offer and but for this advice, defendant would have accepted the offer and the offer's terms were less severe than the actual sentence imposed).

At the hearing, Applicant proceeded only on his claim of ineffective assistance of trial counsel for not properly advising him concerning the plea offer from the State under Lafler v. Cooper.

SUMMARY OF TESTIMONY

Applicant testified he was convicted for trafficking Marijuana and received a twenty-five year sentence. He stated that after he was arrest, Applicant hired Counsel and spoke with Counsel only three times before his trial. Applicant testified he discussed the charges and trial with Counsel and received a copy of his indictment. Applicant claimed Counsel never told him that if he was unsuccessful at trial that he was facing twenty-five years' imprisonment. He also stated the State conveyed a five-year plea offer to him. Applicant admitted that Counsel advised him to accept the plea offer, but did not explain to him that if he did not accept the offer, that he would be facing twenty-five years' imprisonment if he pursued a jury trial. Applicant further stated that if he had known he was facing twenty-five years if he rejected the plea offer ^{than} he would have accepted the five-year offer.

Applicant testified he discussed trial strategy with Counsel and that the strategy would be to challenge an alleged Fourth Amendment violation during a suppression hearing. Applicant stated

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Counsel did not inform him about the consequences of losing the suppression hearing. He testified that after the trial judge's ruling to deny the suppression of the evidence, Counsel failed to inform him of the trial strategy going forward. Applicant also testified he did not know if the five-year plea offer was still available after the suppression hearing, but that he would have accepted it because the State had a strong case.

Applicant then testified Counsel did not discuss with him Applicant's prior convictions from New York nor whether he had counsel when he pled guilty in New York. He also stated Counsel did not explain to him the seriousness of a third drug conviction in South Carolina. Applicant also testified there were other people present when he discussed his case with Counsel but there were no discussion about the trial itself.

On cross-examination, Applicant admitted that he, in fact, had two prior marijuana convictions from New York. He also admitted that he trafficked over fifteen pounds of marijuana in South Carolina.

On re-direct examination, Applicant testified the two prior convictions were guilty pleas. He also stated Counsel never discussed obtaining records from those prior convictions. He further testified the solicitor recited his criminal history during the trial.

Counsel testified he has been practicing criminal law for eight years and has won a drug trafficking case prior to this case. He stated Applicant retained him, and he met with Applicant in his office to discuss the retainer agreement and the Rule 5 material. Counsel testified the State offered Applicant a plea agreement for twelve years. Counsel also testified he was able to negotiate with the State for a plea agreement of five years. This was the State's final offer. Counsel stated he

met with Applicant around three to five times, but spoke with Applicant on the phone over twenty times.

During their discussions, Counsel testified he provided a copy of the video to Applicant wanted Applicant to watch the video because in Counsel's opinion, the video was not going to be suppressed at trial. Counsel also discussed the fact that if Applicant pursued a trial, the State would take the five-year plea "off of the table." Counsel testified he adamantly implored Applicant to accept the five-year plea offer, but Applicant did not want to accept the offer.

Counsel testified he explained to Applicant the trafficking statute in South Carolina and that Applicant was facing a mandatory twenty-five year minimum sentence. Counsel stated he once again relayed the State's offer to Applicant, but it was Applicant's decision to reject the plea offer. Counsel testified he neither threatened nor coerced Applicant in that decision.

Counsel then testified he prepared for trial, discussed the trial strategy with Applicant and tried to blur the case for the jury. He stated he explained to Applicant the five-year offer would no longer be available if Applicant pursued a trial and proceeded to a suppression hearing. Counsel also testified he discussed Applicant's prior convictions with Applicant, along with the fact that this conviction would be enhanced to a third offense by his prior convictions. Counsel admitted he did not research the prior convictions from 1994 and 1996 to check if they were valid. Counsel then explained that it would not matter if the convictions were felonies or misdemeanors for the purpose of enhancement in South Carolina.

Counsel stated he first learned of Applicant's prior record during discovery and that this issue was the crux of the case. He also stated he was aware of these convictions well in advance of the

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trial. Counsel testified he remembers speaking with Applicant's girlfriend about payment as well as the five-year offer.

Counsel lastly testified as soon as the suppression hearing began, he knew the five-year offer was no longer available and that the State would not re-offer the plea deal.

On cross-examination, Counsel testified he accepted this case less than one year after he began practicing law, but had been a public defender for eight months and had tried drug cases. Counsel also testified he discussed this with Applicant and the two agreed to his representation and fee. Counsel stated he knew about Applicant's prior convictions from New York in early December 2007. Counsel also stated he asked Applicant about whether he had had counsel at his prior guilty pleas. Counsel admitted he did not review the New York's penal laws or order the transcripts from Applicant's guilty pleas. Counsel testified the solicitor showed him certified conviction sheets from New York, and this satisfied him. Counsel also stated he objected at trial when the solicitor attempted to introduce Applicant's sentencing sheets from New York because the sheets did not contain references to drug offenses.

Counsel also testified he, as a lawyer, has a duty to investigate his client's case, including reviewing any prior convictions. He stated one can review the transcript of a guilty plea to ascertain whether the plea was knowingly and voluntarily entered. He admitted he did not look into the transcripts of Applicant's guilty pleas. Counsel testified he discussed Applicant's prior convictions from New York with Applicant and determined they were constitutional because Applicant said he had defense lawyers representing him during both pleas. While Counsel admitted he had not read

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the transcripts of Applicant pleas, he testified there are other ways to determine whether the plea were constitutional, including through discussions with Applicant and through the sentencing sheets.

Counsel testified Applicant was facing a mandatory twenty-five year sentence, but did not order the plea transcripts. He also stated he had several conversations with the solicitor, but the solicitor did not have the transcripts. Counsel testified he explained to Applicant that he was facing a mandatory minimum of twenty-five years at the same time he relayed a plea offer from the State. Counsel stated the five-year offer was presented to him one to two months before Applicant's trial. Counsel also stated he did not recall receiving an email from the solicitor concerning a ten-year offer.

Counsel then testified concerning a letter he wrote to Applicant on January 24, 2008, explaining to Applicant that Counsel needed to be paid for his services and that Applicant had an outstanding bench warrant. Counsel admitted that in the letter he did not advise Applicant that Applicant was facing a mandatory twenty-five year sentence, but Counsel testified vehemently that he advised Applicant on numerous occasions concerning the possible penalties.

Counsel testified he did not tell Applicant he had a good chance of winning the suppression motions, but did discuss with Applicant the offense and the trial strategy. Counsel's strategy was to blur the lines for the jury and challenge Applicant prior bad acts under SCRCrimP 404(b), the search warrant, and the canine search.

While Counsel admitted he has not read Laffer v. Cooper yet, he affirmed that he gave Applicant sound legal advice to accept the State's five-year plea offer instead of risking a trial and made Applicant very aware of the fact that if Applicant rejected the five-year offer, he would face a mandatory twenty-five sentence at trial. Counsel also stated that after the suppression hearing was

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unsuccessful, he did not advise Applicant he should then take the guilty plea because Counsel explained to Applicant numerous times that there would be no other offers if Applicant proceeded to a trial, including a suppression hearing.¹

On re-direct examination, Counsel testified he discussed with Applicant his prior convictions and that Applicant was surprised to learn that he would be facing twenty-five years if convicted at trial. Counsel also stated Applicant told him that Applicant was represented at both prior guilty pleas. Counsel stated he received copies of Applicant's certified conviction sheets from the Solicitor. Counsel further testified he advised Applicant and investigated this case based on the information Applicant provided him in their discussions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript and the pleadings, all of which assists the Court in judging their credibility. This Court finds Applicant's testimony concerning Counsel's alleged ineffective assistance not credible while also finding Counsel's testimony credible.

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

Ineffective Assistance of Counsel

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

¹ Counsel also testified he made a "puppy-dog face" to the solicitor in hopes that she would give Applicant another offer, but solicitor in no uncertain terms, gestured that she would not be willing to do so.

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

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

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

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

Failure to properly advise Applicant concerning the plea offer pursuant to Lafler.

First, this Court finds the sole issue before it was whether Counsel was effective in his representation under the standard set forth by Lafler v. Cooper, 132 S.Ct. 1376 (2012).

This Court finds Applicant has not carried his burden of proof and has failed to prove, as he alleges, that in the plea bargaining process of his underlying criminal charge, Counsel was

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ineffective. This Court finds Counsel conveyed the five-year offer from the State to Applicant. This Court finds Counsel advised Applicant that if he pursued a jury trial that he was facing a mandatory minimum of twenty-five years. This Court also finds Counsel made diligent efforts to convince Applicant to accept the five-year offer. This Court finds Counsel advised Applicant regarding his efforts to suppress the drugs at issue. This Court finds that at the time Applicant testified, he would have accepted the five-year offer, post the trial court's ruling on the suppression hearing, that there is no evidence the offer was at that time extant and the testimony of Counsel was that the offer was "off the table." This Court also finds credible Counsel's testimony that in response to his post-eye contact with the solicitor after the suppression hearing, she (solicitor) gave Counsel a "no nod." This Court finds that under the parameters of Lafler, Counsel's pre-suppression hearing advice regarding the five-year offer establishes effective assistance of counsel.

The issue of the enhancement impact of Applicant's two prior drug offenses in New York is not before this Court. This issue is outside of the rubric of Lafler. This issue could have been raised by Applicant by a timely filed application for post-conviction relief, pursuant to § 17-27-20, South Carolina Code of Laws 1976, as amended.²

This Court finds the facts that Applicant rejected the five-year offer, proceeded to trial, and received a sentence substantially greater than the plea offer he rejected lies with him and him alone. This Court further finds that Counsel performed effectively in conveying the five-year offer, advising

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Applicant to accept the offer and advising Applicant of the potential mandatory twenty-five year sentence Applicant could and would receive if he was found guilty at trial.

CONCLUSION

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

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

IT IS THEREFORE ORDERED:

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

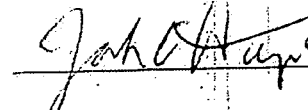
2 This Court finds the issue of the use of the New York adjudication for enhancement interesting, but has no bearing on whether trial counsel conveyed to Applicant a plea offer and advised Applicant to accept the State's plea offer.

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2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!


John C. Hayes, III
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

1/9, 2013
Wm, South Carolina

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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4603762

Devon Miles Brown

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), 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; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: ORDER OF DISMISSAL

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/ John C. Hayes, III.

Circuit Court Judge

2049

Judge Code

1/9/2014

Date

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For Clerk of Court Office Use Only

This judgment was entered on January 10, 2014, and a copy mailed first class or placed in the appropriate attorney's box on January 10, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Dale Lionel Smith Attorney At-Law 99 Park Ave Ste 1600
New York, NY 10016

James Rutledge Johnson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

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

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

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
Devon Miles Brown, #327309,)
Applicant,)
-V-)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Order Denying Plaintiff's
Motion to Amend or Alter and
Plaintiff's Motion for Relief
From Judgment

File Number: 2012-CP-46-3762

FILED-RECEIVED
2014 MAR 13 AM 9:23
YORK COUNTY, SC

This matter comes before the undersigned on Post-Conviction Relief Applicant's Rule 59(e) Motion for Order to Alter or Amend Judgment as well as Applicant's Rule 60 Motion for Order for Relief from Judgment. Dale L. Smith, Esquire, represents the Applicant and J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represents the Respondent.

Procedural History

Applicant was sentenced to twenty-five years imprisonment upon being convicted for trafficking marijuana. Applicant's conviction was affirmed by the South Carolina Court of Appeals on June 7, 2011. Applicant then filed a petition for Post-Conviction Relief on October 24, 2012. An evidentiary hearing into the matter was convened on December 12, 2013. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, David Cook, Esquire, also testified. On January 10, 2014, this Court issued an Order dismissing the Applicant's petition for Post-Conviction Relief. The Order was filed by the York County Clerk of Court on

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January 10, 2014, and mailed to Applicant's Counsel no later than January 11, 2014. Counsel for the Applicant stated that he did not receive the Judgment and Order of Dismissal until January 29, 2014, approximately nineteen days after being placed in the mail. Counsel for Applicant then filed these motions on February 7, 2014. To date, the office of the undersigned has not received a copy of Applicant's motions. Additionally, the filed proof of service with the Clerk of Court's Office does not indicate that a copy of such motion was ever sent to the undersigned as required by SCRCP 59(g). However, Counsel for the Appellant has indicated by email that his office mailed a copy of such motions to the undersigned's office on February 9, 2014. Under the circumstances, the Court will address the motions regardless of whether they were timely received or not.

Ruling

Applicant's initial PCR Petition alleged ineffective assistance of trial counsel under two separate items – Item 1 and Item 2. At the evidentiary hearing convened on December 12, 2013, Applicant pursued only those allegations alleged in Item 1 on his PCR Petition. In Item 1 of his petition, Applicant alleges that trial counsel was rendered ineffective

(i) when he failed to inform me that if convicted at trial I would be sentenced to mandatory 25 years in prison and which caused me to reject a plea offer of five years imprisonment and (ii) when prior to and at the sentencing hearing he failed to conduct an adequate investigation and to challenge two prior misdemeanor convictions as unconstitutionally obtained in violation of due process in that they were not knowing, intelligent, and voluntary and thus permitted the use of invalid convictions to unlawfully enhance my sentence to a mandatory 25 years in violation of the laws of South Carolina and the Constitution of the United States.

Applicant failed to pursue any of the allegations in Item 2 of his PCR Petition at the hearing and therefore is barred from now asserting or "bootstrapping" such allegations to the claims alleged in Item 1. This is further evidenced by the following statement from Applicant's Motion Brief:

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"At the PCR Application Hearing which took place on December 12, 2013, counsel for Brown made clear that because he respectfully disagreed with the Court of Appeals conclusion that trial counsel failed to preserve the errors set forth in Item 2 of the application, Brown would not be pursuing the allegations in the Item 2 of the application." Thus, the Court is limited to reviewing only the arguments alleged in Item 1 of Applicant's PCR Petition. The Court is cognizant of these other issues but can only rule on allegations that were actually pursued by the Applicant at the PCR hearing. This Court is also bound by any rulings from the South Carolina Court of Appeals.

In Paragraph (5) of his Motions Brief, Applicant requests that this Court address "the merits of the ineffective assistance of counsel claim that counsel's failure to investigate and to object to the prior convictions in enhancing the sentence prejudiced Brown and violated his constitutional rights – an issue this court describes as interesting." Applicant contends that the plea transcripts of the prior convictions introduced into evidence at the PCR hearing "demonstrated that the convictions were invalid in that the pleas were not knowing, intelligent, and voluntary." The Court disagrees with this allegation and finds it is without merit. The plea transcripts introduced at trial, on their face, do not demonstrate the unconstitutionality of Applicant's prior convictions. There is no evidence in the plea transcripts introduced at the PCR Hearing that indicates that such prior convictions were invalid by virtue of not being knowing, intelligent, and voluntary. Additionally, at the PCR Hearing Applicant's trial counsel testified that "he discussed Applicant's prior convictions from New York with Applicant and determined that they were constitutional because Applicant said he had defense lawyers representing him during both pleas" (Pg. 7 of Order of Dismissal). Trial counsel testified that not only was he aware of the prior offenses in New York, but he had discussed these offenses and the

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consequences of such offenses with the Applicant in trying to convince him to accept the five year plea offer. Trial counsel also testified that the Applicant had told him he had defense attorneys for his past offenses as well. In its Order dismissing Applicant's PCR Application this Court found that "Counsel stated he first learned of Applicant's prior record during discovery and that this issue was the crux of the case." The failure of trial counsel to obtain the trial transcripts, in itself, does not render his assistance of counsel ineffective. The testimony of trial counsel was credible and made clear that trial counsel adequately investigated and advised Applicant of the effect of his prior convictions. Therefore, Applicant's assistance of Counsel was not ineffective on the basis of trial counsel's failure to investigate and failure to object to the prior convictions used to enhance the Applicant's sentence.

Applicant argues that the Court did not, and should, rule on the Constitutionality of Applicant's sentence based on his claims of constitutional flaws in two New York convictions used by the State for enhancement of his South Carolina charge. This claim is not within the purview of a Lafler review. Also, the issue of the effect of any defect in the New York convictions, even though clothed as ineffective assistance of counsel, were claims which fall under Post-Conviction Relief. (17-27-20(A)(1), S.C. Code of Laws, 1976).

In Paragraph (8) of Applicant's brief, Counsel has requested this Court "to rule on the merits of the ineffective assistance of counsel claim that trial counsel failed to litigate the sentencing hearing competently in the first instance since it observed first-hand the testimony of the witnesses and is in the best position to make critical credibility determinations, and thus making it more likely to lead to an accurate and reliable determination in a proceeding seeking to vindicate important constitutional rights." While the Court is cognizant of these other issues it is bound to rule only on the claims alleged in Item 1 of Applicant's PCR Petition.

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In Applicant's brief, Applicant also contends that "the record evidence at the hearing does not support the factual finding that trial counsel made Brown aware that he would receive a mandatory 25-year sentence if he were convicted after trial." This contention is based on the assertion that Applicant's trial counsel was ineffective under Lafler v. Cooper, 566 U.S., 123 S. Ct. 1376 (2012) (holding counsel ineffective where his advice led defendant to reject a plea offer and but for this advice, a defendant would have accepted the offer and the offer's terms were less severe than the actual sentence imposed).

In its Order dismissing Applicant's PCR Application this Court found that "Counsel advised Applicant that if he pursued a jury trial he was facing a mandatory minimum of twenty-five years." The court also found that "counsel advised Applicant regarding his efforts to suppress the drugs at issue," and additionally that "under the parameters of Lafler, Counsel's pre-suppression hearing advice regarding the five year offer establishes effective assistance of counsel" (Order of Court, Page 11). The Court disagrees with this contention and finds that trial counsel's oral testimony during the PCR hearing provided more than sufficient evidence to support a finding that trial counsel made Defendant aware on multiple occasions that he would receive a twenty-five year sentence if convicted at trial. Counsel for the Applicant contends that "in one letter to his client admitted at the PCR hearing counsel was more concerned with being paid than informing his client of the sentence he faced." The Court also disagrees with this contention as trial counsel did admit to being concerned about being paid at one point during the hearing, but never stated or implied that he was more concerned with being paid than he was with upholding his ethical obligations to his client. While no written evidence was presented which supports such a finding, the oral testimony of trial counsel at the hearing clearly supports the finding that trial counsel made Applicant aware that he would receive a twenty-five year

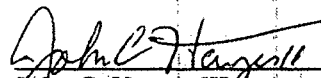
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sentence if convicted at trial. This Court found trial counsel's testimony credible at the evidentiary hearing and declines to change this position now.

Conclusion

Therefore, for the reasons stated above, the Undersigned declines to alter or amend its original order. Additionally, the Court declines to relieve Applicant from Judgment. The Court holds that Applicant failed to pursue the allegations alleged in Item 2 of his PCR application and is therefore barred from attempting to pursue such claims now. The only allegations pursued by Applicant at the PCR hearing were the ineffective assistance of counsel claims which this court has already ruled on, based on *Lafler v. Cooper*, and the argument that trial counsel failed to investigate and challenge the prior convictions of the Applicant from the State of New York. The Court finds that Applicant was informed of the sentence he was facing and the fact that Applicant rejected a five-year plea offer, proceeded to trial, and received a sentence substantially greater than the plea offer rejected lies with him and him alone. The court also finds that trial counsel for Applicant properly investigated and addressed Applicant's prior convictions. The introduction of the plea transcripts of such prior convictions do not in themselves render such convictions invalid or unconstitutional. Also, such grounds were not timely raised by Applicant through a timely filed Post-Conviction Relief application. The Court hereby declines to Alter or Amend the original Judgment or to relieve Applicant from Judgment.

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

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March 11th, 2014
York, South Carolina

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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4603762

Devon Miles Brown

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), 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; (formal order to follow) ☐ Statement of Judgment by the Court.

ORDER INFORMATION

ORDER DENYING PLAINTIFFS MOTION TO AMEND OR ALTER AND PLAINTIFFS MOTION FOR RELIEF FROM JUDGMENT

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

APPENDIX 142

David Hamilton

Clerk of Court

2049

Judge Code

3/13/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on March 13, 2014, and a copy mailed first class or placed in the appropriate attorney's box on March 13, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Dale Lionel Smith Attorney At Law
99 Park Ave Ste 1600
New York, NY 10016

James Rutledge Johnson
PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

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

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