

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

FEB 12 2015

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

S.O. Supreme Court

ALEX O. DAVIDSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001855

APPENDIX

BENJAMIN JOHN TRIPP
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....i

GULTY PLEA HEARING TRANSCRIPT (JULY 27, 2012)..... 1

APPLICATION FOR POST-CONVICTION RELIEF20

RETURN34

POST-CONVICTION RELIEF HEARING TRANSCRIPT (APRIL 10, 2014)40

ORDER OF DISMISSAL 71

INDICTMENT79

INDEX

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

WITNESSES

PAGE

(NO WITNESSES CALLED)

EXHIBITS

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

NO. DESCRIPTION

ID. EV.

(NO EXHIBITS MARKED)

1 (PROCEEDINGS, JULY 27, 2012)

2 ALEX O'NEAL DAVIDSON, having been first duly
3 sworn, testified as follows:

4 THE COURT: Is he going to be -- are we going to
5 be able to go through with the plea?

6 MS. LESKANIC: May it please the court, Your
7 Honor?

8 THE COURT: Yes.

9 MS. LESKANIC: Standing before you is Alex O'Neal
10 Davidson, entering a guilty plea on Indictment
11 2012-GS-11-184. That is a True Billed indictment for
12 distribution of crack cocaine, second offense. He is
13 pleading guilty as indicted.

14 There is a negotiated sentence in this case of
15 seven years.

16 Mr. Davidson is currently on probation. I have
17 also spoken with Kevin Rhodes of the probation office and it
18 will be their recommendation -- I believe he has a ten year
19 exposure. Their recommendation is seven years concurrent
20 with this sentence and then terminate his probation.

21 He is represented by Michael Berry.

22 THE COURT: Sir, you are Alex O'Neal Davidson,
23 correct?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: How old are you, Mr. Davidson?

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THE DEFENDANT: Twenty-nine.

THE COURT: How far did you go in school?

THE DEFENDANT: Two years of college, elementary education.

THE COURT: What do you do for job or occupation?

THE DEFENDANT: Drive cabs for the City of Gaffney.

THE COURT: Are you married, sir?

THE DEFENDANT: No, sir.

THE COURT: Do you have children?

THE DEFENDANT: Four, and one on disability.

THE COURT: What are their ages?

THE DEFENDANT: Fifteen, ten, ten, and six.

THE COURT: How much time have you served in jail on this charge?

MR. BERRY: Twenty days, Your Honor.

THE COURT: Mr. Davidson, you are charged today with distribution of crack cocaine, second offense, which -- I have looked at it wrong. I thought you had fifteen down here instead of five on your sheet, but I'm looking at mine, which -- this offense is classified as a felony. It carries a minimum sentence of five years. It carries a maximum sentence of thirty years and \$50,000 fine.

Do you understand the charge and the maximum and minimum sentences that you could receive on this charge?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Understanding that, how do you wish to
3 plead to this charge today, guilty or not guilty?

4 THE DEFENDANT: Guilty.

5 THE COURT: Do you understand that by pleading
6 guilty you give up your right to remain silent?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you understand that by pleading
9 guilty you give up your right to a trial by jury?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And if you give up your right to trial
12 by jury, you also give up your right to assert any legal
13 defenses you might have in a jury trial. Do you understand
14 that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Of course, we have already gone
17 through a trial earlier this week in this case, which
18 resulted in a mistrial, I believe, but -- so you are
19 familiar with a jury trial and what's involved in a jury
20 trial?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And I'm going to go over that with
23 you, nevertheless.

24 At the trial you would have a right to confront
25 and cross-examine all witnesses against you.

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You would have the right to present any witnesses and/or evidence in your own defense.

You would have the right to testify in your own defense, if you wished to do so, but no one could make you testify in your own trial.

If you decided to go to trial and not testify, the judge would tell the jury they could not hold your failure to testify against you. In fact, the jury couldn't even consider your failure to testify in their deliberations on your guilt or innocence.

You would be presumed innocent throughout your trial. The State would have to prove you guilty beyond a reasonable doubt to a jury of twelve people. All twelve people would have to unanimously agree that you were guilty in order for you to be convicted. And if you were convicted, you would still have the right to appeal that conviction. And, of course, we have been through all of that with you already, but do you understand your rights in a jury trial, Mr. Davidson?

THE DEFENDANT: Yes, sir.

THE COURT: Understanding your right to trial by jury, do you still want to plead guilty, or do you want me to set your case again for trial?

THE DEFENDANT: Plead guilty.

THE COURT: The State is recommending to the court

1 in this case a seven year sentence. They are not opposed to
2 your probation being terminated and run concurrent with this
3 sentence. Is that your understanding of the agreement that
4 you had with the solicitor's office in order to plead guilty
5 to this charge?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Has anybody promised you anything
8 other than that in order to get you to plead guilty?

9 THE DEFENDANT: No, sir.

10 THE COURT: Are you satisfied with the manner in
11 which your attorney has advised and represented you in this
12 case?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Have you and your attorney fully
15 discussed the charges against you?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Has your attorney told you the
18 witnesses and evidence the State has available to present at
19 trial to prove your guilt?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And, as a matter of fact, they have
22 testified in your trial, but has your attorney discussed
23 with you any possible legal defenses that might be available
24 to you, if you go to trial?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Have you told your attorney the names
2 of any and all witnesses you know of that your attorney
3 could subpoena and bring to trial to assist in your defense,
4 if you were to go to trial?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Are you today under the influence of
7 any mind-altering substance, such as alcohol, drugs, or
8 prescription medications, which interfere with your judgment
9 or ability to understand what you are doing in court today?

10 THE DEFENDANT: No, sir.

11 THE COURT: Do you have any mental, emotional, or
12 nervous condition that interferes with your judgment or
13 ability to understand what you are doing in court today?

14 THE DEFENDANT: No, sir.

15 THE COURT: Are you pleading guilty today of your
16 own free will?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Are you, in fact, guilty of this
19 charge?

20 THE DEFENDANT: Sir?

21 THE COURT: Are you, in fact, guilty of this
22 charge?

23 THE DEFENDANT: Yes, sir, I'm guilty.

24 THE COURT: Please give me the facts, solicitor.

25 MS. LESKANIC: Certainly, Your Honor.

1 This occurred on December 12th of 2011, in the
2 area of Fourth Street here in Cherokee County.

3 An undercover operative was equipped with audio
4 and video capability. A phone call was made to this
5 defendant to set up a \$20 purchase of crack cocaine. The
6 informant went out to the area of Fourth Street, exchanged
7 \$20 for a piece of crack cocaine and returned that substance
8 to the sheriff's department.

9 That substance was sent to SLED. It came back
10 positive for crack cocaine, with a weight of 0.2 grams.

11 He does have a prior record, Your Honor, of a
12 trafficking crack cocaine and possession with intent to
13 distribute crack cocaine within proximity of a school from
14 2007. I believe that's what he's on probation for now.

15 THE COURT: Mr. Davidson, you have heard the facts
16 recited to the court by the solicitor's office. Do you
17 disagree in any way with what they say happened?

18 THE DEFENDANT: No, sir.

19 THE COURT: I find the decision of the defendant
20 Alex O'Neal Davidson to plead guilty to this charge to be
21 made freely, voluntarily, and intelligently.

22 He's had the representation of a competent
23 attorney with whom he says he is satisfied.

24 I find the facts presented to the court by the
25 solicitor's office, concurred in by the defendant, fully

1 support the guilty plea in this case.

2 I will accept the plea as freely and voluntarily
3 made.

4 Mr. Davidson, if you disagree with the proceeding
5 in which we are currently involved, you have ten days from
6 today's date within which to file a notice of intent to
7 appeal. That would include the probation matter, if we go
8 into that today.

9 Does he wish to go forward with the probation
10 matter today?

11 MR. BERRY: Yes, Your Honor.

12 THE COURT: All right.

13 Yes, sir.

14 PROBATION OFFICER RHODES: Yes, Your Honor.

15 Mr. Davidson was served with court citation
16 11-12-23, in which today's plea in front of Your Honor is a
17 direct violation of the probation case received June 19th,
18 2007, for possession with intent to distribute crack within
19 one-half mile of a school. He received a sentence of
20 fifteen years, upon the service of five years, and three
21 years probation. So there is a ten year exposure on the
22 case, Your Honor.

23 THE COURT: Counsel?

24 MR. BERRY: Thank you very much, Your Honor.

25 We have gone back and forth all week with Mr.

1 Davidson, talking with him, talking with the solicitor's
2 office, and coming to this agreement.

3 Your Honor, obviously Mr. Davidson is having a
4 hard time accepting this, but I think he is now wanting to
5 put this behind him and move on with his life and I think
6 this is the best way to go about that. I think terminating
7 his probation and allowing him to serve the time would serve
8 him well.

9 I would also tell you that throughout these talks,
10 my talks with him, one of his main concerns has been his
11 children. I think he loves them very much and I think he's
12 very involved in their life. I hope this wouldn't change
13 that when he is released. I hope he would be able to pick
14 back up the relationships that he has and hopefully prove to
15 himself and the courts that he can stay within the confines
16 of the law.

17 So we would respectfully request you go along with
18 the negotiated sentence of seven years, revoke the seven
19 years on the probation case and terminate the probation.

20 THE COURT: Thank you.

21 Mr. Davidson, anything that you want to say to the
22 court?

23 THE DEFENDANT: Yes, sir. I'm sorry. I -- I
24 tried my best every day at everything I do. I try not to
25 fail. I try to stay above so that I can teach my kids and

1 everything that they need to be and everything they want to
2 accomplish.

3 Yeah, it's sad for the events that occurred, but I
4 coach my kids. I teach my kids. Not only that, I be there
5 with them.

6 I have a son that's six years old yesterday. He's
7 on disability. He can't see out of his right eye. He has a
8 blood problem or something in his left foot. I hope for the
9 best for him. He go up there July 26th.

10 And I was coaching. I was working. I was doing a
11 lot of respectful things that a father is supposed to do as
12 a human being. It's just sad for the occasion that occurred
13 in my life. And I'm sorry, but I love my kids, man, and I
14 just don't --

15 I got to man up, because I got to go to prison and
16 I got to do this. I try. I try, man. It's just like every
17 time I try they pull me back down and it hurt. It hurt to
18 be at the bottom again and you can't get to the top. It
19 hurt. It hurt, man. It hurt.

20 THE COURT: Anything else that you want to
21 present?

22 MR. BERRY: Your Honor, this is Michael Davidson,
23 the uncle. I don't know if he would like to address Your
24 Honor.

25 MICHAEL DAVIDSON: Judge, you know, I know there's

1 repercussions and consequences to everything, but, you know,
2 I can't see him put the blame nowhere, you know. If I take
3 any blame, I got to take the blame myself.

4 I took Alex when he was nine years old and I
5 raised him like my own son, because where we were staying at
6 the time we was, I had to get him out of there.

7 But, you know, I feel bad myself. Every time one
8 of my nephews goes to prison, I blame myself because I
9 failed them. I didn't show them the right way, because I
10 was out here shooting people and selling dope, doing all the
11 things that they don't need to be doing.

12 And, you know, I went to prison in 2002, and I got
13 out and he was gone. You know, it was like I didn't even
14 know who he was no more. You know, he -- he just going
15 through that stage in his life and I told him, "you know,
16 there is repercussions and consequences to everything, but
17 you got to man up and just take it, son, because God don't
18 make no mistakes." I buried my brother five months ago and
19 I wish every day I think about if I let him went to prison,
20 would he still be here? You know, I don't know. I can't
21 answer that.

22 But, you know, right now I'm currently on blood
23 pressure medicine and everything. That's no excuse. I'm
24 just stressing a lot, because I just -- like I say, every
25 time one of them go down the road, I just -- I just blame

1 myself for it, because I didn't -- I didn't give them a
2 chance. They looked up to me and I guided them all the
3 wrong way, but, you know, I just hope that, you know, he get
4 out and he do the right thing, because he was trying. He
5 really -- he -- he was trying so hard, but this lady had got
6 fed up with him and she got tired of being in it. I ain't
7 mad at her, because I knew her personally. I think she's a
8 great lady.

9 So, you know, it is what it is. He's got to
10 accept it and move forward.

11 THE DEFENDANT: I'm sorry, man.

12 THE COURT: Well, you know, Mr. Davidson, I hear
13 what you are saying, he was fighting an uphill battle and
14 that, but once you get mixed up with these drugs and
15 everything -- once you get probation on the drugs and
16 everything, you should have learned your lesson. I mean,
17 you can give me all the excuses that you want to, but, you
18 know, there's just hundreds of millions of people out here
19 working hard every day and paying their bills and taking
20 care of their kids. They're not out there selling drugs.

21 These drugs are extremely destructive to people.
22 They commit all kind of crimes when they are on the drugs
23 while they are, you know, addicted to them and trying to get
24 the drugs. And people -- I guy in here this morning. He
25 was on drugs and he broke into ten people's cars. That's

1 ten people affected right there. He stole stuff out of
2 these cars, all because of these drugs. They are terrible
3 things.

4 You just got to stay away from them. And the only
5 thing -- law enforcement and the solicitor's office, the
6 only thing they can do is just keep prosecuting people to
7 try to get the drugs off the street. They don't seem to be
8 able to do it, but --

9 You know, I can remember a time when I started out
10 on this job fourteen and a half years ago, I popped
11 everybody with a lot of time. You had a simple possession,
12 you got five years from me. Another possession, you got
13 ten. But then I realized finally after so many years you
14 can't -- they're going to be somebody else out there. You
15 can't get them off the streets that way. I don't know what
16 the answer is. I think it lies with the community and
17 people turning their -- turning -- condemning -- condemning
18 the people who are doing it and selling -- people doing it.
19 I think the community is the only thing that's stopping it,
20 really totally, because if there is easy money out there,
21 somebody is going to try to make it, to try to pay their
22 bills, but that's not the answer. It too easy to work and
23 pay your bills and that sort of thing.

24 So I hear what you are saying, you struggled, you
25 had battles, but it didn't have to be with drugs. And

1 you -- and that's what happens when your children don't have
2 any father.

3 Let me tell you, for second offense of dealing
4 this stuff -- you are on probation for dealing this stuff.
5 Second offense for dealing this stuff, back in here, and
6 with your other record and that sort of thing, if a jury
7 would have convicted you, you would have been gone for a
8 long, long time, no parole. Do you understand what I'm
9 saying?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: So I think you made the right decision
12 here to plead guilty and take the sentence they negotiated
13 out. If you would have been convicted, it would have been
14 up to me to sentence you, it would have been a lot more
15 time.

16 Case number 2012-GS-11-184, Alex O'Neal Davidson,
17 pleading guilty to distribution to crack cocaine, second
18 offense, the sentence of the court is to be committed to the
19 State Department of Corrections for a determinate term of
20 seven years.

21 He's given credit for twenty days of jail time.

22 Insofar as the probation matter before the court
23 today, the court finds these are substantial willful
24 violations of probation. He's no longer a suitable
25 candidate for probation. The court would, therefore, revoke

1 seven years of that sentence, run it concurrent with the
2 sentence today, and give him, again, credit for twenty days
3 of jail time. I'm going to give him credit for that so it
4 will all even out, and terminate his probation. All right.

5 MS. LESKANIC: Thank you, Your Honor.

6 MR. BERRY: Thank you, Your Honor.

7 (END OF REQUESTED TRANSCRIPT OF RECORD)
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CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for CHEROKEE County, South Carolina, on the 27th day of July, 2012.

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

MAY 27, 2013

Michael R. Watts

Michael R. Watts
Circuit Court Reporter

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FORM 5

STATE OF SOUTH CAROLINA)

County of Cherokee)

Alex O. Davidson, 322478)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

0 1 2 CP-110744

APPLICATION FOR
POST-CONVICTION RELIEF

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 OCT 18 PM 2 11
BRANDY W. NISBEE

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 Livesay B Correctional Institution
P.O. BOX 580 Una, SC 29378
2. Name and location of Court which imposed sentence Cherokee County
Court of General Sessions
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012 G.S. 1100184
 - (b) _____

(c) _____

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

(a) July 27, 2012

(b) 7 years

(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?

no

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) Counsel failed to file notice of intent and did not advise me that I had a Right to an appeal

(b) _____

(c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: SEE, memorandum of Law and support

- (a) Conflict of Interest
- (b) Denial of Right to Appeal / Involuntary Guilty Plea
- (c) Denial of Discovery / Chain of Custody

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

- (a) Failed to advise me of the nature of my Plea
- (b) Counsel failed to advise me of the defective Chain of Custody
- (c) Counsel failed to defend me against the insufficient video

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? _____

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

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

no

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

- (a) Counsel failed to file notice of intent to Appeal
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? Michael BERRY
- (b) your trial, if any? Michael BERRY
- (c) your sentencing? Michael BERRY
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? none
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
PRO SE

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. Michael BERRY
310-B N. Limestone ST P.O. BOX 8008 Gaffney, SC 29341
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. ARRAIGNMENT
 - ii. _____
 - iii. _____

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

REVERSAL -OR- vacating The conviction and sentence

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

NO

STATE OF SOUTH CAROLINA)
County of Cherokee)

VERIFICATION

I, Alex D Davidson # 322478, 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.

Alex Davidson

SWORN to and subscribed before me this 17th day of October, 2012.

Katherine Scott (L.S.)
Notary Public

My Commission Expires: 9/25/2022

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 OCT 18 PM 2 11
BRANDY W. MOBEE

012CP-10744

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

I, Alex O Davidson #322478, 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.



 Applicant

SWORN or affirmed to and subscribed before me this
17th day of October, 2012.

Katherine Scott

 Notary Public

My Commission Expires: 9/25/2022

FILED IN OFFICE OF
 CLERK OF COURT
 MERKEL COUNTY, S.C.
 2012 OCT 18 PM 2 11
 BRANDY W. MCBEE

State of South Carolina
Alex O. Davidson, 322478
Applicant,

U.S.

State of South Carolina
Respondent

County of Cherokee
The court of common Pleas
Case: **012CP-110744**

Memorandum of Law in support
Motion for Relief Pursuant to the
Uniform Post-Conviction Procedure
Act, S.C. Code Ann. 17-27-10, et seq.

As a matter of introduction, The Applicant respectfully submit that the events which transpired in the instant case constitutes a denial of the Applicants Rights to due process of law as guaranteed by the Fifth Amendment to the United States Constitution and the effective assistance of counsel as guaranteed by the sixth Amendment To The United States constitution. These errors was not merely procedural, but substantially infringed upon the Applicants Constitutional Rights to due process of law. At a minimum, The Applicant requests a hearing be held on these issues.

Statement of Issues

1. Conflict of Interest
2. Denial of Right to Appeal
3. Involuntary Guilty Plea
4. Denial of Discovery
5. Chain of Custody

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 OCT 18 PM 2 12
BRANDY W. MCBEE

Conflict of Interest

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Ineffective Assistance of Counsel may result from Attorney's conflict of interest. After jury trial on July 24, 2012, counsel told defendant to plea guilty because the jury ruled (10 to 2) in mistrial. When counsel had failed during trial to question the C.I. on past or current records of arrest, Do to Government intrusion into Attorney-Client Relationship, C.I. (Stephanie Peterson) whom was currently in CCDC on four charges Armed Robbery, Att. Armed Robbery, F.T.C. Fraud, and Child Neglect, Stephanie Peterson had a history. Evidence of the buy showed no drugs on the face of defendant which is showed in photo's of the buy. (See exhibit #D), the investigative report states that defendant ask C.I. to step out of the car on when the undercover operative stepped out Davidson pick crack up off a leaf an exchange the crack for money with undercover operative. The exchange was recorded on video audio. Which is not showed in photo's of buy. There is no facts supporting statement. Yet when Sgt. M. Federico seen that the buy was not recorded. He later dealing with a separate incident a couple hours later in the same white in color Isuzu Trooper and got out with the same coat, and red cell phone, the video does not show the statement. The case is built mostly on here say instead of facts because Davidson past. Had counsel done a deeper investigation of the facts the outcome would have been different. Blankenship v. Johnson, 118 F.3d 312, 318 (5th Cir. 1997) states conflict of interest affected performance because counsel took no action on behalf of defendant, also in Luyler v. Sullivan, the conflict had an adverse effect on specific aspects of counsel's performance. When the defendant alleges that the guilty plea resulted from counsel's conflict of interest, the defendant must show a reasonable probability that he/she would have insisted on a trial but for the effect of the conflict of interest on counsel's advice. Lubb v. State, 408 S.E. 2d 223 (1991). Pretrial preparation, principally because

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it provides a basis upon which most of the defense case must rest is perhaps, the most critical stage of a lawyer's preparation. This case meet the Strickland Standard with South Carolina adopted. See E.G. Cherry v. State, 386 S.E. 2d 624 (1989). The right to effective assistance of counsel may be violated by even isolated error of counsel if the error is sufficiently egregious and prejudicial.

Denial of Right of Appeal

Counsel did not inform defendant he had a right to an appeal. Frazier v. U.S., 18 F. 3d 778, 785 (9th Cir. 1994). Defense counsel must keep the defendant fully informed of development in case and consult with defendant on all major decisions to be made; conduct a reasonable pre-trial investigation, and at the bottom, serve as vigorous and devoted advocate of the defendant cause.

Involuntary Guilty Plea

Counsel advising defendant to take the plea offer a day after miss trial bring in question the voluntariness of the plea. See Kolle v. State (Spinkin MD, 26771, Feb. 16, 2010). The S.C. Supreme Court affirmed the PCR judge's order granting a new trial. The court held that there was sufficient evidence that plea counsel was ineffective in failing to procure relevant discovery material. U.S. v. Ward 997 F. 2d 657 (9th Cir. 1993). Failure of court to determine whether defendant was pressured into signing on to package plea deal calls into question the voluntariness of the plea.

Denial of Discovery

The Investigative Report of Sgt. N. Federico describing how Davison was contacted by an informant. The investigative report describing

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events leading to Davidson's arrest. The undercover operative called Alex Davidson on the phone and arranged for Alex Davidson to meet the undercover on 4th St. Sgt. Mr. Federico placed a video/audio camera on undercover operative and gave the undercover instruction on where to go and what to purchase. The orders authorizing interception, application process, agencies and individuals authorized to conduct interception (6 C. Code 17-30-70), 5 C. Code 15-30-70, an order of a court is mandated prior to the use of such an intercept. No such order existed or had been presented Davidson counsel. The phone call Sgt. Federico had the undercover operative call Davidson is also not on record. There is no proof or recording of the call is not in evidence. Only Sgt. Mr. Federico stating it was made, good faith is not the case. A copy of the call should have been made in the discovery, yet Sgt. Mr. Federico is vouching for the undercover operative. *U.S. v. Smith, L.A. Minn. 1972*, Vouching of informant's reliability by police officer in support of warrant does not attest to veracity of individual giving information of informant *U.S. v. Spach, L.A. Wis. 1975, 518 F.2d 866*. That a person is named is not alone sufficient ground on which to credit an informer, but it is one factor which may be weighed in determining the sufficiency of affidavit for warrant. The video does not show Davidson but a person with a mask on. Sgt. Mr. Federico base this case on the description of clothes and a cell phone not the sell of drugs. The video shows no drug sell which is what the case is about. Sgt. Mr. Federico states in a separate incident he photoed Alex Davidson, this has no bearing on the case. It does bring into the issue the "Fruit of poisonous tree" come to mind (*Wong Sun v. U.S.*), 371 U.S. 471, 491 (1963). When the connection between the illegal conduct and acquisition of the challenged evidence is so attenuated that it dissipates the taint of the unlawful act. *U.S. v. Leon, 468 U.S. 897, 913, 921 (1984)*. Good faith exception to exclusionary rule did not

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apply in case when defective on basis of statutory violation. No indictment was in the discovery raise the question of subject matter jurisdiction. State v. Green cite as 239 S.E.2d 485 criminal law 662(D) rights of an accused under state or federal constitutions to be informed of nature and cause of accusation and to be confronted with witness against him are personal to accused and it is accused,

Chain of Custody

The chain of custody was defective because the drugs was not on the video as showed in the photo's of the sell as stated in the investigative report. There is possibility of tampering of the evidence because there is no proof of where the drugs came from. The investigative report states Stephanie Peterson (the undercover operative) got the drugs from Alex Davidson and the exchange was recorded on video/audio. Yet, the video shows no exchange as stated and do not show Davidson, Peterson name never appear on chain of custody from only NF 2001-03, which is the video. Good faith do not apply when there's no proof of buy. See State v. Sweet (2002) and State v. Taylor 360 S.C. 18, 25, 598 S.E.2d 735 (2004). If the identity of each person handling the evidence is established and the manner of handling is reasonably demonstrated, no abuse in admitting the evidence absent proof of tampering, bad faith, or ill-motive, the state could have taken a sworn statement from the informant and procedure of Rule 6b) SC rule of criminal procedure. See State v. Chisolm 335 S.C. 175 (2003).

Conclusion

If counsel would not have told Davidson to take the plea deal after the miss-trial the case would have been dismiss with a

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suppression hearing. There was never no real proof of a drug sell being made. The main evidence did not show the sell or the face of who suppose to make the sell only after another incident. Which do not show any drugs only Davidson talking on the phone. This case is base only on the clothes and phone not on the sell of drugs. The facts show this. Who is the person with the mask on a where are the drugs. The video does not show Distribution of Crack Cocaine or the sell of drugs from one hand to another. No proof of the sell of crack is seen. So the question is where did the drugs come from? The investigative report say one thing, the video say's another

~~Alex Davidson~~

Alex Davidson #322478

W-6-66

live say B.C.I.

P.O. Box 580

Una, S.C. 29378

Notary Public of South Carolina

Katherine Scott

sworn before me this 17th day of October 2012

my Commission expires 9/25/2022 County: Spartanburg

State of South Carolina.
Alex O'Davidson, 322478
Plaintiff,

County of Cherokee
In the Court of Common Pleas
C/A NO. **012CP-110744**

vs.
State of South Carolina

Certificate of Service

Defendant.

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 OCT 18 PM 2:11
BRANDY W. MOBEE

I, Alex O'neal Davidson, hereby do certify that on this date I served on Defendant a (PLH Application) and a Memorandum of Law in support,

Date: 10-17-12

Alex Davidson
Alex O'neal Davidson 322478
W-6-66.
Livesay B L.I.
P.O. Box 580.
Una, S.C. 29378

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHEROKEE)
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)
 Alex O. Davidson, #322478,)
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 Applicant,)
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 v.)
)
 State of South Carolina,)
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)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2012-CP-11-0744

RETURN

Respondent, making its Return to the application for post-conviction relief (PCR) filed October 18, 2012, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. He was indicted at the March 2012 term of the Cherokee County Grand Jury for distribution of crack cocaine (2012-GS-11-0184). Michael Berry, Esquire, represented Applicant. On July 27, 2012, Applicant pled as indicted. He was sentenced by the Honorable Lee S. Alford, to confinement for seven (7) years. Applicant did not appeal his conviction and sentence.

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

II.

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to advise me of the nature of the plea,
 - b. Counsel failed to advise of the defective chain of custody,
 - c. Counsel failed to defend against the insufficient video,
 - d. Counsel failed to file a direct appeal,
2. Involuntary guilty plea;
3. Conflict of interest;
4. Denial of discovery;
5. Chain of custody.

III.

Respondent interprets Applicant's first, third, fourth, and fifth allegations as an allegation of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

IV.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by

showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Respondent submits that the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper v. State, 305 S.E.2d 247.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.


Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

January 9, 2014

STATE OF SOUTH CAROLINA)
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 COUNTY OF CHEROKEE)
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 ALEX O. DAVIDSON, # 322478)
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 Applicant,)
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 vs)
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 STATE OF SOUTH CAROLINA,)
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 Respondent)
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IN THE COURT OF COMMON PLEAS
 IN THE SEVENTH CIRCUIT

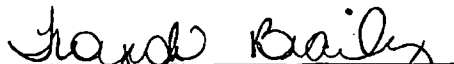
2012-CP-11-0744

AFFIDAVIT OF SERVICE BY MAIL

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

Leah B. Moody, Esquire
Post Office Box 1015
Rock Hill, SC 29731

DATED this 9th day of January, 2014


 Troyesh Brailey, Legal Assistant
 For Respondent

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STATE OF SOUTH CAROLINA)	
COUNTY OF CHEROKEE)	IN THE COMMON PLEAS COURT
Alex O. Davidson,)	
Applicant,)	TRANSCRIPT OF RECORD
)	2012-CP-11-0744
-vs-)	
The State.)	April 10, 2014
)	Spartanburg, South Carolina

B E F O R E :

HONORABLE J. DERHAM COLE, JUDGE

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

LEAH B. MOODY, ESQUIRE
Attorney for the Applicant

SUZANNE H. WHITE, ESQUIRE
Attorney for the State

Linda D. Moffitt
Circuit Court Reporter

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INDEX

WITNESSES

PAGE

ALEX O. DAVIDSON (AW)

Direct examination by Ms. Moody

4

Cross-examination by Ms. White

18

MICHAEL ANTHONY BERRY (SW)

Direct examination by Ms. White

20

Cross-examination by Ms. Moody

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No exhibits entered into evidence.

1 MS. WHITE: Thank you, Your Honor. This is Alex
2 Davidson vs. the State. It's case No. 2012-CP-11-0744.

3 He was represented by Mr. Michael Berry. Originally
4 proceeded to trial on a charge of distribution of crack
5 second offense. That ended in a mistrial with a hung jury,
6 and therefore after -- thereafter -- excuse me -- he pled
7 guilty to the charge and received a 7-year negotiated
8 sentence.

9 At the same time the potential ten years he faced on a
10 probation revocation, they ran that concurrent with seven
11 years and terminated probation.

12 He's filed this alleging ineffective assistance of
13 counsel and involuntary guilty plea alleging counsel failed
14 to advise him of the nature of the plea, failed to advise
15 him of a defective chain of custody, failed to defend
16 against insufficient video, failed to file a direct appeal.
17 And then he also listed conflict of interest, denial of
18 discovery and chain of custody, which the state has
19 interpreted as ineffective assistance of counsel.

20 He's represented today by Ms. Moody, so I'll turn it
21 over to her.

22 THE COURT: Ms. Moody.

23 MS. MOODY: Thank you, Your Honor. May it please the
24 Court.

25 As to the conflict of interest, we would withdraw that

Alex O. Davidson
Direct examination by Ms. Moody

1 ground. And then in terms of -- and with regard to the
2 denial of discovery and chain of custody, Your Honor, we
3 would withdraw that ground. Your Honor, I'm sorry. We're
4 not withdrawing the denial of discovery. We're withdrawing
5 the chain of custody matter.

6 THE COURT: Who denied discovery?

7 MS. MOODY: That's one of his grounds, that he was
8 denied his -- denied his discovery.

9 THE COURT: The state didn't give him his discovery?

10 MS. MOODY: He's saying his attorney didn't give him
11 his discovery.

12 THE COURT: Oh, his lawyer didn't give him his
13 discovery?

14 Okay. All right. Call him. Let's hear it.

15 MS. MOODY: All right. We would call Mr. Alex Davis
16 -- Davidson.

17 ALEX O. DAVIDSON, having been
18 first duly sworn, testified as follows:

19 DIRECT EXAMINATION BY MS. MOODY

20 Q Mr. Davis, please -- Mr. Davidson, please state your
21 full name for the record.

22 A Alex Oneal Davidson.

23 Q And where are you currently incarcerated,
24 Mr. Davidson?

25 A Livesay B Correctional Institution held in Una, South

Alex O. Davidson
Direct examination by Ms. Moody

1 Carolina, Spartanburg county.

2 Q Okay. And you have filed this post conviction relief
3 action regarding your distribution of crack second,
4 correct?

5 A Yes, ma'am.

6 Q Okay. Who was your attorney on that date?

7 A Mr. Michael Berry.

8 Q Okay. And you all proceeded to a trial in this case,
9 correct?

10 A Yes, ma'am, I went through a trial.

11 Q All right. And so do you recall what happened that
12 caused you to have a mistrial in the case?

13 A I think the jurors couldn't come to a conclusion on
14 guilty or not guilty.

15 Q Okay. And then right after that mistrial you decided
16 to plead guilty.

17 A Well, my attorney, Mr. Berry, and Mr. Donald Thompson,
18 the head public defender, they walked by the room, and they
19 was telling me to plead guilty, because the next time that
20 girl come that she wouldn't be in jail clothes, that she
21 would be in regular street clothes, and that if they found
22 me guilty, then the solicitor said she was going to give me
23 20 years.

24 Q So when you say the girl?

25 A The girl, which mean Stephanie Peterson, their C.R.I.

Alex O. Davidson
Direct examination by Ms. Moody

1 Q Their confidential informant.

2 A Yes, ma'am.

3 Q Okay. So your case was based off of a drug buy.

4 A It was based off a drug buy.

5 Q To the C.I.

6 A To the C.I.

7 Q Okay. And you decided to plea based off of what her
8 testimony might have been and her appearance in court?

9 A No, ma'am. I decided to plea because Mr. Berry told
10 me that I would be charged with first offense distribution
11 and that I would be running concurrent with the probation
12 revocation, which meaning that the charge was -- I think it
13 was terminated. At the time I thought terminated mean
14 expunged -- expunged.

15 So when I get back here and I get the transcript from
16 you, the transcript says that I have seven years. So I'm
17 running seven years together with a 7-year sentence that's
18 violent, a violent 7-year time.

19 Q Okay. Well, let's slow down first.

20 You have a probationary charge that you were on
21 probation for at the time that you got arrested on this
22 distribution of crack.

23 A Yes, ma'am.

24 Q Okay. And when you went to trial you were trying to
25 prove that you were not guilty. But when you decided to

Alex O. Davidson
Direct examination by Ms. Moody

1 plea that caused you to violate your probationary --

2 A Yes, ma'am. And he knew that I didn't want to take
3 the plea because I was on probation. He knew that I wanted
4 to go to trial.

5 Q Okay. So when you decided to accept the plea based on
6 the transcript that you read, it tells you now that you
7 have a seven -- well, excuse me. You have a 7-year
8 sentence. But they terminated your probation on your first
9 charge.

10 A Yes, ma'am.

11 Q Okay.

12 A But they gave me seven years with that ran concurrent.

13 Q Okay. So when you got violated on a -- what was your
14 exposure for a probation if you got violated on probation?

15 A What you mean, what I had left?

16 Q Yes. What was the amount of time hanging over your
17 head if you messed up on probation?

18 A It was seven years left over my head, and I had two
19 months left.

20 Q Okay.

21 A I ain't failed no drug tests or nothing at the time, I
22 mean, no drug tests. And I had a job. I ain't ever been
23 violated for no such.

24 Q Okay. So why then -- why then did you plead?

25 A Because of what he told me. That's the only way I

Alex O. Davidson
Direct examination by Ms. Moody

1 wouldn't have went back to trial. I was going to go to
2 trial and be stuck away.

3 Q Okay. And so when you allege that your attorney
4 failed to advise you of the nature of your plea, what do
5 you mean by that?

6 A He never sat down and explained to me really what
7 terminated means. He never -- he told me that I was going
8 to be charged first offense.

9 See, I'm serving a first offense distribution charge
10 and I'm serving a second offense distribution charge, which
11 means I'm serving one at a time. It's 85 percent. And one
12 at a time is nonviolent, 51 percent. And he never broke
13 that down to me.

14 Q Okay. And so how does that affect you serving --
15 well, he only represented you on the distribution charge
16 that you had gone to trial on.

17 A Yes, ma'am.

18 Q Okay. And that's the charge that is the 85 percent.

19 A Yes, ma'am.

20 Q Okay. And so you're saying that when you went to plea
21 he didn't explain to you the consequences of that plea?

22 A Yes, ma'am.

23 Q Now, the second ground that you state is counsel
24 failed to advise you of the defective chain of custody.

25 A Yes, ma'am.

Alex O. Davidson
Direct examination by Ms. Moody

1 Q Now, you realize that you entered in a plea of guilty,
2 correct?

3 A Yes, ma'am.

4 Q Do you recall when the judge went over the -- your
5 rights to go to trial and what you were giving up during
6 your plea?

7 A Yes, ma'am.

8 Q Okay. But you still feel that your attorney failed to
9 advise you on the chain. Could you please explain to the
10 Court how that is a -- why he should explain to you the
11 defective chain?

12 A The defective chain of custody. Well, on the pictures
13 you actually never saw a person. So he never -- I'm
14 thinking that a person has to be seen giving drugs to the
15 C.R.I., and the C.R.I. giving the drugs to the narcotic,
16 and narcotic, such and such, on down the line. But in the
17 actual video and the actual pictures you never see a face.
18 You never see drugs. You never see money. They state that
19 the person had on a bandanna. You never see no one.

20 He never advised to me. And if he would have told me,
21 well, Mr. Davidson, we have a fact right here that can help
22 us if we go back to trial, because you never see a person.

23 Q Well, did y'all not discuss that before you went to
24 trial the first time?

25 A No, ma'am, no, ma'am. I met with him -- the charge

Alex O. Davidson
Direct examination by Ms. Moody

1 happened the December 12th of 2011. I got locked up
2 January the 9th of 2012. I met him for the first time. I
3 was out. I made bond February the 9th, 2012. I met him
4 for the first time July the 16th of 2012. I was on jury
5 trial July the 23rd after meeting him one time.

6 Q Okay. So what, if anything, did y'all discuss going
7 into that trial? Now, you realize that you're not here on
8 ineffective assistance of counsel for that trial.

9 A Yes, ma'am.

10 Q Okay. So when you discussed with him what was your
11 defense or anything about your case going into trial, did
12 you not get any explanation of the evidence or any kind of
13 understanding of the evidence?

14 A All he could tell me was they tried to prove you
15 guilty of a coat but that's --

16 Q Of a what?

17 A A coat, a coat with coat pockets. He never explained
18 to me, well, Mr. Davidson, here's the drugs right here,
19 this is the actual drug-transaction buy. He never said,
20 well, Mr. Davidson, they got you redhanded. But he
21 actually said, well, they trying to prove you on a coat.
22 But I'm not in jail for distribution of a coat or
23 distribution of a bandanna. I'm in jail for distribution
24 of crack cocaine second offense.

25 Q Where were the drugs found?

Alex O. Davidson
Direct examination by Ms. Moody

1 A well --

2 Q with the C.I.?

3 A Yeah. You never seen drugs that they say that she
4 gave them drugs. But you never see drugs in the video.
5 You never see drugs ever.

6 Q okay. So when you got ready to enter your plea after
7 the mistrial --

8 A Yes, ma'am.

9 Q -- when you all sat down and went over your rights,
10 did you go over your rights with him for your plea, to
11 enter your plea?

12 A He told me that I couldn't say certain things because
13 the solicitor would take the plea back.

14 Q what do you mean, certain things?

15 A I told him that I never met this girl before, and I
16 told him that I didn't want to take no 7-year sentence that
17 was just violent. And he told me that if I get up there
18 and I say anything that's discreditable that the state would
19 take the plea back.

20 Q so, in other words, if you could not have gotten
21 through the plea by accepting responsibility?

22 A Yes, ma'am.

23 Q Okay. And so then why did you go forward on a plea if
24 that was the case?

25 A Because he kept telling me if you don't take this plea

Alex O. Davidson
Direct examination by Ms. Moody

1 that girl is going to come back in regular street clothes
2 and they're going to give you 20 years, you need to take
3 this plea.

4 I never sat down and negotiated nothing with them. I
5 met the man one time. He came to the county jail after I
6 had had the mistrial. And all he kept doing was trying to
7 get me to plea. That's all he kept doing, was trying to get
8 me to plea. And I never understood why after we just had a
9 mistrial. I never understood why.

10 Q Okay. So, now, when you -- on the defective chain,
11 you also, you say that is one of the grounds. And then you
12 say your counsel failed to defend you against an
13 insufficient video. So that's going into the evidence as
14 far as, like, the defective chain. And then the video,
15 you've already said that. But y'all didn't discuss the
16 video any further after the mistrial.

17 A No. All he did was have -- well, no. He never come.
18 I'm about to say something else. All he -- he never called
19 me or talked about the video again. As a matter of fact,
20 they put me -- I came in from the streets. I was working.

21 After I had the mistrial they threw me back in the
22 county and never let me out again.

23 Q Okay. All right. So you've alleged that your
24 attorney didn't give you discovery.

25 A He never gave me discovery. I -- I went to trial July

Alex O. Davidson
Direct examination by Ms. Moody

1 the 27th of 2013. I got my motion of discovery, Rule 5
2 package, September of 2013 after the trial was over. I got
3 my indictment March of 2013.

4 Q Okay. Well, let's -- let's be clear on this. Your --
5 you pled guilty July 27th of 2012.

6 A Yes, ma'am.

7 Q Okay. And you're saying you got your discovery when,
8 again?

9 A I meant to say September of 2012.

10 Q Okay. So when you met with him or talked to him about
11 your case, got ready for your trial, did you have an
12 opportunity to review the discovery?

13 A No, ma'am. He showed me the video.

14 Q And that's all that you got to see?

15 A Yes, ma'am.

16 Q Now --

17 A And I told him when I seen the video that I wasn't
18 taking a plea because you never see nothing. It's like
19 trying to look through a bush with all of the limbs on it.

20 Q Okay. So, there again, that begs the question. Why
21 did you enter your plea?

22 A Because what he said. He told me that I was going to
23 be first offense, which the probation was going to be
24 terminated, ran concurrent with the sentence, which mean a
25 first offense, meaning that I wouldn't be serving

Alex O. Davidson
Direct examination by Ms. Moody

1 85 percent time.

2 Q Well, okay. So let's -- you're saying that the
3 charges you went to trial on, that that would be treated as
4 a first offense.

5 A Yes, ma'am.

6 Q Okay. And the charge that you were serving probation
7 on, what was that charge?

8 A First offense.

9 Q Distribution.

10 A Yes, ma'am.

11 Q Okay. So he told you that -- your testimony here
12 today is that the plea that you entered in on July 27th of
13 2012, that that was going to be treated as a first offense.

14 A Yes, ma'am.

15 Q Okay. So the offer from the state was a first
16 offense.

17 A Yes, ma'am.

18 Q Okay. So could you possibly mean that you were going
19 to get sentenced based on that first offense?

20 A Yes, ma'am.

21 Q Okay.

22 A All I can say is what he told me.

23 Q I understand.

24 A You know, I know it's he say, she say, but all I can
25 say is what he told me, and that's the only way that I

Alex O. Davidson
Direct examination by Ms. Moody

1 would take that plea.

2 Q Okay. So when you signed this sentencing sheet did
3 you see that the sentencing sheet had second offense?

4 A No, ma'am.

5 Q Okay. And all you knew is that it was a 7-year
6 concurrent with your probation.

7 A Probation, which I thought was terminated, but I got
8 seven years for, which, like I told you, I thought
9 terminated, which means down without, which meaning I
10 wasn't going to get no time for it. But I'm actually
11 serving seven years of probation violation and seven years
12 of distribution, a second offense.

13 Q Okay. But they're running at the same time.

14 A Yes, ma'am. Even though it's ran together, I still
15 got seven years for it. The parole board don't look at it
16 like that.

17 Q Okay. Now, this was a negotiated sentence that you
18 entered into, a negotiated plea that you entered into.

19 A Which I never knew.

20 Q Okay. So when the Court mentioned that it was a
21 negotiated plea or when you signed the sentencing sheet did
22 y'all go over your sentencing sheet?

23 A No. You know when I found out what negotiated mean?
24 When you told me on -- when you told me. That's the first
25 time I found out what negotiated sentencing mean. I never

Alex O. Davidson
Direct examination by Ms. Moody

1 knew what that meant. I still don't know what it meant. I
2 went and looked it up in the definition. But I never knew
3 it until you told me.

4 Q Okay. So do you recall when I said you had a
5 negotiated sentence that it -- you knew you were going in
6 and you were receiving seven years?

7 A Yes, ma'am, but I never answered him. But when you
8 told me, I never actually met with the solicitor and him at
9 the same time.

10 Q No, no, no, not negotiated that you meet with the
11 solicitor and your attorney at the same time.

12 A Which meaning they came to agreement though.

13 Q Right. But you knew going in what you were going to
14 be sentenced to.

15 A Yes, ma'am, when he told me that.

16 Q He told you that?

17 A When he told me what I was going in for.

18 Q You knew what you were going in for.

19 A Yes, the first offense.

20 Q Okay. But did you understand the consequences of a
21 negotiated?

22 A I don't know the consequences of a negotiated plea. I
23 never knew that until you told me. But at the time, all I
24 know is what I was going in front of the judge for.

25 Q Okay. Let's make sure we're clear on this because I

Alex O. Davidson
Direct examination by Ms. Moody

1 think you just said he. You said you never knew what a
2 negotiated plea was until I told you, Leah Moody told you?

3 A Until Ms. Leah Moody told me, I never knew what it
4 meant.

5 Q Okay. But you understood you were going to be
6 sentenced for seven years.

7 A Yes, ma'am.

8 Q Okay. And then it's also your contention that you
9 didn't understand that when you got your probation
10 terminated that you would be sentenced -- once they
11 terminated the probation that you would get seven years for
12 that probation violation.

13 A Yes, ma'am. I never knew that.

14 Q Okay. Now, you are seeking relief from the Court.
15 Can you please tell the Court what relief you're seeking?

16 A I'm seeking for it to be overturned and get a new
17 trial or just, you know, get it first offense or anything,
18 just.

19 Q On your application you -- you state you want a
20 reversal or vacate -- vacating the conviction and the
21 sentence.

22 A Yes, ma'am.

23 Q And is that what you want here from the Court?

24 A Yes, ma'am.

25 Q And do you realize that if you were granted that

Alex O. Davidson
Cross-examination by Ms. White

1 relief that the Court couldn't sentence you here today?

2 A Yes, ma'am.

3 Q That you start all the way over.

4 A Yes, ma'am. And I'm willing to do that.

5 MS. MOODY: No further questions for this witness.

6 MS. WHITE: Thank you.

7 CROSS-EXAMINATION

8 BY MS. WHITE

9 Q Mr. Davidson, the juror -- excuse me. The judge told
10 you that the Court was -- the state was willing to give you
11 a 7-year sentence, to run your probation concurrent with
12 this sentence. And you said that that was your
13 understanding.

14 A I said that was --

15 Q Do you recall that?

16 A I said that because that's basically what you're
17 trained to do. He told me that I couldn't say certain
18 things because they would take the plea back. All I'm
19 thinking is that I'm ending up with first offense
20 distribution. So I'm going off what he told me to say
21 instead of agreeing with what they say.

22 Q So when the Court went over with you said, "Let me
23 tell you. For second offense of dealing this stuff --
24 you're on probation for dealing this -- second offense with
25 your other record, a jury would have convicted you, and you

Alex O. Davidson
Cross-examination by Ms. White

1 would have gone for a long, long time, no parole. Do you
2 understand what I'm saying?"

3 And you said, "Yes, sir."

4 A Yes, ma'am. I had went to trial.

5 Q So at the time the Court even informed you that this
6 was a second offense.

7 A Yeah. But he told me first offense, but I couldn't --
8 I'm -- I couldn't say nothing because he told me that they
9 would take the first offense plea back. They're saying
10 certain things, but I'm telling you what he told me not to
11 say.

12 Q But if you thought you were getting a first offense
13 and the judge is telling you it's a second offense, is that
14 not the time you should have said something about the fact
15 that I thought this was first?

16 A I mean, I don't know. I was scared; I was confused.

17 Q Okay.

18 A He never sat down and talked to me, so I don't
19 understand what's going on.

20 Q You admitted that you were guilty of this, and, in
21 fact, said that you were going to go to prison, you were
22 going to do this, that you understood you got to man up.
23 Do you recall that?

24 A I admit saying that based on the fact that I knew I
25 was getting seven years first offense.

Michael Anthony Berry
Direct examination by Ms. White

1 Q And you had a prior record of trafficking crack
2 cocaine and possession with intent to distribute within a
3 proximity, is that correct?

4 A Yes, ma'am.

5 Q Okay. And, again, you told the judge that you were
6 guilty and that you were aware of your rights and that you
7 were pleading guilty that day of your own free will.

8 A Yes, ma'am.

9 Q All right. Thank you.

10 MS. WHITE: That's all I have, Your Honor.

11 THE COURT: Step down.

12 MS. MOODY: No further witnesses, Your Honor.

13 MS. WHITE: The state would call Michael Berry.

14 MICHAEL ANTHONY BERRY, having
15 been first duly sworn, testified as follows:

16 DIRECT EXAMINATION BY MS. WHITE

17 Q If you would, state your full name for the record,
18 please.

19 A Michael Berry.

20 Q And, Mr. Berry, do you recall representing
21 Mr. Davidson on this charge?

22 A Yes, ma'am, I do.

23 Q And you recall that this proceeded to trial originally
24 and then ended in a hung jury and mistrial.

25 A Yes, ma'am.

Michael Anthony Berry
Direct examination by Ms. White

1 Q Is he correct in the testimony that this was a very
2 quick procedural from the time you were appointed and the
3 time he had been arrested to the time of trial?

4 A He is. This was actually an unusual case for Cherokee
5 because we -- he was arrested in December. We were
6 appointed in February. We received the discovery in mid
7 April. And then the trial proceeded in July, which is very
8 fast track for Cherokee. It would have been normally
9 months longer before we would have gone to trial. His case
10 was put on the docket and was called during our July term
11 in 2012.

12 Q And in regards to discovery, Mr. Davidson testified
13 that you showed him the video. Was there any other
14 discovery that you had been provided that you shared with
15 him?

16 A Yes. I actually received discovery, as I said, in mid
17 April.

18 I realized that I had problems with my -- with the
19 video that the state had provided and actually e-mailed the
20 solicitor on July 13th requesting a new copy of a video.

21 Mr. Davidson was scheduled for appointments on July
22 16th, July 19th. And then we met again before the trial
23 actually began on July 25th. He came in that morning after
24 the state told us that they intended to call the case for
25 trial.

Michael Anthony Berry
Direct examination by Ms. White

1 Q So you met with him several times before the trial.

2 A Yes, ma'am.

3 Q Okay. And in regards to the charge being dropped from
4 a distribution of crack second to a distribution first, do
5 you recall having any conversation with him that the charge
6 was going to be reduced to a first offense?

7 A Absolutely not. The state was emphatic that he would
8 have to plead to a second. But their offer from the
9 beginning even before we went to trial was that it was --
10 he would have to plead to a negotiated seven on
11 distribution second. After the mistrial the state then
12 again extended that offer, and that is why we ended up
13 pleading on the 27th.

14 Q And in your discussions with him did you discuss any
15 possible defenses or proceeding to trial again after the
16 mistrial?

17 A We talked about the downfalls to that. Certainly, I
18 was concerned with going to trial the first time.

19 Mr. Davidson was correct then that the video -- it was
20 a hard video to watch because the sequence of events
21 happened so quickly. Literally, this transaction took 30
22 seconds. However, if you slowed it down to frame by frame
23 you could see more of a -- a progression of events.

24 If I could, I'd go into the facts a little bit. This
25 video buy occurred. Narcotics officers had sent the C.I.

Michael Anthony Berry
Direct examination by Ms. White

1 out. The C.I. actually made the purchase from the
2 individual, came back. And then a few hours later they were
3 actually still doing surveillance on Mr. Davidson.

4 One of the narcotics officers had taken pictures of Mr.
5 Davidson out in his yard. Mr. Davidson referred to a coat
6 earlier. The narcotics officer provided still photos from
7 later on in that same day where Mr. Davidson was seen with
8 nothing covering his face, but he had on substantially the
9 same clothes that were caught in the -- in the video.

10 Q And so in addition to having the video, the C.I. was
11 going to testify or did testify.

12 A She did testify, and she I.D.d Mr. Davidson as the one
13 that she had purchased the crack cocaine from.

14 Q Okay. Did you have any discussions with him about how
15 this would affect his probation?

16 A We did. Initially, before we went to trial, before we
17 even started entertaining a plea, I did tell him that if he
18 was found -- or convicted of the offense that it would be a
19 violation of the probation he was currently on. Even if we
20 entered into a plea it'd still be a violation of the
21 probation that he was on. And I believe he had a 10-year
22 exposure on the probation violation.

23 Q Did you ever explain to him the difference in the
24 negotiated sentence or proceeding to court with a
25 recommendation or an open plea?

Michael Anthony Berry
Cross-examination by Ms. Berry

1 A Absolutely. And I think -- I think the fact that the
2 probation told the Court when we entered the plea that they
3 were willing to recommend seven to run along with the
4 negotiated seven -- would speak to that -- we absolutely
5 talked about the difference between a negotiated. And I
6 think that's the only reason that Mr. Davidson would have
7 even entertained any plea, would be the fact that, you
8 know, the Court wouldn't -- would have been bound by that
9 negotiation. And certainly we would have been allowed to
10 withdraw.

11 Q Did you have any concerns after talking with him or at
12 the time of the plea that he was doing this without
13 knowledge of what he was pleading to or with any kind of
14 misunderstanding?

15 A Absolutely not.

16 Q Okay.

17 MS. WHITE: Thank you that's all I have, Your Honor.

18 CROSS-EXAMINATION

19 BY MS. MOODY

20 Q Mr. Berry --

21 A Yes, ma'am.

22 Q -- good afternoon.

23 A Good afternoon.

24 Q As far as the video was concerned, what was the
25 problem with the video?

Michael Anthony Berry
Cross-examination by Ms. Berry

1 A I think Mr. Davidson's problem with the video was
2 that, as I said earlier, that the time sequence, it only --
3 the whole transaction only took about 30 seconds. It was
4 very hard to see anything.

5 As I said though, if you slowed it down and you played
6 the video frame by frame you could then get still images,
7 which is what our solicitor did. She printed still images
8 from the video, and that's after she played the video. She
9 introduced those still images to the jury.

10 Q So, now, with those images did any of them have like a
11 ski mask or anything involved in it?

12 A No. There was no ski mask. There was a bandanna that
13 was across the person's face that was shown on the video.

14 Q Okay. And when you say substantially the same
15 clothes, what do you mean substantially the same clothes?

16 A Well, in the -- in the video, the drug-buy video, this
17 person has on dark-colored pants, has on a white t-shirt
18 that hangs out.

19 MS. MOODY: May I approach, Your Honor?

20 A Has on a brown-colored jacket that has fur around the
21 neck. There's also a -- a red cell phone that was captured
22 in the video.

23 And there -- you can't see it very well in this
24 picture, but there's a yellow bracelet that the person has
25 on. And that's from the drug-buy video.

Michael Anthony Berry
Cross-examination by Ms. Berry

1 And then this is -- these are the surveillance pictures
2 that were caught later showing the same brown jacket, the
3 watch, the cell phone and the yellow bracelet.

4 Q Okay. So these -- you're saying these were the
5 pictures that were submitted to the jury?

6 A They all were, yes, ma'am. Narcotics officers
7 testified that these four picture were taken a few hours
8 later after these were actually taken by the C.I. They
9 were still doing surveillance on Mr. Davidson when they
10 took those later in that day.

11 Q So when did you get these pictures?

12 A I don't recall exactly. I will tell you that the
13 still images from the video I actually printed out on my
14 home computer as I was watching the video. I did the play
15 by play, and I printed these as well.

16 The solicitor actually introduced still images of her
17 own. So these are not the ones that went to the jury.
18 These however were provided to me with the discovery.

19 Originally they were provided in black and white, which
20 made it very hard to see anything. The week before the
21 trial when I had the meetings with Mr. Davidson I asked the
22 solicitor to provide me with color copies, which is when she
23 did that.

24 Q Okay. So those are the picture that you all
25 discussed. And then the video that y'all watched is -- you

Michael Anthony Berry
Cross-examination by Ms. Berry

1 had a copy of that.

2 A That's right.

3 Q Okay. And so when you all got the mistrial do you
4 know why it was a mistrial, or did you make a motion? Was
5 there -- I mean, what was the basis of it being declared a
6 mistrial?

7 A The jury could not reach a verdict initially, and they
8 sent notes out to Judge Alford saying that they were stuck
9 ten to two at first, and then toward the end it became
10 clear that one of them had switched over, and it became
11 eleven to one. And then after the trial, actually, our
12 clerk of court got information that the holdout juror
13 actually knew Mr. Davidson and told the jury that they --
14 that she was not going to convict him.

15 Q And so that -- all right. At some point you all
16 discussed him going forward on a plea, and he decided to
17 plea.

18 A And that would have been the day that the mistrial was
19 declared, which would have been the Thursday, I believe,
20 the 26th. I went over to the jail because Judge Alford had
21 revoked his bond. And he remained in jail, and we spoke
22 that evening.

23 Q Okay. Now, when you all -- you earlier indicated that
24 you talked about a negotiated plea knowing that he was
25 going in for seven years. And you talked about the

Michael Anthony Berry
Cross-examination by Ms. Berry

1 probation violation.

2 A Yes, ma'am.

3 Q Did you all talk about the impact of that plea and,
4 like, whether he was going to have to do violent time
5 versus or no -- nonparole type? Did y'all discuss anything
6 about the difference that he had that he was facing with
7 the first charge that he was on probation and then the
8 second charge that he was on probation?

9 A Absolutely, because distribution second carries
10 anywhere from five to 30. And, as you know, anything that
11 carries 20 years or more, that is what kicks in 85 percent,
12 not whether it's violent or nonviolent. Most 85 percent
13 crimes are violent. However, there are some that are not
14 such as a manufacturing methamphetamine first offense, is a
15 violent crime, but it's not 85 percent. So I always make
16 that distinction with my clients because there is a lot of
17 misinformation out there by clients that we represent.

18 Q So you're certain that you discussed this with Mr. --

19 A Absolutely. It would have been a topic that would
20 have been discussed.

21 Q And so going forward on that, in terms of the
22 termination of the probation, you indicated that it is in
23 the transcript that the probation agent discussed that they
24 would run the seven years concurrent but that you and
25 Mr. Davidson discussed the termination and what he would be

Michael Anthony Berry
Cross-examination by Ms. Berry

1 receiving or if he would receive any time on the probation
2 violation.

3 A well, that was my discussion with him in regards to
4 the whole negotiation. I think he was really concerned,
5 and I think he even testified he was concerned about
6 accepting any plea offer because he was on probation. So
7 we did discuss that.

8 And I did discuss that with the probation officer,
9 whether that would be something that they would be willing
10 to do. He indicated yes.

11 So when I went to the jail on the evening of the
12 26th we discussed all of that and what would be included as
13 part of any plea that we did.

14 MS. MOODY: Beg the Court's indulgence.

15 (Pause.)

16 Q Okay. Mr. Berry, did you have an opportunity to talk
17 with him about where the drugs -- if they had any drugs
18 returned from the C.I. to the officers in this case?

19 A Yes, ma'am, and we went through that at trial. And
20 the C.I. testified that she returned to the narcotics
21 office, returned the drugs to the officer.

22 There's a complete chain of custody. The officers say
23 that they received the drugs. Every officer in the chain
24 testified at trial. And they were sent to SLED from that
25 point.

Michael Anthony Berry
Cross-examination by Ms. Berry

1 Q Okay.

2 MS. MOODY: No further questions.

3 MS. WHITE: The state has nothing further.

4 THE COURT: You may step down.

5 I'll review the record and issue an order.

6 END OF REQUESTED TRANSCRIPT OF RECORD

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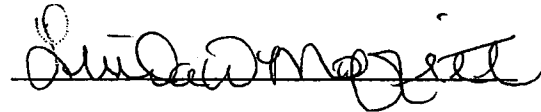
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Cherokee County, South Carolina, on the 10th day of April 2014.

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

October 8, 2014



Linda D. Moffitt
Circuit Court Reporter

as indicted. He was sentenced by the Honorable Lee S. Alford, to confinement for seven (7) years. Applicant did not appeal his conviction and sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to advise me of the nature of the plea,
 - b. Counsel failed to advise of the defective chain of custody,
 - c. Counsel failed to defend against the insufficient video,
 - d. Counsel failed to file a direct appeal,
2. Involuntary guilty plea;
3. Conflict of interest;
4. Denial of discovery;
5. Chain of custody.

At the beginning of the hearing, Applicant voluntarily withdrew his claims regarding conflict of interest and defective chain of custody.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1e,

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

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he initially proceeded to trial on all charges, but the first trial ended with a hung jury. Applicant testified that Counsel and Don Thompson, Esquire, both advised him to plead guilty instead of attempting another trial. Applicant testified that Counsel informed him that the State's confidential informant ("CI"), who was dressed in jail clothes for the first trial, would most likely be dressed in street clothes if they proceeded to a second trial,

which might affect the jury's verdict. Applicant also testified that he was on probation at the time of his arrest for these charges.

Applicant testified that both attorneys informed him that the charge Applicant would plead to would be for a distribution – 1st offense. Applicant testified that he never saw the sentencing sheet that indicated it was a 2nd offense. Further, Applicant testified that he only found out about the fact that he pled guilty to a negotiated plea when he discussed the case with his PCR attorney. Applicant testified that he always wanted a trial because he believed the fact that you never saw Applicant's face on the CI video was a good defense. Applicant testified that he never discussed the video with Counsel, but then testified that Counsel showed him the video. Applicant also testified that he did not receive a copy of his discovery until September 2012.

Counsel testified that he received discovery materials in April, prior to the trial scheduled for July. Counsel testified that he met with the Applicant several times prior to the trial and then again following the mistrial. Counsel testified that although the video tape did not show the Applicant's face, continued surveillance resulted in photos that showed Applicant in the same clothing/coat as in the video tape. Counsel testified that the video tape included a confidential buy which only lasted approximately thirty seconds. However, because the officers were still performing surveillance, they took additional photos following the buy. Counsel that he never discussed the possibility of Applicant pleading guilty to a 1st offense charge. Counsel testified that the offer was always for a negotiated plea to a 2nd offense for seven years. Counsel also testified that he discussed the effect the plea would have on Applicant's probation and discussed the negotiations regarding a concurrent probation revocation sentence. Further, Counsel testified that during the initial trial, the chain of custody was testified to and the chain was complete.

This Court finds the testimony of Counsel to be more credible than the testimony of Applicant and this Court finds no merit to the claims that Counsel was ineffective. The testimony at this hearing and the record speak to the fact that the Applicant was informed as to the charge he was pleading guilty to, the sentence he would receive, and the effect the plea would have on his probation by both Counsel and the plea court. This Court finds no merit to the allegation that Counsel was ineffective for failing to defend against an insufficient video. As discussed, following the initial mistrial, the Applicant accepted an offer to plead guilty to a negotiated seven years. A guilty plea generally constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. See Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (a plea of guilty constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea); Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981). Therefore the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. "Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment." State v. Allen, 261 S.C. 448, 200 S.E.2d 684, 686 (1973). This is because the guilty plea "admits all matter of fact averments of the accusation." Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 534 S.E.2d 708, 709 (2000).

This Court finds that the Applicant presented absolutely no evidence to support his claim that Counsel was ineffective for failing to advise of a defective chain of custody. Further, this Court finds Counsel's testimony credible that the chain was complete when it was presented at the initial trial, so there were no concerns prior to the plea. Additionally, this Court finds that

the Applicant presented no testimony in support of his claim that Counsel failed to file a direct appeal. Therefore, these claims are denied and dismissed.

Involuntary Guilty Plea

The Applicant also alleged that his plea was involuntary. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

This Court finds that the Applicant failed to meet his burden of proof as to this claim. Applicant's testimony that he believed he pled to a 1st offense is not credible in light of the record, which shows that the Applicant was informed of the 2nd offense charge before and during his plea several times. (Tr. pp. 4; 5; 17). The Applicant indicated at his plea that he was satisfied with Counsel and that he and Counsel had fully discussed the charges he faced. (Tr. p. 8). This Court finds that the Applicant failed to offer any testimony or evidence to support his

claim that he did not plead freely and voluntarily and the record directly refutes that claim. Therefore, this claim is denied and dismissed.

Denial of Discovery

The Applicant alleged in his application that he was denied the right to his discovery materials. The Applicant testified that he did not receive a copy of his discovery materials until September 2012. However, Applicant also testified that he had reviewed the video tape of the confidential buy. Counsel testified that he received discovery materials in April prior to the July scheduled trial. Counsel testified that he met with Applicant several times and reviewed discovery materials, including the video tape and still photos, with Applicant. This Court finds Counsel's testimony to be credible. Applicant failed to meet his burden of proof of demonstrating any deficiency on Counsel's behalf. The Applicant proceeded to and completed an initial trial before a mistrial was issued. This Court finds that prior to his plea, Applicant was informed of and shown all discovery materials. Therefore, this claim is denied and dismissed.

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.

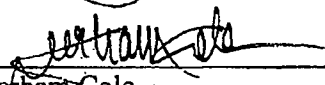
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a 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. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25 day of July, 2014.



 J. Derham Cole
 Presiding Judge

FILED IN OFFICE OF
 CLERK OF COURT
 CHEROKEE COUNTY, S.C.
 2014 JUL 28 PM 8 38
 BRANDY W. MCBEE

WITNESSES

Cherokee County Sheriff's Office

[Signature]

ARREST WARRANT NUMBER

M133925

ACTION OF GRAND JURY

TRUE BILL

Thos Brooks
Foreperson of Grand Jury
Date: 3/22/12

VERDICT

Foreperson of Petit Jury

DOCKET NO. **12-065-11-0184**

The State of South Carolina

County of Cherokee

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAR 22 2012

TERM

THE STATE

vs.

Alex O'Neal Davidson

Indictment for

DISTRIBUTION OF CRACK COCAINE

SC Code: 44-53-375

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 MAR 22 PM 9 57
BRANDY W. MCREE

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)


INDICTMENT

At a Court of General Sessions, convened on MAR 22 2012, the
Grand Jurors of Cherokee County present upon their oath:

DISTRIBUTION OF CRACK COCAINE

That Alex O'Neal Davidson, did in Cherokee County on or about December
12, 2011, manufacture, distribute, dispense, deliver, purchase, aid, abet,
attempt or conspire to manufacture, distribute, dispense, deliver or purchase, or
possess with intent to manufacture, distribute, dispense, deliver, or purchase a
quantity of Crack Cocaine, a schedule II controlled substance under provisions
Code §44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as
amended, such distribution not having been authorized by law.

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


ASSISTANT SOLICITOR