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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

Appeal from Lexington County
William P. Keesley, Circuit Court Judge

MICHAEL T. CANNON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000101

APPENDIX

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ATTORNEYS FOR RESPONDENT

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF LEXINGTON) COURT OF GENERAL SESSIONS

3
4 STATE OF SOUTH CAROLINA,) TRANSCRIPT
5 PLAINTIFF,) OF
6 VS.) RECORD
7 MICHAEL TYRONE CANNON,) 2012-GS-30-00987
8 DEFENDANT.)

9
10 December 11th, 2012
11 Lexington, South Carolina

12 B E F O R E:

13 THE HONORABLE ROGER M. YOUNG, SR., Judge.

14
15 A P P E A R A N C E S:

16 ROBERT LANIER
17 ASSISTANT SOLICITOR
Attorney for the State

18 SARA HAHN
19 ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

20
21 KAREN AMBROZIAK
22 Circuit Court Reporter

23
24 Transcribed by Pamela E. Green, Circuit Court Reporter
25

I N D E X

(There were no exhibits marked during this hearing.)

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P R O C E E D I N G S

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THE CLERK: Indictment 2012-GS-32-00987, State versus Michael Tyrone Cannon. Indicted for distribution of crack cocaine third offense. The defendant's pleading to distribution of cocaine base second offense. Signed and properly attested to, true billed, represented by Ms. Hahn.

Raise your right-hand, sir.

(WHEREUPON, Defendant Cannon was placed under oath at this time.)

PROBATION AGENT: Your Honor, Mr. Cannon is on probation.

THE COURT: Okay.

PROBATION AGENT: We can serve this warrant on him.

THE COURT: And he is facing how much time for what?

PROBATION AGENT: He is facing 14 years for distribution of crack cocaine.

THE COURT: Okay. And where's that out of?

PROBATION AGENT: Lexington.

THE COURT: Lexington.

All right. And he was on probation at the time he committed this offense?

PROBATION AGENT: Yes, sir.

THE COURT: Excuse me?

1 PROBATION AGENT: Yes, sir.

2 THE COURT: Okay. All right. You're Michael Tyrone
3 Cannon, is that correct?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Mr. Cannon, you're here today. You were
6 indicted for distribution of crack cocaine third offense.
7 You face a minimum of ten years, up to thirty years on
8 that, and it looks like the State is going to allow you to
9 plead guilty to distribution of crack cocaine second
10 offense, a minimum of five up to thirty years.

11 Do you want to plead guilty to distribution of crack
12 cocaine second offense?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Now, even though you have a
15 minimum of five years on that offense, your bigger problem
16 is today, no matter what you plead guilty to or what you
17 get convicted of, if you get convicted or plead guilty,
18 you violate the probation that you were on when you
19 committed this offense. You owe the State 14 years for
20 that. You got put on probation. That's how much is left.

21 Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: So, pleading guilty today will cause your
24 probation to be violated, and that -- whatever I sentence
25 you today to, I'll allow it to run concurrent, but you owe

1 14 years on the other one.

2 Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. Do you still want to plead guilty?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. Now, you have the right to a
7 jury trial, which you give up when you plead guilty. We
8 were getting ready to start your trial this morning.

9 At that point, the State would have to convince 12
10 people that you are guilty of this charge beyond a
11 reasonable doubt. All 12 jurors would have to agree that
12 you were guilty in order to convict you, and, if
13 convicted, you would have the right to appeal.

14 You could challenge the State's evidence, put up
15 evidence of your own, testify if you want, and if you
16 don't want to testify, the judge will instruct the jury,
17 excuse me, not to hold that against you while they are
18 deliberating.

19 Do you understand all of those rights?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And you want to give up all of those
22 rights and plead guilty today?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And you're pleading guilty to this charge
25 because you're guilty of it?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Now, has anyone promised you anything or
3 threatened you to get you to plead guilty other than the
4 reduction in the charges, and the -- me telling your
5 lawyer I would give you a current sentence with whatever I
6 sentence you today to run currently with your probation
7 revocation?

8 THE DEFENDANT: No, sir.

9 THE COURT: Pardon?

10 THE DEFENDANT: No, sir.

11 THE COURT: Okay. Are you satisfied with your
12 lawyer's representation?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you need any more time with her?

15 THE DEFENDANT: No, sir.

16 THE COURT: Has she done everything you asked her to
17 do?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right. How old are you?

20 THE DEFENDANT: Thirty, sir.

21 THE COURT: How far did you get in school?

22 THE DEFENDANT: Tenth grade, sir.

23 THE COURT: From high school?

24 (Defendant Cannon nods affirmatively.)

25 THE COURT: You worked before you got arrested?

1 THE DEFENDANT: No, sir, I was unemployed.

2 THE COURT: I'm sorry.

3 Could you tell me---

4 THE DEFENDANT: I have worked, but I was unemployed
5 before I got arrested.

6 THE COURT: All right. Are you married?

7 THE DEFENDANT: No, sir.

8 THE COURT: Do you have children?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: How many?

11 THE DEFENDANT: Two.

12 THE COURT: And how old are they?

13 THE DEFENDANT: Ten and eleven.

14 THE COURT: All right. Ms. Hahn, does this gentleman
15 understand what he is doing, waiving his right to a jury
16 trial and pleadings guilty today?

17 MS. HAHN: Yes, Your Honor.

18 THE COURT: All right. I find that his plea's
19 freely, voluntarily, and intelligently made, will accept
20 it, and if there's a substantial factual basis for it.

21 What would the State like to tell me about the case?

22 SOLICITOR LANIER: Thank you, Your Honor.

23 On November 10th, 2011, at the [REDACTED] block of Linwood
24 Drive in the Batesburg area of Lexington County, agents of
25 Lexington County narcotics team conducted a controlled

1 purchase of crack from the defendant utilizing a
2 confidential informant. They placed a recording device
3 and wire on the confidential, confidential informant to
4 record the transaction.

5 The C.I. then drove to the [REDACTED] block of Linwood.
6 Mr. Cannon then came up to the window, and the C.I. then
7 sold him a quantity of crack cocaine. Subsequent testings
8 confirmed it was .32 grams of crack, crack cocaine base.

9 This was monitored via wire, audio. Mr. Cannon's
10 voice was identified by Agent Carver. He was also
11 identified by the C.I. and the C.I.'s girlfriend who was
12 working with them at the time.

13 Mr. Cannon has three prior drug convictions in his
14 criminal history. He has a conspiracy to distribute
15 marijuana in 2002.

16 He has a distribution of crack cocaine within
17 proximity from April of 2005.

18 Distribution of cocaine first offense from 2006,
19 possession with intent to distribute near a school
20 in 2006, and he also has the current -- currently the
21 offense that he's currently on probation for, which is
22 distribution of crack first offense. He got 15 years
23 suspended to two years' probation on that offense, and
24 that was in September of 2010.

25 THE COURT: All right. Mr. Cannon, your lawyer

1 probably talked with you about strike offenses, but I want
2 to go over that with you today.

3 Again, you're familiar with the game of baseball,
4 right?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Okay. So, you've heard of the phrase
7 three strikes and you're out?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. Well, we take that phrase to
10 help people understand what's going to happen to them if
11 they get convicted of a certain number of a certain type
12 of crimes. We have what we call two strike offenses and
13 we have three strike offenses. Two strike offenses are
14 called most serious offenses.

15 If you get two of those convictions, you go to jail
16 for the rest of your life. There's no possibility of ever
17 getting out on parole. The only way you get out is when
18 you die.

19 Three strike offenses are called serious offenses,
20 and if you get three of those, you go to jail for the rest
21 of your life with no possibility of parole.

22 The drug -- the distribution charge that you're
23 pleading guilty to today is a serious offense or one of
24 the three strike types.

25 All right. However, the lawyer -- the prosecutor

1 just told me that you have some previous convictions for
2 proximity drug charges. Those are also strike offenses of
3 the two strike -- of the three strike. So, after today,
4 you're gonna have two strikes against you.

5 Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: If you ever get convicted of another
8 strike offense during the rest of your life, you're gonna
9 go to jail for the rest of your life. You're never ever
10 gonna get out.

11 Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: That's a long time. The only way you get
14 out is in a box.

15 So, after you do your time, you need to figure out
16 something else to do other than deal in drugs because, if
17 you get caught, there's a very very strong possibility
18 that that will be it for it.

19 All right. Do you understand that?

20 You'll go to jail for the rest of your life without
21 the possibility of ever getting, coming up for parole.
22 You'll never get out. You'll never see your children
23 unless they come to see you.

24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Do you still want to plead
2 guilty?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. Well, Ms. Hahn, what would you
5 like to tell me about this?

6 MS. HAHN: Thank you, Your Honor.

7 Mr. Cannon had indicated that he wasn't working when
8 he was arrested on this charge. However, he does have a
9 work history before that. He's done work for fast food
10 restaurants. He's also done construction and foundation
11 work. The most recent job related to that was a company
12 that he worked for in Aiken called Elot. He worked for
13 them for a while doing foundation work there.

14 Your Honor, he lives with his father. His father has
15 some significant health problems and Mr. Cannon is the
16 primary caretaker for him. Since he's been locked up,
17 Mr. Cannon's grandfather has been taking care of his
18 father, and he has his own health issues as well. So,
19 it's been a burden on his family in having him locked up
20 for the time that he's already done.

21 As he told you, he does have two children. He cares
22 for them. He has regular visitation with them. One of
23 them is -- he pays mandatory Court, Court ordered child
24 support on one child. The other one he supports
25 voluntarily. But he does have a relationship with his

1 children as well.

2 As you heard the prior record that the solicitor has
3 recited, he doesn't have any kind of prior convictions for
4 any kind of violent crimes. No theft or anything of that
5 nature. He does have a prior history of drug charges.
6 Never been charged with trafficking or anything, anything
7 of that nature.

8 I point that out to say that he's not a violent
9 person or someone that's more -- somebody that's more
10 dangerous than like a -- he's not a big time drug dealer,
11 in other words, Your Honor.

12 In this case, it was a fairly small amount of drugs.
13 He's just not the kind of person that's a threat to the
14 community other than putting drugs available where other
15 people can get them.

16 Your Honor, he's one of the nicest clients that I've
17 ever had. I've met with him on a number of occasions
18 before his case was set for trial and then in preparation
19 for that. He's exactly the way he is in front of the
20 Court today. He's very easy going. He's always very mild
21 mannered. He never seems like the kind of person that
22 wanted to do any harm to anybody else.

23 Your Honor, we'd ask the Court to consider giving him
24 any time that you feel you have to give him on the
25 probation violation. Since the distribution case is no

1 parole, he's gonna have to do 85 percent of whatever he
2 receives on that, but we ask that the Court give him any
3 active sentence on the probation violation rather than a
4 longer sentence on the distribution charge.

5 Other than that, we'd ask that Your Honor consider
6 giving him credit on the probation case backdated to the
7 date that he was arrested on these charges. I don't think
8 they served a violation warrant on him until fairly
9 recently. But he's been in jail on this for 362 days on
10 the distribution charge. So, we'd ask the Court to
11 consider backdating the probation violation to him.

12 Your Honor, he understands the, the situation that
13 he's in with the strikes. He knows it's very serious, and
14 it's something that I think has weighed on his mind
15 heavily. But we just ask the Court to give him a lenient
16 sentence as possible.

17 THE COURT: Mr. Cannon, what would you like to say?
18 Anything?

19 THE DEFENDANT: I'd just like to apologize, and say
20 I'm sorry, and just ask that you have leniency on me
21 please, sir.

22 THE COURT: All right. Well, Mr. Cannon, you dug
23 yourself into a deep hole. I hope you use the time
24 productively cause, again, when you come out, life's
25 already hard enough as a convicted felon, but you're

1 looking at serious consequences way beyond what people
2 normally do when you get back out, and that is if you get
3 another strike offense conviction, which they're not just
4 limited to drug cases, but they are serious cases, you'll
5 go to jail for the rest of your life, you know. You know
6 you control that. Just don't commit any crimes.

7 Drug cases tend to be people that have drug problems.
8 I'm gonna put down here ATU so that that -- you can get
9 some treatment while you are in SCDC. I hope you'll take
10 advantage of that so that when you come out you won't have
11 a drug or alcohol problem, and that you'll figure out some
12 way to help learn a productive skill while you're in SCDC,
13 and not just, you know, waste the next number of years of
14 your life.

15 So, when you come out, you know, you'll have a
16 chance, being relatively young, to still have some time to
17 live a good productive life and spend some time with your
18 family.

19 I'm gonna give you ten years on this charge. I'm
20 gonna revoke your previous probation in full. So, I
21 understand you got 14 years on that. That will run
22 concurrent. You'll get credit for the 362 days that
23 you've been incarcerated.

24 Good luck to you.

25 MS. HAHN: Your Honor, does that 362 days count as

1 credit towards the probation violation as well?

2 THE COURT: I'll put down on here that he will get
3 credit for that.

4 MS. HAHN: Thank you, Your Honor.

5 THE COURT: Okay.

6

7 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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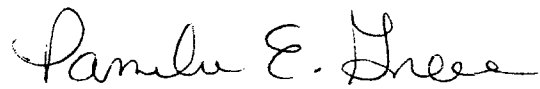
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C E R T I F I C A T E

I, Pamela E. Green, 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 the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Lexington County, South Carolina, on the 11th day of December, 2012, as reported by Karen Ambroziak and transcribed by myself to the best of my ability.

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

October 25th, 2013



PAMELA E. GREEN, Court Reporter

CMII100D
OMCOMITA

SCDC OFFENDER MANAGEMENT SYSTEM
COMMITMENT APPLICATION
CONVICTION SUMMARY

04/10/14
C047423

SCDC# > 318275
CANNON, MICHAEL -

CURR LOC: CAMPBELL
SCDC CLASSIFICATION...: NON-VIOL

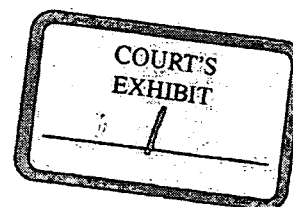
OFFENDER TYPE: ADULT-STRAIGHT SENTENCE

NUM	CONVICTION OFFENSE	YRS MO DYS	INCARC SENT	SENT DATE	SENT START	PROJ COMP	STAT	IND	CONV VIO
* S00006	MANU/DIST CRACK-2ND	010 00 000		12/11/12	12/15/11	06/12/2020	ACT	N N	
- S00005	CRACK DISTRIBUTION	014 00 000		12/11/12	12/15/11	02/15/2019	ACT	N N	

PAGE: 0001

MAKE A SELECTION AND PRESS <ENTER>...

PF3-ADD	PF4-MODIFY/REVOKE	PF6-DISPLAY CONSEC	PF9-DETAIN	PF12-SUMREPT
4-@	1 Sess-1	167.7.50.33	SCDC1714	4/10



FORM 5

FILED

STATE OF SOUTH CAROLINA

COUNTY OF LexingtonMichael Tyrone Cannon #318275
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY**ORIGINAL**

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 Lexington County Detention Center
2. Name and location of Court which imposed sentence Lexington County General Sessions
3. Name(s) of co-defendant(s) (if any) 0 205 EAST MAIN ST
Lexington, S.C. 29072
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012GS 3200987 Drugs/Manufacture, distribution, etc. cocaine base, 2nd
 - (b) 2010GS-32-721 Distribution of cocaine 1st violation of Probation
 - (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 2012GS 3200987-12/11/12 - 10 years 85% credit for 362 days time served. Concurrent
 - (b) 2010GS-32-721-12/11/12 - 14 years 65% Concurrent, 362 Days credit for time served.

Revised 3/2003

2013CP3203322

FILED

- (c) N/A
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty N/A
- (c) after a plea of nolo contendere N/A
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. N/A
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. N/A
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. N/A
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) See Attached page
- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Conflicting Errors in Rule 6 CHAIN OF CUSTODY

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CLERK OF COURT
LEXINGTON SC

- (b) Errors in Warrant D. Inefficient Counsel
- (c) Error in Rule 5 Motion of Discovery

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

- (a) See Attached pages D. See Attached pages
- (b) See Attached pages
- (c) See Attached pages

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

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

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

(a) the specific nature thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

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

i. N/A

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

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

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CLERK OF COURT
LEXINGTON SC

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

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

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

NO

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

- (a) which grounds have been presented:

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

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

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

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) Conflicting Errors in Rule 6 CHAIN of Custody: Under Assumption that Lawyer Appealed
- (b) Errors in WARRANT: Under Assumption that Lawyer Appealed
- (c) Errors in Rule 5 Motion of Discovery: Under Assumption Lawyer Appealed.
- (d) Inefficient Counsel: Under Assumption Lawyer Appealed

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? NO
- (c) your sentencing? yes

Revised 3/2003

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

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

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CLERK OF COURT
LEXINGTON SC

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

i. SARAH HAHN P.D. 407 1/2 West Main St. Lexington, S.C. 29072

ii. N/A

iii. N/A

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

i. SARAH HAHN P.D. represented me At plea.

ii. SARAH HAHN P.D. represented me At sentencing.

iii. N/A

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

The relief I seek is either my conviction overturned or my sentence reduced.

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

NO

Question 9. If you answered "NO" to (7), state ^{page 1}
your reasons for not appealing: _{of 1}

Answer: I WAS under the assumption that my public defender (SARAH HAHN) had filed An Appeal on my behalf. I sent A letter to the S.C. Supreme Court on June 18, 2013 to check the status of my Appeal and was informed that no Appeal WAS filed on my behalf. The response to my inquiry was signed by Branda F. Shealey, Chief Deputy Clerk, The Supreme Court of S.C.

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CLERK OF COURT
LEXINGTON SC

FILED

Question 11.

State concisely And in the ~~same~~ order, the of 5 facts which support each of the grounds set out in (10):

SEENA A. CANNON
CLERK OF COURT
LEXINGTON SC

A. Conflicting Errors in Rule 6 CHAIN OF CUSTODY:

- ① Form B (Rule 6) Initial Custody states the evidence was delivered to Evidence Room At Lexington County Sheriffs department on Nov. 11, 2011 by Brannon Slice and notarized by Margaret Harmon.

The property And evidence voucher states evidence was placed in Evidence locker "GBOX" located At Lexington County SHERIFFS At approximately 17:10 on 11/10/2011 by SLICE B, 374 LCSD

Two (2) different conflicting reports concerning when the evidence was initially placed into custody At the Lexington County SHERIFFS Department.

- ② FORM C (Rule 6) CHANGE OF Custody dated Nov. 15, 2011 states that Best KIT #0020380 was seized by Michael CANNON, which is the defendant, not the police officer. This document was signed by CANDY KYZER And Notarized by Margaret Harmon on Nov. 15th, 2011.

Continued next page

continued from page 1 (Conflicting Errors in Rule 6)

page 2
of 5

③ Initially, I was only provided with one (1) Rule 6 document in my Motion of Discovery, A Form B Rule 6 Initial Custody that wasn't notarized, but when I was put on trial docket, the solicitor produced a different form B Rule 6 that had been notarized but had a different street address as to where the drugs had been seized.

④ The solicitor also produced two (2) Form C Rule 6 Change of Custody documents that weren't issued or included in my Motion of Discovery, in which one (1) of the documents (Form C) includes the error of the defendant being responsible for seizing the evidence. These forms appear to have been fabricated after the fact due to an impending trial.

Question
11 B.

B. ERRORS IN WARRANT

I have two (2) copies of my warrant for Drugs / Man., distribution, etc. of Meth or Cocaine base 3rd.

The Defendants copy, which was served to me at the Lexington County Detention Center, and an Audit Copy which was included in my Rule 5 Motion of Discovery.

Continued →

Question 11B. Errors in WARRANT continuedPage 3
of 5

2013 SEP 27 AM 8:41

BETH A. GARRIGG
CLERK OF COURT
LEXINGTON

Both warrants are supposed to be photo copies of the one and the same original document. The Defendants Copy has the judges signature written in ink, as if the warrant was signed by the judge After it was copied. The Audit copy is clearly a photo copy but the judges signature and the Affiants signature are different on each warrant. These copies are supposed to be of one and the same document but they are clearly two(2) different warrants for the same charge.

Question 11C. ERROR IN RULE 5 Motion of DISCOVERY SUMMARY

Rule 5 SUMMARY states Michael Cannon was positively identified by Audio and Video. The solicitor and my lawyer (Public Defender Sarah Hahn) viewed the video evidence and determined that it was not in fact me (Michael Cannon) in the video, but an older person. When the solicitor presented this fact to the Narcotics Investigators, they admitted that they in fact had no video of me, they lied on the Rule 5 summary.

Question 11.D.

D. INNEFICIENT COUNSEL

FILED

Page 4
of 5

2013 SEP 27 AM 8:41

BETH A. CARRIGG
CLERK OF COURT

In light of the "Lack of Evidence" the solicitor offered a plea of 1st offense Distribution "no contest" and my lawyer was pursuing time served on both the distribution and the violation of probation.

At the time of court, my solicitor was present, but provided a fill-in solicitor because he was resigning and pursuing a private practice. At that time my lawyer didn't want to continue with the presiding judge because he wanted to automatically sentence me to 14 years on the violation of probation by itself, she wanted to go in front of another judge that would better consider my evidence as to my innocence in the initial drug charge, that if convicted on, would violate my probation.

I was assigned a new solicitor that wouldn't accept the initial plea, and without offering a new plea, he placed me on the trial docket. At the time that my trial was to begin, the judge didn't want to follow thru with a trial, he conferred with the solicitor and my lawyer and urged them both to convince me to take a plea. I regretfully entered a plea of guilty because the solicitor threatened me by saying if I didn't plea, I would receive 45 years along with 15 years running consecutively, also I felt uncomfortable with my representation because she showed a lack of concern for my well-being in this matter.

Question 11 D. Inefficient Counsel continued

FILED

page 5
of 5

2013 SEP 27 AM 8:41

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, VA

Prior to this point I had requested she file several motions on my behalf pertaining to this case, which she didn't do because she stated that they "would automatically be denied."

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

ORIGINAL

Michael
I, Cammon 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.

Michael Cammon
Applicant

SWORN or affirmed to and subscribed before me this
23 day of September, 2013.

Dwain D. Lawton
Notary Public

My Commission Expires: April 22, 2023

2013 SEP 27 AM 8:42
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

FILED

2013CP3203322

STATE OF SOUTH CAROLINA

County of

Michael

I, Cannon, 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.

Michael Cannon

SWORN to and subscribed before me this 23rd
day of September 2013.
Devian J. Dawkins (L.S.)
Notary Public

My Commission Expires: April 22, 2023

BEITH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2013 SEP 27 AM 8:42

FILED

2013CP3203322

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
Michael Tyrone Cannon,	)	Case No. 2013-CP-32-3322
S.C.D.C. No. 318275,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the application for post-conviction relief September 27, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the April 2012 term of the Lexington County Grand Jury for distribution of crack cocaine, third-offense (2012-GS-32-0987). Applicant was represented by Sarah H. Hahn. On December 11, 2012 the State called its case. Applicant entered a guilty plea to the lesser included offense of distribution of crack cocaine, second-offense. The Honorable Roger M. Young, Sr., sentenced Applicant to ten (10) years imprisonment for the distribution charge. Applicant did not appeal his guilty plea or sentence.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's trial transcript, the Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records. 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. "Conflicting error in Rule 6 chain of custody:"
 - a. Insufficient Form B and C.
2. "Errors in warrant"
 - a. Improper Audit copy.
3. "Error in Rule 5 motion for discovery"
 - a. Evidence disclosed misidentified Applicant.
4. "Ineffective Counsel"
 - a. Failure to advise Applicant to plead guilty.

Any claims not specifically enumerated in the PCR application or **amendments not filed ten (10) days prior to the evidentiary hearing** will be opposed by the State, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

The Respondent submits that Applicant's first three allegations for Post-Conviction Relief should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashlev v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, the Court should summarily dismiss these allegations.

IV.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his 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, 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 (1985).

Respondent submits that 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, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant further alleges a violation of enhancement. However, Applicant fails to set forth with specificity the grounds upon which these violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina

(1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since Applicant has failed to make even a prima facie showing, Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

VI.

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

VII.

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

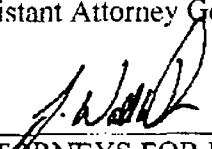
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

RECEIVED
JUL 10 2013
CLERK OF COURT

U.S. DISTRICT COURT

CLERK

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE ELEVENTH CIRCUIT
COUNTY OF LEXINGTON	)	
	)	2013-CP-32-3322
	)	
MICHAEL T. CANNON, # 318275	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent	)	
_____	)	

FILED
CLERK OF COURT
SOUTH CAROLINA
JAN 14 2014

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:

Kristy Grafton Goldberg, Esq.
1720 Main St., Suite 301
Columbia, SC 29201

DATED this 11th day of December, 2013

Troyeshi Brailey
Troyeshi Brailey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

MICHAEL CANNON)
SCDC # 318275,)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
2013-CP-32-3322

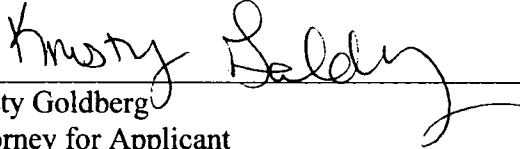
ORIGINAL

**AMENDED APPLICATION
FOR POST CONVICTION RELIEF**

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows:

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

(a) Ineffective assistance of trial counsel – counsel never informed Applicant that the initial plea offer would be withdrawn by the Solicitors office.


Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, SC 29201
803-252-2299
803-799-4059 (fax)
kristy@kristygoldbergllaw.com

FILED
2014 APR -7 P 1:01
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Columbia, South Carolina

This 3rd day of April, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

MICHAEL CANNON)
SCDC # 318275,)

Applicant,)

vs.)

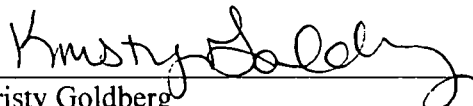
STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
2013-CP-32-3322

ORIGINAL

CERTIFICATE OF SERVICE

I certify that on this date I served the Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. mail at Post Office Box 11549, Columbia, South Carolina 29211-1549.



Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
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Columbia, South Carolina

This 3rd day of April, 2014

FILED
2014 APR -7 P 1:01
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

1 State of South Carolina

Court of Common Pleas

2 County of Lexington

3
4
5 Michael T. Cannon)

6 Applicant,)
7 v.)

Transcript of Record
13-CP-32-3322

8 State)
9 _____)

10 April 17, 2014

11 Lexington, South Carolina

12
13 B E F O R E:

14 The Honorable William P. Keesley, Judge.
15

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

17 Kristy G. Goldberg, Esquire
Attorney for the Applicant

18 Walt Whitmire, Esquire
19 Attorney for the State
20
21
22
23
24

25 Stacy L. Sheppard, RPR
Circuit Court Reporter

I N D E X

WITNESSPAGE

Michael Cannon	
Direct Examination By Ms. Goldberg	4
Cross-Examination By Mr. Whitmire	12
Redirect Examination By Ms. Goldberg	18
Recross-Examination By Mr. Whitmire	18
Sarah H. Mauldin	
Direct Examination By Mr. Whitmire	20
Cross-Examination By Ms. Goldberg	30
Redirect Examination By Mr. Whitmire	33
Certificate of Reporter	40

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
C-1	Conviction Summary	3	

1 (The following proceedings were held on
2 April 17, 2014.)

3 (Court's Exhibit Number 1, conviction
4 summary, marked for identification.)

5 **MR. WHITMIRE:** May it please the Court. The
6 matter before this Court is Michael Cannon v. State
7 of South Carolina, 2013-CP-32-3322. Mr. Cannon was
8 indicted on distribution crack cocaine base third
9 offense. He was represented by Sarah Hahn.

10 On December 11th, 2012, he entered a plea to
11 the lesser-included distribution second offense.
12 Judge Young sentenced him to ten years imprisonment.
13 As a result of that sentence and conviction, Judge
14 Young revoked the remainder of his probation, which
15 was 14 years. Those two sentences were to run
16 concurrent.

17 He is represented by counsel. He did not file
18 a notice of appeal. He did file a timely
19 application of post-conviction relief. Ms. Goldberg
20 filed a timely amended application alleging
21 ineffective assistance pursuant to Lafler v. Cooper
22 in advising on the earlier terms of the plea offer
23 before it expired. At this time, I turn matters
24 over to Ms. Goldberg.

25 **THE COURT:** Yes, ma'am.

1 **MS. GOLDBERG:** Thank you, Your Honor. May it
2 please the Court. Does Your Honor have in your file
3 a copy of the amended application?

4 **THE COURT:** Yes.

5 **MS. GOLDBERG:** Then we're ready to proceed. We
6 would call Michael Cannon to testify at this time.

7 **THE COURT:** Come around, please.

8 MICHAEL CANNON,
9 having been duly sworn, testified as follows:

10 **THE CLERK:** Have a seat and state your name for
11 the record.

12 **THE WITNESS:** Michael Cannon.

13 DIRECT EXAMINATION

14 BY MS. GOLDBERG:

15 **Q** Good morning, Mr. Cannon.

16 **A** Good morning.

17 **Q** Where are you currently housed?

18 **A** Campbell prerelease.

19 **Q** Campbell prerelease. And you are serving
20 sentences on two charges currently; is that right?

21 **A** Yes, ma'am.

22 **Q** Explain what the two charges are.

23 **A** Distribution second, ten-year sentence, and
24 probation violation, 14 years.

25 **Q** What's the probation violation for?

1 **A** Distribution first.

2 **Q** Distribution first offense. Did you plead

3 guilty to these charges or did you have a trial?

4 **A** I was in trial, but I pleaded guilty.

5 **Q** The day the trial was called?

6 **A** Yes, ma'am.

7 **Q** What were you originally charged with?

8 **A** Distribution third.

9 **Q** And you pled to distribution second?

10 **A** Yes, ma'am.

11 **Q** So the plea offer was for the reduced charge?

12 **A** Yes, ma'am.

13 **Q** Who was your attorney?

14 **A** Sarah Hahn.

15 **Q** Were you in jail while your charges were

16 pending?

17 **A** Yes, ma'am.

18 **Q** Did your lawyer come to the jail to meet with

19 you to prepare for trial and discuss the case?

20 **A** Yes, ma'am.

21 **Q** Did you -- previous to the day of trial when

22 you entered your plea, did you ever receive any plea

23 offers prior?

24 **A** Yes, ma'am, first offense.

25 **Q** Okay. Tell me how you found out about that.

1 **A** She came and told me -- okay, they had said one
2 time that they had a video on me, right, so they
3 found out that they never had a video on me. So she
4 said that the solicitor dropped it to first offense
5 and that I could plea out to first offense once they
6 found out that they didn't have a video on me.

7 **Q** Because the video information was inaccurate,
8 the solicitor offered a plea to distribution first
9 offense?

10 **A** Yes, ma'am.

11 **Q** Where were you when she told you about this?

12 **A** I was still incarcerated.

13 **Q** She came to the jail to tell you?

14 **A** Yes, ma'am.

15 **Q** So did you tell her that you wanted to accept
16 that offer?

17 **A** Yes, I agreed.

18 **Q** And did you go to court?

19 **A** Yes, ma'am.

20 **Q** What happened when you went to court?

21 **A** We went up to take the plea, but the judge
22 automatically wanted to give me 14 years for my
23 probation time. So she was like, Let's just wait
24 and take it in front of another judge. And then
25 once they listen to the case of the drug charges,

1 they'll probably see stuff a different way to give
2 me all that time for my probation violation.

3 **Q** What judge was it?

4 **A** Young.

5 **Q** Judge Young. Did she tell you that if you did
6 not accept the plea offer on that day, that the plea
7 offer would be withdrawn?

8 **A** No, ma'am. I thought we was taking it in front
9 of another judge.

10 **Q** Did she mention when you might go back to
11 court?

12 **A** No, ma'am.

13 **Q** But you thought you would be going back for
14 another plea?

15 **A** For the same plea offer.

16 **Q** For the same plea offer?

17 **A** Yes, ma'am.

18 **Q** Did you sign anything when you went to court
19 that day?

20 **A** Yes. I had signed to take the plea that day,
21 but like I said, when we went up, because of the
22 probation, she was like, Let's take it in front of
23 another judge.

24 **Q** You had signed a sentencing sheet?

25 **A** Yes, ma'am.

1 Q Completely willing to accept the plea offer?

2 A Yes, ma'am.

3 Q And then you thought you'd be going up for a
4 plea another day?

5 A Yes, ma'am.

6 Q When was the next time you heard something?

7 A A couple weeks later she come to me and told me
8 then that I was going to trial.

9 Q Did she say what happened?

10 A No. Only thing she said, we was on the trial
11 docket.

12 Q That you had been placed on the trial docket?

13 A Yes, ma'am.

14 Q Did she tell you that your initial offer had
15 been withdrawn?

16 A No, ma'am.

17 Q She didn't explain that?

18 A No.

19 Q Once she first told you that you were on the
20 trial docket, how long did it take for you to come
21 to court?

22 A Some months.

23 Q Between the first time you went to court and
24 the second time you went to court, how much time do
25 you think passed?

1 **A** Four -- three, four months.

2 **Q** Did you ever come back to court to try and
3 plead in front of another judge?

4 **A** No, ma'am. They --

5 **Q** Would you have been willing to?

6 **A** Yes, ma'am.

7 **Q** If your lawyer had told you in court that first
8 day that your offer would be withdrawn if you did
9 not plead guilty on that day, would you have pled
10 guilty?

11 **A** Yes, ma'am.

12 **Q** Even though the judge was going to give you 14
13 years on the probation violation, you're telling me
14 you still would have pled guilty that day?

15 **A** If I was knowing that he was going to give me
16 the 14 years on the probation violation?

17 **Q** Right.

18 **A** No, ma'am, I probably wouldn't have pleaded
19 then.

20 **Q** Everything's exactly the same as it was except
21 you know that your offer's going to be withdrawn?

22 **A** Yes, ma'am.

23 **Q** Would you still plead guilty?

24 **A** If I knew the offer -- okay. Could you repeat
25 that for me now.

1 Q Imagine that first day you came to court, all
2 of the circumstances are the same except Ms. Hahn
3 tells you, if you don't plead guilty to this first
4 offense today, the offer is being withdrawn.

5 A I would have pleaded.

6 Q You would have pled guilty?

7 A Yes, ma'am.

8 Q Why?

9 A Because we was pleading under no con -- and I
10 had been locked up so long, I was ready to get back
11 home to my children.

12 Q Currently, you've explained your -- you're
13 serving a sentence on a second offense and a first
14 offense?

15 A Yes, ma'am.

16 Q Can you explain for the Court the difference in
17 how those sentences are being calculated?

18 A On the ten-year sentence, I have to do 85
19 percent for pleading to that second offense. So
20 instead of doing half of my time, I have to do eight
21 years and six months on the ten-year sentence. And
22 on the 14-year sentence, I only do seven years.

23 Q So if you had gotten -- if you had pled guilty
24 to a first offense, would you be doing less time
25 than you are now?

1 **A** Yes, ma'am.

2 **Q** Even if you had still gotten a ten-year
3 sentence?

4 **A** Even with the 14 and the 10, I still would have
5 been doing less time.

6 **Q** Simply because you would be pleading to a first
7 offense?

8 **A** Yes, ma'am.

9 **Q** You filed a PCR application yourself to bring
10 on this case; is that correct?

11 **A** Yes, ma'am.

12 **Q** And in that PCR application, you mentioned
13 several issues related to things that could have
14 been contested at trial; is that right?

15 **A** Yes, ma'am.

16 **Q** Do you want this Court to overturn your case
17 and give you a new trial?

18 **A** No, ma'am.

19 **Q** Do you want a new trial?

20 **A** No, ma'am.

21 **Q** So do you want to go forward on any of those
22 issues regarding what could be argued in trial?

23 **A** No, ma'am.

24 **Q** What is it that you want this Court to do?

25 **A** I just want to try to get my first -- the first

1 plea that was offered back to me.

2 Q That's for a first offense?

3 A Yes, ma'am.

4 Q What is your current max-out date?

5 A June the 12th, 2020.

6 MS. GOLDBERG: No further questions.

7 MR. WHITMIRE: May it please the Court.

8 THE COURT: Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. WHITMIRE:

11 Q Mr. Cannon, you have four prior narcotics
12 convictions; is that correct?

13 A Yes, sir.

14 Q In Lexington County?

15 A Yes, sir.

16 Q Did you enter guilty pleas on those or go to
17 trial?

18 A Guilty.

19 Q Who were your attorneys on those cases?

20 A Matthew Buchanan and I forgot the other two
21 names -- Oh, Sally Henry and the other guy, he just
22 -- right there, I forgot his name, Casey Cornwell.

23 Q And is this the first time you've been arrested
24 in a buy-bust sting?

25 A A buy-bust sting?

1 Q Using an informant?

2 A No, ma'am -- I mean, no, sir. My fault. No,
3 sir.

4 Q Did you and Ms. Hahn discuss the State's
5 evidence?

6 A Yes, sir.

7 Q The informant identified you as the seller of
8 the narcotics; is that correct?

9 A The State had a preliminary hearing. I wasn't
10 there. She said that they never even put the
11 informant -- me in a lineup in front of the
12 informant.

13 Q And according to State's evidence, y'all
14 discussed that the informant's girlfriend also
15 identified you?

16 A That's what they -- but in the motion of
17 discovery, they're saying the way I was identified
18 was through the narcotics agent watching the video
19 tape that they never had.

20 Q And Ms. Hahn discovered that fact for you,
21 didn't she?

22 A Yes, sir.

23 Q But the State also had an audio tape; is that
24 correct?

25 A That's what they said they had. I never heard

1 it.

2 Q And you were arrested on -- in November of
3 2011; correct?

4 A Yes, sir -- no, I was arrested on the 15th,
5 December 15th.

6 Q Indicted April 2012; is that correct?

7 A Yes, sir.

8 Q You and Ms. Hahn discussed that indictment?

9 A Yes, sir.

10 Q When was your first plea offer made?

11 A I forgot the original date when it was first
12 made.

13 Q And was that to plead you straight up?

14 A No, sir, to the first offense.

15 Q Was the second offense -- I mean, sorry --

16 A Third offense.

17 Q Third offense first?

18 A Uh-huh.

19 Q Then on, I believe it's August 2012, the
20 solicitor made an offer to plead you to the first
21 offense?

22 A Yes, sir.

23 Q You and Ms. Hahn discussed this offer, the
24 terms of it?

25 A Yes, sir.

1 Q Discussed constitutional waivers?

2 A Yes, sir.

3 Q And you said you rejected it because the plea
4 judge for that day indicated he was going to revoke
5 your probation in full?

6 A Uh-huh.

7 Q Fourteen years hanging over your head?

8 A Yes, sir.

9 Q Did Ms. Hahn explain to you that the solicitor
10 was free to make or revoke plea offers at will?

11 A No, she never told me that.

12 Q Did the solicitor ever make a written offer?

13 A Did he ever make a written offer? I don't
14 know. The only thing she told me, that the
15 solicitor was offering us a first offense plea. She
16 came to the jail and let me know.

17 Q So you didn't have any information saying that
18 this offer would stay open for X number of days
19 before it terminates?

20 A No, sir.

21 Q Nothing like that?

22 A No, sir.

23 Q And when you pled guilty on prior occasions
24 with Ms. Henry, Mr. Buchanan and Mr. Cornwell, did
25 they tell you the State was free to make and revoke

1 offers?

2 **A** No. They just -- the same. They told me that
3 they was offering me this plea, the State was
4 offering this plea.

5 **Q** And where did you learn that you're serving 85
6 percent of the second offense?

7 **A** The department of corrections.

8 **Q** You learned it in corrections?

9 **A** Yes, sir.

10 **Q** So Ms. Hahn --

11 **A** Yeah. When I pleaded to the second offense, I
12 knew that it would be 85 percent.

13 **Q** Who advised you of that?

14 **A** She did, Ms. Hahn.

15 **Q** And when did you learn that? Did you know that
16 in the beginning?

17 **A** Sir?

18 **Q** Did you know that the second carried 85 percent
19 in the beginning?

20 **A** Once she let me know, yes, sir.

21 **MR. WHITMIRE:** Beg the Court's indulgence.

22 (Pause.)

23 **Q** Did you do anything to help the police to --

24 **A** No, sir.

25 **Q** -- elicit that good offer?

1 **A** No, sir.

2 **Q** And you said that several months elapsed
3 between you standing down on the second offer and
4 your trial date?

5 **A** Yes, sir.

6 **Q** You told Judge Young at your plea that you were
7 satisfied with Ms. Hahn?

8 **A** Yes, sir.

9 **Q** And you have had similar discussions with
10 judges on several prior occasions; is that correct?

11 **A** Yes, sir.

12 **Q** Why didn't you mention that you just wanted the
13 first offer back?

14 **A** Because I only had two choices that day, either
15 take the -- well, we tried to get that back, but the
16 solicitor wouldn't provide it. So I either had to
17 go to trial that day or take the second offense
18 plea. I only had two choices.

19 **Q** And how many times did Ms. Hahn meet with you
20 in this case?

21 **A** Three times at the most.

22 **Q** Did she ever promise you that that second offer
23 to the first distribution would stay open for you to
24 make a decision to go in front of another judge?

25 **A** She was just like, Let's just wait and take it

1 in front of another judge. So that's why I didn't
2 take it that day.

3 **MR. WHITMIRE:** No further questions, Your
4 Honor.

5 Thank you, Mr. Cannon.

6 **THE COURT:** Redirect.

7 **MS. GOLDBERG:** Just to clarify, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. GOLDBERG:

10 **Q** Mr. Cannon, you said your lawyer's advice was
11 to wait and plea another day?

12 **A** Yes, ma'am.

13 **Q** Did she ever tell you the offer would be
14 withdrawn?

15 **A** No, ma'am.

16 **MS. GOLDBERG:** Nothing further.

17 **THE COURT:** Recross.

18 **MR. WHITMIRE:** Just one question, Your Honor.

19 RECROSS-EXAMINATION

20 BY MR. WHITMIRE:

21 **Q** Did Ms. Hahn ever tell you you had a right to
22 that offer?

23 **A** To the plea offer? No, sir.

24 **Q** Has any attorney ever told you you had a right
25 to a plea offer?

1 **A** No, sir.

2 **MR. WHITMIRE:** No further questions. Thank
3 you, Mr. Cannon.

4 **THE COURT:** Thank you, sir. You may step down.
5 Any further witnesses for the Applicant?

6 **MS. GOLDBERG:** No, Your Honor, no more
7 witnesses.

8 At this time, the Applicant would like to
9 submit to the Court an exhibit. The Attorney
10 General's Office stipulates to it. It does just
11 specifically reflect how each sentence is
12 calculated. Instead of one max-out date total, it
13 would be for each sentence. And she's already
14 marked it. Can I hand it up, Your Honor?

15 **THE COURT:** Sure. Mark it in evidence, Madame
16 Court Reporter.

17 **MS. GOLDBERG:** Nothing further for the
18 Applicant.

19 **THE COURT:** Does the State have any witnesses?

20 **MR. WHITMIRE:** Yes, Your Honor. Respondent
21 calls Ms. Hahn to the stand.

22 **THE COURT:** Come around, please.

23 SARAH H. MAULDIN,
24 having been duly sworn, testified as follows:

25 **THE CLERK:** Have a seat and state your name,

1 please.

2 **THE WITNESS:** I'm Sarah Mauldin.

3 DIRECT EXAMINATION

4 BY MR. WHITMIRE:

5 **Q** Good morning, Ms. Mauldin. How long have you
6 been a public defender?

7 **A** In May, eight years.

8 **Q** And do you recall your representation in this
9 matter?

10 **A** I do.

11 **Q** Had a chance to review your file?

12 **A** I have.

13 **Q** When were you appointed on this case?

14 **A** On December -- well, I can tell you that I
15 received the file on December 22nd, 2011. I don't
16 know what day the PD's office was technically
17 appointed.

18 **Q** Did you have a chance to meet with Mr. Cannon
19 soon after your appointment and review his version
20 of events?

21 **A** There initially was a delay in the case. For
22 some reason, when I tried to find him in the jail
23 file, he didn't show up, and there was an additional
24 delay in my getting to the jail to see him. And
25 this happened with the solicitor, too. For some

1 reason, the jail records had an error with his name.
2 We even had occasions where he was supposed to be
3 brought to court and was not. But, at any rate, I
4 know that I met with him on March 20th of 2012.

5 Q Do you recall the circumstances of his arrest?

6 A I do. It was a drug bust.

7 Q How many drug cases have you tried or pled out
8 in the past?

9 A I've handled probably hundreds of drug cases.

10 Q CI buy-busts, is that a common set of
11 circumstances for you to handle?

12 A It is.

13 Q Did you file for Rule 5?

14 A I did.

15 Q Do you recall the State's evidence as it was
16 initially presented to you?

17 A I do. And if you are asking about the video, I
18 can explain that. We had a preliminary hearing in
19 February of 2012. The officer at that hearing
20 testified that there was an audio recording. Then
21 we received the discovery and there was mention of a
22 video. I talked to Mr. Cannon about that later.
23 And after I had seen the video at the solicitor's
24 office and they provided a still image, I showed it
25 to him and he recognized it from his uncle's

1 discovery materials and realized it was from his
2 uncle's case.

3 At that point, I talked to the solicitor,
4 pointed out the error. He acknowledged that the
5 police had incorrectly said that they had a video
6 from the case. I asked him to dismiss the case
7 based on that. He said they still had an audio tape
8 and they were confident enough in their CI's
9 credibility to proceed with him and the audio tape
10 that they had. However, he did agree to reduce what
11 had initially been an offer to plead to a second
12 offense down to a first offense based on the problem
13 with the video tape.

14 **Q** So is Mr. Cannon a knowledgeable client?

15 **A** Yes.

16 **Q** Was he active in his case?

17 **A** He was.

18 **Q** Was this a plea always from the beginning of
19 the representation?

20 **A** No. The State initially made an offer of
21 distribution of crack second and I discussed that
22 plea with him. And my common practice when I have a
23 case like that is to discuss the maximum sentence,
24 which would have been up to 30 years; the maximum
25 fine up to \$50,000; it would have been a felony; and

1 they would have kept his DNA on file; it's not
2 violent, but it would be serious; and no parole,
3 which I typically explain is an 85 percent offense
4 and somebody with that comes out on community
5 supervision; and that any -- since it's a graduated
6 offense, any subsequent drug convictions following
7 that would face higher penalties.

8 **Q** And when did he communicate a desire to accept
9 the State's offer to a first offense, if you can
10 recall in your file?

11 **A** I'm not sure when he said that he wanted to do
12 that. I do know that I met with him on June 18th
13 and then also on July 12th. And at that point --
14 well, if you'll give me a second, I can tell you
15 when the solicitor made the reduced offer.

16 **Q** No problem.

17 **A** That was in August of 2012 on the 23rd, the
18 solicitor made an offer to the distribution first.
19 And I met with him again in September on the 6th and
20 then the plea was scheduled for October 4th, 2012.

21 **Q** So he had several months to think it over?

22 **A** Yes.

23 **Q** Do you recall the manner in which that plea was
24 conveyed to you for the distribution first?

25 **A** It was an e-mail I received from the solicitor.

1 Q Are there any specific terms or contingencies
2 attached to it?

3 A In the e-mail, the solicitor explains why he's
4 making the reduction. And the only thing he wrote
5 to me was that considering the errors in the matter,
6 he's willing to reduce his previous plea offer to
7 distribution first.

8 Q Did you discuss that with your client?

9 A I did. He's the one that knew about the video,
10 so he understood what was going on with that.

11 Q What was your impression on the lack of video
12 in terms of the State being able to prove its case
13 at trial?

14 A Well, that's always an uncertainty. It just
15 comes down to the credibility of the CI. The audio
16 tapes are usually not sufficient enough to point out
17 exactly who a person is, but when the CI takes the
18 stand and testifies about who they purchase from, it
19 comes down to whether the jury believes that person
20 or not.

21 Q Did you have a chance to independently evaluate
22 the audio tape?

23 A I think that I did, but I don't have a note
24 about hearing the audio tape.

25 Q Would you have investigated the CI or other

1 relevant witnesses at the scene?

2 **A** I did. Mr. Cannon had a pretty good idea of
3 who the CI was. And later that person was
4 inadvertently revealed by the solicitor's office and
5 I was able to pull police reports and that kind of
6 thing. I knew the person had some pending charges,
7 knew about their prior involvement with the police
8 and that kind of information.

9 **Q** Had the case come to trial would you have been
10 ready and prepared?

11 **A** Yes.

12 **Q** Now, going back to the plea offer to
13 distribution first, did Mr. Cannon do anything and
14 -- to detrimentally rely to induce that offer?

15 **A** No.

16 **Q** Are there any terms attached to the offer
17 regarding termination dates?

18 **A** No.

19 **Q** Did he ever inquire into the State's ability to
20 terminate?

21 **A** No, he didn't.

22 **Q** Now, do you recall the circumstances that led
23 Mr. Cannon to stand down his plea, I believe, in
24 front of Judge Young initially?

25 **A** I don't. I have reviewed my notes and the only

1 thing that I wrote down was that the plea was
2 scheduled and we stood down because the judge said
3 that he would give 15 years on the probation
4 revocation. I don't recall telling him that he
5 should stand down. I don't recall telling him that
6 he should go through with it. He may be completely
7 correct about that.

8 If the solicitor had told me that day that that
9 was the last chance to plead and the offer would be
10 withdrawn, I would have conveyed that to him. But I
11 don't remember if there was any other information
12 provided to us from the State then, and I don't
13 remember anything else about why he stood down at
14 that point.

15 **Q** So you had no information on the continued
16 viability of that offer, just for the record?

17 **A** At this point, I don't remember whether we did.
18 If I had been given any information that day, I
19 would have conveyed that to him.

20 **Q** When did you learn or discover that
21 Mr. Cannon's case was scheduled on the trial docket?

22 **A** It was scheduled for three different dates, I
23 think. And when I remember back, my focus at this
24 point was treating the case as a trial case. And I
25 know that it was scheduled for trial three separate

1 times. I believe that one was for an October term,
2 one was a November term and then the December term.

3 Q Just so I have my timeline right, when did you
4 appear in front of Judge Young prior to that?

5 A The plea that did not go through was October
6 4th. And I think that he was scheduled for the
7 October 15th term for trial.

8 Q So he was already on the trial docket?

9 A I think so. I have that if you will give me a
10 second.

11 He was on the October 15th, 2012, trial term.

12 Q Now, y'all met a couple times after that
13 October stand down and his eventual December plea?

14 A We did.

15 Q Do you recall your conversations with
16 Mr. Cannon?

17 A I don't. My only notes are that we talked
18 about the trial status.

19 Q Do you have any notations or any correspondence
20 in your file where -- that would reflect Mr. Cannon
21 inquired about pleading guilty again to distribution
22 first?

23 A I do. At some point, the solicitors changed
24 and the solicitor that initially had the case had
25 left the solicitor's office and a new solicitor was

1 assigned the case. And in, I think it was December,
2 I e-mailed him that Mr. Cannon had asked me if he
3 could enter a plea under the initial offer, and the
4 solicitor declined to do that. I believe that was
5 in early December.

6 Q Who was the original solicitor on the case?

7 A Will Whetstone.

8 Q Ms. Mauldin, who was the inevitable solicitor
9 at the plea?

10 A You know, I'm not sure who actually was the
11 solicitor at that point. I know that Robby McNair
12 had taken the case. He's the one that declined to
13 go back to the offer of the distribution first. I
14 don't remember who the solicitor was on the final
15 plea.

16 Q Did you discuss, tentatively, Mr. McNair's
17 decision to decline to make the offer again with
18 your client?

19 A I don't remember a specific conversation about
20 that, no, but, I mean, if we were going to trial,
21 then it would have been obvious to him that that
22 option wasn't available.

23 Q Were there any grounds to make a motion to have
24 the State -- well, to compel the State to reconvey
25 the offer?

1 **A** Well, he hadn't relied on anything, so I guess
2 not.

3 **Q** Had he asked you to make such a motion or take
4 such action, would you have done it or attempted to
5 do it on his behalf?

6 **A** If there were any grounds to support it, yes.

7 **Q** Just a few more questions.

8 **MR. WHITMIRE:** Beg the Court's indulgence.

9 **THE COURT:** Yes.

10 (Pause.)

11 BY MR. WHITMIRE:

12 **Q** It was Mr. Cannon's decision to stand down in
13 October in front of Judge Young?

14 **A** The only note that I have was that we stood
15 down because the judge would give 15 years. If he
16 had wanted to enter a plea at that point, I would
17 not have talked him out of it, but other than that,
18 I don't -- I mean, I don't have anything specific.
19 He may be right, maybe we did hope for a better
20 judge, but if the solicitor had told me this is the
21 last chance, I'm going to revoke the offer, I would
22 have told him that. I don't have any notes one way
23 or the other to tell anymore than that.

24 **Q** And what was he most concerned about entering a
25 guilty plea? Was it the probation time or was it

1 the active sentence stuff was going to be imposed in
2 the future?

3 **A** Well, I think he was concerned when he heard
4 what the judge would give on the probation
5 revocation, if that's what you mean.

6 **Q** Uh-huh. Did you represent Mr. Cannon to the
7 best of your ability?

8 **A** I did.

9 **MR. WHITMIRE:** No further questions. Thank you
10 very much.

11 **THE COURT:** Cross-examination.

12 **MS. GOLDBERG:** Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. GOLDBERG:

15 **Q** Good morning, Ms. Mauldin.

16 **A** Good morning.

17 **Q** The original -- well, I believe you explained
18 the original plea offer in this case was for a
19 second offense?

20 **A** Right.

21 **Q** And when that plea offer was made, you
22 explained to Mr. Cannon all of the consequences of a
23 second offense?

24 **A** I did. And he had a question about that
25 because I told him that based on his prior record,

1 he was looking at life without parole because he had
2 two prior proximity charges, the more serious
3 offenses. He had questions about that. I pulled
4 the sentencing sheets and showed him those, too.

5 Q So, at that point in time, you explained to him
6 how distribution second offenses are calculated in
7 the department of corrections?

8 A Eighty-five percent, yes.

9 Q Later you received a second offer which was for
10 distribution first offense?

11 A Uh-huh.

12 Q And that was in writing; correct?

13 A It was in an e-mail, yeah.

14 Q When you explained this offer to Mr. Cannon, I
15 would assume, at that point, you also explained to
16 him the consequences of a first offense?

17 A Right.

18 Q And how they differ from a second offense?

19 A Right.

20 Q So, at that point, Mr. Cannon understood that
21 distribution first offense and distribution second
22 offense are calculated differently by the department
23 of corrections?

24 A I went over those consequences with him. If he
25 didn't understand me completely, I didn't know.

1 **Q** But, to your knowledge, he did understand?

2 **A** As far as I could tell, yes.

3 **Q** The original e-mail you received with the plea
4 offer did not state that it expired on any given
5 day; correct?

6 **A** No.

7 **Q** When you went to court with Mr. Cannon for the
8 guilty plea, do you recall if he signed anything
9 that day?

10 **A** He would have signed the sentencing sheet, but
11 that's the only plea document that we use.

12 **Q** Do you remember the circumstances that led to
13 you all being aware of the judge's intentions
14 regarding the probation violation?

15 **A** I don't remember the specifics. I think that
16 it was a situation where we had gotten mostly
17 through the plea and the judge announced what
18 sentence he was likely to give and gave us an
19 opportunity to stand down.

20 **Q** So you don't think it was a conversation in
21 chambers for --

22 **A** No.

23 **Q** The plea had begun?

24 **A** I think it was a plea in front of the judge,
25 and I don't think there was any prior discussion

1 about this. I don't recall anything like that.

2 Q And you don't remember -- do you remember when
3 you found out that the plea offer was withdrawn?

4 A I don't, but when I look back, I was thinking
5 about the case as a trial from that point on, so I
6 don't remember any specific conversations with the
7 solicitor about whether the plea offer was still in
8 effect or not. I was just thinking about it as a
9 trial case from that point.

10 Q Do you remember any specific conversations with
11 Mr. Cannon regarding whether the plea offer was
12 going to be withdrawn?

13 A No, just I know that at some point after that,
14 he asked me if he could plead to a first offense,
15 and I wrote Robby McNair, who was the solicitor at
16 that point, and asked if he could still take
17 advantage of that offer and he declined.

18 MS. GOLDBERG: No further questions.

19 THE COURT: Redirect.

20 MR. WHITMIRE: Just a few questions, Your
21 Honor.

22 REDIRECT EXAMINATION

23 BY MR. WHITMIRE:

24 Q When Mr. Cannon stood down in October of 2012
25 or November, were you focused on preparing for

1 trial?

2 **A** Yes.

3 **MR. WHITMIRE:** No further questions, Your
4 Honor. Thank you very much.

5 **THE COURT:** Recross.

6 **MS. GOLDBERG:** No, Your Honor.

7 **THE COURT:** Thank you, ma'am. You may step
8 down.

9 Any other witnesses for the State?

10 **MR. WHITMIRE:** No, Your Honor.

11 **THE COURT:** Any reply?

12 **MS. GOLDBERG:** No, Your Honor.

13 **THE COURT:** Any argument?

14 **MS. GOLDBERG:** Yes, Your Honor. On behalf of
15 the Applicant, Mr. Cannon testified that he was
16 willing to enter that plea -- to accept the plea
17 offer. He testified that it was the advice of his
18 counsel to stand down and wait and do the plea in
19 front of another judge at another time. Mr. Cannon
20 testified that he did not reject the plea offer and
21 did not intend to reject the plea offer. Next thing
22 he knew he was on the trial docket.

23 Your Honor, Ms. Mauldin was not able -- does
24 not remember any specific conversations contrary to
25 Mr. Cannon's testimony. She states that she cannot

1 remember exactly when she discovered that the plea
2 offer was withdrawn; she cannot recall ever having
3 any conversation with Mr. Cannon advising him that
4 the plea offer would be withdrawn.

5 In light of that testimony, I would argue that
6 I -- the Attorney General did mention *Lafler v.*
7 *Cooper*, but I think in addition -- that is a U.S.
8 Supreme court case {sic}. I think it's analogous to the
9 state court -- state cases where the attorney did
10 not relay a plea offer. I would argue that not
11 advising a client that an offer is going to be
12 withdrawn is analogous to not advising them at all.
13 It's not the client. Mr. Cannon, in this particular
14 circumstance, is unable to accept a plea offer when
15 the advice of counsel is to not take it on a
16 particular day, take it another day, and before he
17 can do anything about it, the plea is gone.

18 He did sign -- he testified and Ms. Hahn both
19 testified, he signed a sentencing sheet that day,
20 because he wasn't sentenced, that would have been
21 destroyed. That's not a part of the record, but
22 that does show that he was willing to accept the
23 plea offer to the charge. The only issue is the
24 probation violation.

25 Your Honor, we have handed up a copy of the

1 department of corrections' calculation of each
2 sentence. We do this in order to show prejudice on
3 this -- in this matter. As you can see, Your Honor,
4 the crack distribution sentence of 14 years, his
5 max-out date is in 2019. That's because it's
6 calculated as a first offense at 65 percent. The
7 second offense distribution charge, even though it's
8 a lesser sentence of ten years, his max-out date is
9 in 2020. So it is calculated at 85 percent.

10 Your Honor, if he had received a sentence on
11 the first offense, regardless of what that sentence
12 would have been, it would have been calculated
13 lesser than what he's dealing with right now.
14 That's -- for that reason, his max-out date would
15 have been less.

16 Your Honor, we ask that this Court issue an
17 order allowing Mr. Cannon to plea to the original
18 offer of distribution first offense as Mr. Cannon
19 did not knowingly and intelligently reject that
20 offer at any time.

21 **MR. WHITMIRE:** May it please the Court.

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

23 **MR. WHITMIRE:** Your Honor, testimony shows,
24 Ms. Mauldin testified that Mr. Cannon was on the
25 trial docket in October when he went to plead to

1 distribution first in front of Judge Young.
2 Mr. Cannon made the voluntary and intelligent
3 decision to stand down based on the judge's conveyed
4 intention to revoke in full. He had 14 years
5 hanging over his head.

6 What the testimony shows is Ms. Mauldin started
7 preparing for trial. The moment Mr. Cannon inquired
8 about possibly getting that plea offer back, she
9 contacted the solicitor. There was a new solicitor.
10 She discovered that the plea offer had terminated.

11 There was no indication that he had ever
12 detrimentally relied or that the new Solicitor's
13 decision to terminate was in contradiction or
14 violation of any plea agreement. The record only
15 shows that the original solicitor offered to plea to
16 distribution on -- without any stipulations,
17 qualifications or contingencies. It is certainly,
18 under Reed v. Becka, the State's prerogative and
19 ability to make and revoke plea offers at will,
20 unless there's detrimental reliance pursuant to
21 Custodio v. State.

22 First, Your Honor, we'd argue Ms. Mauldin is
23 not under a duty of clairvoyance to know what the
24 solicitor will do and not do, particularly that a
25 solicitor will leave the office, a new solicitor

1 will decide to take the case to trial and not
2 reconvey a plea offer. Second of all -- that's
3 pursuant to Thornes v. State.

4 Second of all, Your Honor, Strickland does not
5 extend to advising a client that a plea offer will
6 terminate. It is what it is. There's no
7 detrimental reliance, no -- he's not prejudiced in
8 any way by not being advised of that.

9 Furthermore, this particular Applicant, in this
10 particular case, he was a knowledgeable Applicant.
11 He was the one that -- well, informed his attorney
12 and was able to ferret out a potential error in
13 evidence. He has pled guilty four times prior.
14 He's very knowledgeable in general sessions matters.
15 When he stood down that day, he did that at his own
16 peril to distribution first.

17 Going to Wolf v. State, wishful thinking on
18 behalf of a applicant, he can't have his cake and
19 eat it too and want distribution first back because,
20 on the eve of trial, he decided his best course of
21 action would be to plead to the lesser-included
22 offense of distribution second.

23 Regarding the prejudice argument, Your Honor, I
24 would be happy to brief it. It's very, I would say,
25 particular, and I would, at this time, not want to

1 inform the Court of any inaccuracies in Applicant's
2 case or my case.

3 **THE COURT:** All right. I'll notify you of a
4 decision in writing. If I need briefs, I'll let you
5 know. Thank you.

6 **MS. GOLDBERG:** Thank you, Your Honor.

7 **MR. WHITMIRE:** Thank you, Your Honor..

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9 END OF PROCEEDINGS

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1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA

4 COUNTY OF LEXINGTON

5

6 I, the undersigned, Stacy L. Sheppard, Circuit
7 Court Reporter for the Eleventh Judicial Circuit of
8 the State of South Carolina, do hereby certify that
9 the foregoing is a true, accurate and complete
10 transcript of record of all the proceedings had and
11 the evidence introduced in the hearing of the
12 captioned cause, relative to appeal in the Circuit
13 Court for Lexington County, South Carolina, on the
14 17th of April, 2014.

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

17

18

February 6, 2015

19

20

s/Stacy L. Sheppard

21

22

Stacy L. Sheppard, RPR
Circuit Court Reporter

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24

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Michael Tyrone Cannon,
S.C.D.C. No. 318275,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-32-3322

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 27, 2013. Respondent made its Return. An evidentiary hearing into the matter was convened at the Lexington County Judicial Center on April 17, 2014. Applicant was present and was represented by Kristy Goldberg, Esquire. Respondent was represented by Assistant Attorney General Walt Whitmire. Applicant and plea counsel testified at the PCR hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the April 2012 term of the Court of General Sessions for Lexington County for distribution of crack cocaine, third or subsequent offense (2012-GS-32-0987). Assistant Public Defender Sarah Mauldin¹ represented Applicant. On December 11, 2012, Applicant entered a guilty plea to the lesser-included offense of distribution, second-offense, pursuant to a plea agreement. The Honorable Roger M. Young, Sr., sentenced Applicant to a ten (10) year term of imprisonment.

¹ Formerly Sarah Hahn at the time of the representation.

As a result of the plea, Judge Young revoked Applicant's probationary sentence on a separate distribution conviction in full. Applicant did not appeal his sentence or conviction.

At the PCR hearing, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. failure to advise Applicant on the consequences of rejecting the State's first plea offer and failing to revive the offer.

APPLICABLE LAW

WP
#2
In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 668, 104 S.Ct. at 2064. 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, *supra*.

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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

WHL
#3
As a matter of general impression, this Court has evaluated the credibility of the applicant, and the actions of the attorney in preparing the case for trial refute the applicant's version of events related to his failure to go accept the initial plea offer of distribution, first-offense. This Court finds that the Applicant failed to meet his burden to prove counsel's performance was deficient or prejudicial in advising him on the terms and conditions of the first plea offer and not making a motion for specific performance or a revival of the first rejected plea offer.

A.

"The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to "all 'critical' stages of the criminal proceedings." Missouri v. Frye, — U.S. —, —, 132 S.Ct. 1399, 1402 (2012). "The question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction

on lesser charges, or both." Id. — U.S. at —. 132 S.Ct. at 1408. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). "To show prejudice from ineffective assistance of counsel in a case involving a plea offer, petitioners must demonstrate a reasonable probability that (1) they would have accepted the earlier plea offer had they been afforded effective assistance of counsel, and (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." Merzbacher v. Shearin, 706 F.3d 356, 366 (4th Cir. 2013) cert. denied, 134 S. Ct. 71, 187 L. Ed. 2d 56 (U.S. 2013) reh'g denied, 134 S. Ct. 725, 187 L. Ed. 2d 580 (U.S. 2013) (internal quotations omitted).

WPC
#4 At the beginning of the PCR hearing, PCR counsel stated Applicant was solely proceeding upon an allegation of ineffective assistance of counsel concerning the expiration of a more favorable initial plea offer. Applicant faced multiple charges, including distribution, third-offense or greater. In addition, Applicant was serving a probationary sentence and was facing a probable revocation. At the PCR hearing, counsel summarized the 'buy-bust' transaction that led to Applicant's arrest and conviction. She further independently investigated the State's confidential informant 'C.I.' and other evidence related to the buy-bust.

Counsel made the necessary requests for discovery materials. She came upon an error related to the discovery materials provided. The Solicitor's office had some confusion at the beginning of handling these cases, and a video that was thought to be one involving this Applicant actually was one involving his uncle. The State did have an audiotape of the alleged transaction. Because of the confusion, the Assistant Solicitor who originally had the case

decided to extend the original plea offer so as to benefit Applicant further. An offer was conveyed to plead Applicant to the lesser-included offense of distribution, first-offense. The plea did not go forward on first offense distribution because of something the judge indicated that caused the Applicant to refuse to go forward.

Applicant testified that he appeared in court to plead guilty under the plea bargain whereby his charges of distribution, third-offense, were to be treated as a first-offense. Since he was on probation, he faced a probation revocation proceeding at the same time. The circuit judge that was about to accept Applicant's plea of guilty indicated that he was going to revoke 14 or 15 years on the probation matter. The underlying charge for which he was on probation was not an 85% minimum service offense. His claim is that his attorney advised him not to go forward and to wait for another judge.

WPA
H/S
The State's initial plea offer was terminated and Applicant eventually entered a less favorable plea agreement. Thus, Applicant pleaded guilty to distribution, second-offense, which made the sentence fall under the no-parole (minimum 85%) provisions, with community supervision to follow, in addition to a revocation.

Counsel testified at the PCR hearing that she could not recall specifically whether she advised Applicant not to go forward at the first effort to plead guilty. She was unable to specifically stipulate to or dispute Applicant's version of the representation regarding his decision to reject the initial plea offer. However, she does remember that she considered the case to be a trial from the point that the plea agreement was rejected, and she began preparing in that fashion. The cases then appeared on multiple trial dockets over a course of several months, as opposed to plea dockets. This Court finds that such an understanding and preparation is totally inconsistent with an intention of waiting for another judge to consider the plea.

This Court finds that it is undisputed that the Assistant Solicitor who was handling the case left his job. Another Assistant Solicitor took over the case. Applicant asked counsel to inquire to determine if the initial offer that he rejected was still on the table. There is no indication that the prior plea was put in writing or that it had been communicated to have an expiration date. Counsel contacted the new Assistant Solicitor, who rejected renewing the original terminated plea offer. See Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) - A defendant has no constitutional right to plea bargain. Applicant had an extensive criminal record and was facing multiple charges that allegedly occurred while he was on probation. A new set of plea negotiations resulted in the State conveying a second plea offer to the lesser-included offense of distribution, second-offense, in addition to the *nol prosequere* dismissal of several other pending charges. Because of the change, Applicant, is expected to serve a slightly greater active term of imprisonment in the Department of Corrections than he would had he not rejected the initial plea agreement. He also has to go through community supervision. This Court finds that the Applicant made the intelligent and voluntary decision to enter the second plea agreement.

This Court finds that there is no indication that the State had anything to do with the Applicant's decision not to go forward on the plea agreement. While there was no expiration date specified, there also was not an indication that the plea bargain was effective forever. Solicitors have the right to withdraw their plea offers, except where the Applicant can prove detrimental reliance. See Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 39 (2007) - Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining.

Applicant has the burden of proof in this PCR case. First, he has not met the burden to prove that the Solicitor's office did anything that caused him to rely to his detriment. Therefore, counsel could not have been ineffective for failing to revive the original offer as a matter of course on a theory of detrimental reliance. The record shows a motion to enforce the original plea offer would have been without merit. See Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308 (1983).

Second, Applicant has not met his burden to prove counsel's performance was ineffective in advising him on the terms, consequences, and conditions of the original plea offer. This Court finds that the Applicant intelligently and voluntarily rejected the first plea offer based on the prospect of a full revocation on his probationary sentence. Despite the inability of counsel to recall the specifics of the conversation, her actions following that decision belie a belief that the plea would merely be rescheduled in front of another judge. See Burt v. Titlow, — U.S. —, 134 S. Ct. 10, 16, 187 L. Ed. 2d 348 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'"). She prepared for trial. The case appeared on multiple trial rosters. The Applicant's assertion that he was advised to reject the initial plea offer without being told of the consequences of his decision are not credible. See Stewart v. Secretary, Dept. of Corrections, 476 F.3d 1193, 1209 (11th Cir. 2007) - the experience of counsel strengthens the presumption of reasonable assistance.

It is equally or more likely that the applicant decided not to enter a plea and elected to go to trial based on his own intelligent and accurate assessments, not on the alleged deficient performance of counsel. See White v. Livingston, 231 S.C. 301, 308, 98 S.E.2d 534, 537 (1957) ("[E]vidence adduced before the referee indicates that the result of the case is not a serious

miscarriage of justice, if it is a miscarriage at all. At any rate, appellant has made his bed and he must lie in it.") Applicant's hope that the original plea offer would not terminate or be revived was a product of wishful thinking, not deficient performance from counsel. The Applicant has a history of involvement with the workings of General Sessions Court. See Merzbacher at 366-67 ("But it is entirely clear that to demonstrate a reasonable probability that he would have accepted a plea, a petitioner's testimony that he would have done so must be credible.") Therefore, this allegation is denied and dismissed.

B.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are 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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

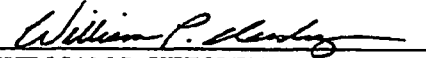
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 10th day of June, 2014.

#9


WILLIAM P. KEESLEY
 Presiding Judge
 Eleventh Judicial Circuit

Edgefield, South Carolina

FILED
 2014 JUN 12 A 11:42
 BETT A. CARRIG
 CLERK OF COURT
 LEXINGTON, SC

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP3203322

Michael Tyrone Cannon
#318275

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

6/20/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on 20th of June 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Michael Tyrone Cannon #318275

ATTORNEY(S) FOR THE PLAINTIFF(S)

J Walt Whitmire SC Attorney Generals Office

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

WITNESSES

Lexington County Sheriffs Department

Brannon D. Slice

Law Enforcement Case #: 11003330

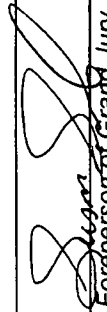
CWW

ARREST WARRANT NUMBER

J827490

ACTION OF GRAND JURY

TRUE BILL


Foreperson of Grand Jury
Date: 4/2/2012

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2012GS3200987

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

APRIL TERM 2012

**THE STATE
vs.**

Michael Tyrone Cannon

CDR #: 3039

Indictment for

**DISTRIBUTION OF CRACK COCAINE -
3RD OFFENSE**

§ 44-53-0375(B)(3)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	DISTRIBUTION OF CRACK COCAINE - 3RD
COUNTY OF LEXINGTON	)	OFFENSE
	)	
		§ 44-53-0375(B)(3)

At a Court of General Sessions, convened on APRIL 2012, the Grand Jurors of Lexington County present upon their oath:

That Michael Tyrone Cannon did in Lexington County, South Carolina on or about November 10, 2011, knowingly and intentionally distribute a quantity of Crack Cocaine, a controlled substance under the provisions of Section 44-53-110, *et. seq.*, of the SC Code of Laws (1976), as amended, such distribution not having been authorized by law, in violation of Section 44-53-375(B)(3) of the SC Code of Laws (1976), as amended.

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

C. W. Whelstone III
ASSISTANT SOLICITOR