

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

AUG 25 2015

S.C. Supreme Court

TRAVIS COLSTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001009

A P P E N D I X

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Appellate Defender

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ATTORNEYS FOR RESPONDENT

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHEROKEE) IN THE COURT OF GENERAL SESSIONS
3
4 THE STATE)
5 -vs-) TRANSCRIPT OF RECORD
6 TRAVIS LAMAR SENTELL) 2011-GS-11-00367
7 COLSTON,) 2011-GS-11-00368
8) JULY 24, 2012
9) GAFFNEY, SOUTH CAROLINA
10
11 DEFENDANT.

11 B E F O R E :
12 THE HONORABLE LEE S. ALFORD, JUDGE.

13
14
15 A P P E A R A N C E S :
16 KIMBERLY LESKANIC, ASSISTANT SOLICITOR
17 ATTORNEY FOR THE STATE
18 MICHAEL BERRY, ASSISTANT PUBLIC DEFENDER
19 ATTORNEY FOR THE DEFENDANT
20 KEVIN RHODES, PROBATION AGENT
21 MICHAEL R. WATTS
22 CIRCUIT COURT REPORTER
23
24
25

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WITNESSES

PAGE

(NO WITNESSES CALLED)

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
1	(NO EXHIBITS MARKED)		
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1 (PROCEEDINGS, JULY 24, 2012)

2 MS. LESKANIC: May it please the court, standing
3 before you, Your Honor, is Travis Lamar Sentell Colston. He
4 is pleading guilty on two indictments.

5 2011-GS-11-367 is a True Billed indictment for
6 trafficking crack cocaine, third offense. He is pleading
7 guilty to the lesser included offense of trafficking crack
8 cocaine, second offense. There is a negotiated sentence in
9 this case of fifteen years concurrent with his probation
10 revocation and also concurrent with Indictment
11 2011-GS-11-368, which is a True Billed indictment for
12 possession with intent to distribute marijuana, third
13 offense. There is a negotiated sentence in that case of
14 five years concurrent with his probation revocation and
15 concurrent with Indictment 2011-GS-11-367.

16 The defendant is represented by Michael Berry of
17 the Public Defender's office.

18 TRAVIS LAMAR SENTELL COLSTON, having been first
19 duly sworn, testified as follows:

20 THE COURT: Sir, you are Travis Colston, is that
21 right?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: How old are you, Mr. Colston?

24 THE DEFENDANT: Thirty-one, sir.

25 THE COURT: How far did you go in school?

1 THE DEFENDANT: I got a GED, sir.

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

3 THE DEFENDANT: I'm a roofer, sir.

4 THE COURT: Are you married, sir?

5 THE DEFENDANT: No, sir.

6 THE COURT: Do you have any children?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: What are their ages?

9 THE DEFENDANT: I have a little boy. He's five
10 years old.

11 THE COURT: Did you serve time in jail on these
12 charges when you were arrested?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: How much time?

15 THE DEFENDANT: Six months.

16 THE COURT: Mr. Colston, you are charged today
17 with two offenses.

18 You are charged with trafficking crack cocaine in
19 an amount between 10 and 28 grams, second offense, which
20 offense carries a minimum sentence of five years, a maximum
21 sentence of 30 years and \$50,000 fine.

22 It is classified as a violent offense, which could
23 affect your eligibility to participate in certain programs
24 down at the South Carolina Department of Corrections.

25 It's a no-parole offense, which means you would be

1 expected to serve the sentence that you actually receive on
2 this charge.

3 It's also classified as a serious offense. The
4 importance of that classification is should you get three
5 serious offenses on your record, or a combination of three
6 serious and most-serious offenses on your record, upon
7 receiving the third such offense you could get a sentence of
8 life without parole, the so called Three-Strikes Rule. This
9 offense would classify as one of those three strikes. Do
10 you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: If I accept your plea of guilty to
13 these two drug charges, they will constitute a drug offense
14 on your record. The importance of that is should you get
15 another drug offense of any kind in the future with these
16 charges on your record, the penalties may be enhanced or
17 higher because these are on your record. In other words,
18 penalties for a second drug offense -- excuse me, a third
19 drug offense are higher, in some cases much higher, than
20 they are for a second offense. Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: You are also charged today with
23 possession with intent to distribute marijuana, first
24 offense, which offense is also classified as a felony, as is
25 the trafficking charge, and it carries a maximum punishment

1 of five years and \$5,000 fine. Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Understanding that, how do you wish to
4 plead to these two charges today, guilty or not guilty?

5 THE DEFENDANT: Guilty, sir.

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

8 THE DEFENDANT: Yes, sir.

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

11 THE DEFENDANT: Yes, sir.

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

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Now, I know your attorney has gone
17 over your rights with in a jury trial. I'm going to do so
18 as well.

19 If you requested a trial by jury, the State would
20 give you a trial. At trial you would have the right to
21 confront and cross-examine all witnesses against you.

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

24 You would have the right to testify in your own
25 defense, if you wished to do so, and no one could make you

1 testify in your own trial.

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

7 You would be presumed innocent throughout your
8 trial.

9 The State would have to prove you guilty beyond a
10 reasonable doubt to a jury of twelve people. All twelve
11 people would have to unanimously agree that you were guilty
12 in order for you to be convicted. And even if you were
13 convicted, you would still have the right to appeal that
14 conviction.

15 Do you understand your rights with regard to a
16 trial by jury?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Understanding that right, do you still
19 want to plead guilty, or do you want me to set your cases
20 for trial?

21 THE DEFENDANT: Plead guilty, sir.

22 THE COURT: The State is -- is this a negotiated
23 sentence?

24 MS. LESKANIC: Yes, Your Honor.

25 THE COURT: The State has negotiated a sentence of

1 fifteen years on the trafficking crack cocaine, second
2 offense charge, and five years on the marijuana charge,
3 those two to run concurrent with each other and concurrent
4 with any sentence that you might receive on -- has he
5 already received a probation sentence, or is that going to
6 be taken up today?

7 MS. LESKANIC: It would be taken up today, I
8 believe, Your Honor.

9 PROBATION OFFICER RHODES: Yes, sir.

10 THE COURT: Any sentence that you might receive on
11 a probation violation today.

12 And are you dismissing a charge?

13 MS. LESKANIC: No, Your Honor.

14 THE COURT: All right. Is that your understanding
15 of the agreement that you had with the solicitor's office in
16 order to plead guilty to these two charges?

17 THE DEFENDANT: Yes, sir.

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

20 THE DEFENDANT: No, sir.

21 THE COURT: Are you satisfied with the manner in
22 which your attorney has advised and represented you in these
23 cases?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Have you and your attorney fully

1 discussed the charges against you?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Has your attorney told you the
4 witnesses and evidence the State has available to present at
5 trial to prove your guilt?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Has your attorney discussed with you
8 any possible legal defenses that might be available to you,
9 if you were to go to trial?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you told your attorney the names
12 of any and all witnesses you know of that your attorney
13 could subpoena and bring to trial to assist in your defense,
14 if you were to go to trial?

15 THE DEFENDANT: Yes, sir.

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

20 THE DEFENDANT: No, sir.

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

24 THE DEFENDANT: No, sir.

25 THE COURT: Are you pleading guilty today of your

1 own free will?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Are you, in fact, guilty of these two
4 charges?

5 THE DEFENDANT: Yes, sir.

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

7 MS. LESKANIC: Yes, Your Honor.

8 This occurred on April 5th of 2011, here in
9 Cherokee County, in the area of West Carlisle Street.
10 Officers pulled up on a vehicle that was sitting in the
11 middle of the road impeding traffic. When they walked up on
12 the vehicle, Mr. Colston was in the back seat of the car.
13 There were two females in the driver's seat and front
14 passenger's seat.

15 Mr. Colston had an open container sitting between
16 his feet. Officers got him out of the car. They were
17 placing him under arrest for the open container. Search
18 incident to arrest they found a quantity of marijuana and a
19 quantity of crack cocaine, as well as \$211 in cash in his
20 left front pocket that was seized. He also had a jacket in
21 the back seat of the car with him. Inside the pocket of the
22 jacket there was more crack cocaine. The substance was
23 seized by officers, Your Honor.

24 The crack cocaine was sent to SLED for testing.
25 They did confirm that it was crack cocaine and it was 23.4

1 grams of crack cocaine.

2 Also the marijuana was tested by the Gaffney City
3 Police Department and the total weight was 0.09 ounces of
4 marijuana.

5 Those are essentially the facts that the State
6 would present at trial, Your Honor.

7 This was actually a third strike for Mr. Colston.
8 The State served him with notice of life, but we have taken
9 that off of the table and allowed him to plead in return for
10 the negotiated sentence of fifteen years.

11 I'll be happy to go over Mr. Colston's prior
12 record, if the court would like the same.

13 THE COURT: I'd just like to know any priors for
14 the record, any drug charges.

15 MS. LESKANIC: Yes, Your Honor.

16 He has drugs in 2010, distribution of crack
17 cocaine and distribution within proximity of a school.

18 Then another distribution and distribution within
19 proximity of a school, Your Honor, and those are his prior
20 convictions.

21 We did file a notice of life, as I stated, on
22 March 27th of 2012, and Mr. Colston was personally served
23 with that on May 2nd of 2012, but the State has agreed to
24 reduce this from a third offense to a second offense in
25 exchange for the negotiated plea.

1 THE COURT: Mr. Colston, you have heard the facts
2 recited to the court by the solicitor's office with regard
3 to these two charges. Do you disagree in any way with what
4 they say happened?

5 THE DEFENDANT: No, sir.

6 THE COURT: I find the decision of the defendant
7 Travis Colston to plead guilty to these two charges to be
8 made freely, voluntarily, and intelligently.

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

11 I find the facts presented to the court by the
12 solicitor's office, concurred in by the defendant, fully
13 support the guilty plea in this case. I will accept the
14 plea as freely and voluntarily made.

15 Mr. Colston, if you disagree with the proceeding
16 in which we are currently involved, you have ten days from
17 today's date within which to file a notice of intent to
18 appeal. Do you understand your right to appeal today's
19 proceeding?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Counsel -- that would include the
22 probation violation matter, if we go into that today.

23 Counsel, does he wish to go forward with the
24 probation violation today?

25 MR. BERRY: Yes, Your Honor.

1 THE COURT: Okay. Has he been served.

2 PROBATION OFFICER RHODES: Your Honor, Mr. Colston
3 was just served with courtroom citation 11-12-20, in which
4 he's charged with violating probation by today's pleading
5 before Your Honor under 11-GS-11-367 and 368.

6 He's currently on probation for two counts of
7 distribution of crack, first offense; also two proximity
8 within a half mile of a school associated with those. He's
9 also on probation for a possession with intent to distribute
10 first, and a correlating proximity on that. So it's six
11 total charges, Your Honor.

12 He received the same sentence on all, which is 10
13 years suspended on the service of one and five years
14 probation, so he has a nine year exposure, judge.

15 THE COURT: Mr. Colston, you have heard what the
16 probation agent said with regard to the prior charges
17 against you and that you are on probation for those charges.
18 Do you disagree in any way with what he has said about the
19 probation?

20 THE DEFENDANT: No, sir.

21 THE COURT: Probation charges.

22 All right, counsel.

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

24 I won't belabor many points.

25 I would tell you by way of background from Mr.

1 Colston that in all actuality he's a very good guy. I mean,
2 he's come into my office and he's been polite with me.
3 Unfortunately he can't stay away from these drugs and he
4 understands that.

5 When I have drug clients in front of me, I always
6 try to make them promise me, for what that's worth, that
7 when they are done with their sentence, or when they are
8 done off their probation, that they will stay away from that
9 stuff. And I always hope that they will keep their word to
10 me, and Mr. Colston has done that today. He's told me that
11 he's done, that I think he's realized that none of this
12 activity leads in the right path, and hopefully this will be
13 his last encounter with our court system.

14 I would just ask that you would go along with the
15 negotiated sentence.

16 Mr. Colston and I have discussed the case. We
17 discussed the evidence and we have discussed the potential
18 outcomes and we have come to the conclusion together that
19 this is the best route to go for him.

20 With regards to the probation violation, I would
21 simply request that you go ahead and revoke in full and
22 allow Mr. Colston to serve that time, have it all run
23 concurrent, allow him to come out potentially with a clean
24 slate, allowing him the chance to serve his time and serve
25 his debt to the courts and to society, but for him to come

1 out and allow him the opportunity to not only prove to
2 himself, but also the courts, that we made the right
3 decision and let him serve his time and then also let him
4 have another chance when he comes out and prove himself.

5 THE COURT: Thank you.

6 Mr. Colston, anything that you wish to say to the
7 court?

8 THE DEFENDANT: Yes, Your Honor.

9 I want to start out by saying that, like Mr. Berry
10 say, that I'm not a bad guy. I have made some mistakes, you
11 know what I'm saying, but every mistake that I have made, I
12 manned up with it and I have accepted it and I took it on
13 the chin, because that's the type of man I am.

14 My family, they are counting on me. Like Mr.
15 Berry, I am through. I have been through since I got messed
16 up. And I say again that I was through, you know what I'm
17 saying? I didn't think this would be the outcome, you know
18 what I'm saying, like she said seeking the life sentence, or
19 whatever. But I pray to God to give me a chance to live.
20 Fifteen years is a long time, but I still got a chance to
21 live, and that's all I'm asking. And I appreciate the mercy
22 of the court in giving me another chance. It ain't just for
23 me. It's for my family as well and my son. I want to make
24 sure I make the best out of it. That's all I have to say.

25 MR. BERRY: Your Honor, Mr. Colston's sister, Ms.

1 Shamika Armstrong, may want to address the court.

2 THE COURT: Yes, ma'am.

3 MS. ARMSTRONG: I would just like to say that,
4 like my brother said, he's not a bad person, and
5 unfortunately he had a hard life. And going along with that
6 he made bad decisions. His worse charge to us was the
7 charge that he got right after he turned sixteen years old.
8 And unfortunately that made as an adult charge, so it's on
9 his record permanently, and that's scarred him for life,
10 because it made it hard for him to get a job in order to
11 make a living, not only for himself but for his family
12 because he's unable to obtain work because of his history.
13 It really has scarred his life permanently and he was just
14 doing what he thought he could do to survive, do you
15 understand what I'm saying? Unfortunately it was not only
16 decisions that he could have made, but the decisions that he
17 made and not a very good one, Your Honor. Every bad choice
18 that he did make, he did own up to his decisions and he did
19 his time and he's made the best that he could out of not
20 only sentences, but his time out here, as well. We have a
21 nephew that lost his father two years ago and unfortunately
22 he's gone and he's not coming back, but Travis did step up
23 and he's really been a father figure, not only to him, but
24 to his son. So we are all counting on him. Not only is he
25 there, but he helps to mentor him, as well as the other

1 children in our neighborhood and tell them "I made these
2 decisions and I want you to look at what I did and know that
3 not only was it wrong, but we don't want you to go down this
4 road. So as a lesson to his child do as I say and not as I
5 do. And he tries to protect them as much as he can and try
6 to lead them to God as much as he can. I just want you to
7 understand how much of a value he is to us, as well as our
8 neighborhoods. He has made these mistakes, but again, he's
9 working toward rehabilitating himself, as well as protecting
10 the youth coming up from making the same decisions that he
11 made, Your Honor.

12 I'd like to just ask you to take into
13 consideration that he was wrong, but he's owned up to the
14 big mistakes and he wants to have an opportunity to come out
15 and turn his life around because he will be able to help
16 others. Thank you, Your Honor, for allowing me to speak.

17 THE COURT: Well, these drugs are a terrible
18 thing. They are terrible to everybody. They are nothing
19 but destructive any way you look to the person who is
20 dealing in drugs, the people who is getting them and staying
21 on them and committing crimes to keep drugs and their health
22 and everything else is nothing but destructive out of these
23 drugs. And why in the world anybody would ever get mixed up
24 in them is beyond me. It's easy money and a way to make a
25 living without actually working, but they are a terrible

1 destructive force to everybody and everybody around them and
2 it's -- it's costing you. You will find that out now.

3 In any event, you might have been better off to
4 have gotten some time rather than all this probation you got
5 on these other charges when you got them. You just didn't
6 take that seriously. You could have gotten life without
7 parole, or you could have gotten -- if this would have been
8 a third offense, you could have gotten mandatory long
9 prison -- much a longer prison sentence without parole on
10 the third trafficking. So, you know, it's just -- you just
11 didn't learn from that, and it's unfortunate that you
12 didn't. Maybe you would have been better off if you had
13 gotten a few years on those and served some time and
14 actually realized what could happen to you.

15 THE DEFENDANT: May I address the court, Your
16 Honor?

17 THE COURT: Yes, sir.

18 THE DEFENDANT: I'm not making excuses, Your
19 Honor, but I want to make this clear, because I don't know
20 if you understand it or not. It ain't like I got out and
21 caught like -- when I explained earlier when I say when I
22 got messed up, I said I was done. I went and did a little
23 bit of time. I know I had these charges pending. I
24 explained to Ms. Leskanic that, yeah, of course, I thought I
25 was coming to do some time, but I didn't expect a life

1 sentence. And, yes, it was my ignorance that put me in that
2 predicament, because I wasn't -- I just want to know that
3 the strike would count against me, because I had the
4 trafficking charge pending when I pleaded to the
5 distributions, but the attorney that I had at the time when
6 I would ask him about it, the way he put it to me, I wasn't
7 expecting it to count against me as a strike, being that I
8 had the charges all at the same time. So I don't want you
9 to think I'm just went and did a little time and got out and
10 got in trouble and went back and, oh, I'm doing this again.
11 No, Your Honor, I meant that what I said. When I got messed
12 up, I was done.

13 THE COURT: I understand. You had these pending.
14 All right.

15 In any event, it was unfortunate to pick up all
16 those drug charges, because they do result in a lot of time.
17 Either way that you went would have been a long time. Even
18 just on the trafficking third would have been much more
19 time.

20 THE DEFENDANT: I understand, Your Honor.

21 THE COURT: All right. Case number
22 2011-GS-11-367, Travis Colston, having pled traffic guilty
23 to trafficking in crack cocaine in an amount between 10 and
24 28 grams, second offense, the sentence of the court is to be
25 committed to the State Department of Corrections for a

1 determinate term of fifteen years. This sentence is
2 concurrent to the sentence in 2011-GS-11-368, and also to
3 the sentences on the probation violations that I will impose
4 today.

5 He's given credit for six months of jail time.

6 Case number 2011-GS-11-368, Travis Lamont Sentell
7 Colston, having pled guilty to possession with intent to
8 distribute marijuana, first offense, the sentence of the
9 court is to be committed to the State Department of
10 Corrections for a determinate term of five years. This
11 sentence is concurrent with the sentence in 2011-GS-11-367
12 and the sentences on probation violation this date.

13 Again, he's given credit for six months jail time.

14 On the probation violation cases the court finds
15 these are substantial willful violations.

16 Let me ask you this. Were these already pending
17 at the time he went on probation?

18 PROBATION OFFICER RHODES: He was sentenced May 19
19 of 2011 on these judge. The offense date --

20 MS. LESKANIC: He was arrested April 6th.

21 THE COURT: This is April 5th, 2011.

22 PROBATION OFFICER RHODES: They do not, judge.
23 We -- which would leave a 15 year toll, or Your Honor to
24 terminate the probation.

25 THE COURT: Well, I guess it's six of one and half

1 a dozen of the other, but these are -- these are not
2 technically a violation of his probation, because he already
3 had the charges pending at the time he was put on probation,
4 so they would not be a violation.

5 Do you understand that, Mr. Colston?

6 THE DEFENDANT: Yes, sir, Your Honor.

7 THE COURT: All right. And so -- what I'm going
8 to do is you are getting fifteen years. I'm going to go
9 ahead and terminate the probation anyway, because by the
10 time he gets out, you know, that period -- I'm not going to
11 hold him in abeyance for almost fifteen years until he gets
12 out and then let him be put back on probation, so I'll do
13 you a big favor and just terminate your probation. I'm not
14 imposing any sentence on that.

15 MR. BERRY: Thank you, Your Honor.

16 THE COURT: Because these are technically not a
17 violation. Okay. All right.

18 PROBATION OFFICER RHODES: Thank you, sir.

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

20 MS. LESKANIC: Thank you, Your Honor.

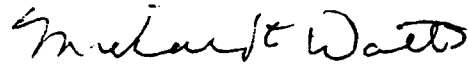
21 (END OF REQUESTED TRANSCRIPT OF RECORD)
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25

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for CHEROKEE County, South Carolina, on the 24th day of July, 2012.

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

MAY 27, 2013



Michael R. Watts
Circuit Court Reporter

79W

FORM 5

013CP-110238

STATE OF SOUTH CAROLINA)

County of Cherokee)Louis Lamar Sentell Colston)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEFFILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2013 APR 11 PM 1:41
BRANDY W. ROBBE**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Lieber Correctional Institute
2. Name and location of Court which imposed sentence Cherokee County
General Sessions Court, 125 E. Floyd Baker Blvd. Gaffney, S.C. 2934
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011 GS 1100367
 - (b) 2011 GS 1100368

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 7-24-2012, 15 yrs. 85% Trafficking Crack 10-28^{2nd}
- (b) 7-24-2012, 5 yrs. non-violent concurrent P.W.T.D Marijuana
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty yes
- (b) after a plea of not guilty —
- (c) after a plea of nolo contendere —
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) No contact with a Attorney after plea, once I was able to have my family contact him time limit had run out. I was incarcerated.
- (b) _____

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- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) Involuntary Plea
- (c) Violation of Due process
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel violated my 5th, 6th and 14th amendments.
- (b) Not made aware of charges pleading to or the penalty of charges
- (c) Violated my 4th, 5th, 6th and 14th amendments
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. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

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(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

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

No

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

(a) which grounds have been presented:

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

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

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

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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) N/A

(b) N/A

(c) _____

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

(a) your arraignment and plea? plea

(b) your trial, if any? N/A

(c) your sentencing? yes

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

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

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

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

i. Michael Berry Att. at Law, 310-B N. Limestone St.
P.O. Box 8068 Gaffney, S.C. 29340

ii. _____

iii. _____

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

i. plea

ii. sentencing

iii. _____

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

Sentence vacated and remanded back to General Sessions Court and dismissed. Or sentence vacated or remanded to General Sessions and re-sentenced under original charge.

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

No

STATE OF SOUTH CAROLINA)

County of Cherokee)

VERIFICATION

I, Travis Lamar Sentell Colston, 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.

Travis L. Colston

SWORN to and subscribed before me this 9th day of April, 2013.

Sylvia Jones (L.S.)
Notary Public

My Commission Expires: 1/24/2018

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013CP-10238

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

I, Travis Lamar Sentell Colston, 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.

Travis L. S. Colston
Applicant

SWORN or affirmed to and subscribed before me this
6th day of April, 2013.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2018

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CLERK OF COURT
CHEROKEE COUNTY, S.C.
2013 APR 11 AM 10 41
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	
	)	2013-CP-11-0238
Travis Lamar Sentell Colston, #240843,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed April 11, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. He was indicted at the June 2011 term of the Cherokee County Grand Jury for trafficking crack cocaine 28-100 grams – 3rd offense (2011-GS-11-0367) and possession with intent to distribute marijuana (2011-GS-11-0368). The Applicant was represented by Michael Berry, Esquire. On July 24, 2012, the Applicant pled guilty to the lesser-included offense trafficking crack cocaine 10-28 grams – 2nd offense and all other charges as indicted. The Honorable Lee S. Alford sentenced Applicant, pursuant to a negotiated sentence, to concurrent sentences of fifteen years for trafficking and five years for possession with intent to distribute. Judge Alford also terminated Applicant's probation relating to prior charges at this time. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein are the records of the Cherokee County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department

of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

- a. Ineffective assistance of counsel, in that;
 - i. Counsel violated Applicant's 5th, 6th, and 14th amendments,
- b. Involuntary guilty plea, in that;
 - i. Applicant was not made aware of the charges he was pleading to or the penalties,
- c. Violation of due process, in that;
 - i. Applicant's 4th, 5th, 6th, and 14th amendments were violated.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813. Respondent notes that it appears the Applicant appeared and pled guilty voluntarily without the assistance of counsel.

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

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

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

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

IV.

The Applicant also alleges that he did not plead guilty freely and voluntarily. The State submits this allegation has no merit. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at

the PCR hearing. Harris v. Leake, 282 S.C. 131, 318 S.E.2d 360 (1984).

The State submits the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The State submits the Applicant should not be allowed to depart from the truth of the statements he made during his guilty plea hearing.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Respondent submits that the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it should therefore, be treated as such.

V.

The Applicant further alleges that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these

constitutional 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 the 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 the Applicant has failed to make even a prima facie showing, the 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 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

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

March 18, 2014.

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

)
)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Travis Lamar Sentell Colston,

)
)

2013-CP-11-0238

Applicant,

)
)

v.

)
)

CERTIFICATE OF SERVICE BY MAIL

State of South Carolina,

)
)

Respondent.

)
)

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

Ms. Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
P.O. Box 1015
Rock Hill, SC 29730



Anne A. Mueller

Legal Assistant for the Respondent

DATED this 18th day of March, 2014.

1	STATE OF SOUTH CAROLINA	}	COURT OF COMMON PLEAS NONJURY
2	<u>COUNTY OF CHEROKEE</u>		
3			
4	TRAVIS LAMAR SENTELL COLSTON,	}	TRANSCRIPT
5	APPLICANT,		OF
6	VS.		RECORD
7	STATE OF SOUTH CAROLINA,		2013-CP-11-0238
8	<u>RESPONDENT.</u>		

9

10 January 15th, 2015

11 Spartanburg, South Carolina

12

13 B E F O R E:

14 THE HONORABLE DEADRA L. JEFFERSON, Judge.

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

16 LEAH B. MOODY

17 ESQ.

18 Attorney for the Applicant

19 SUZANNE H. WHITE

20 ASSISTANT ATTORNEY GENERAL

21 Attorney for the Respondent

22

23

24

25

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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P R O C E E D I N G S

THE COURT: This is Travis Lamar Sentell Colston versus the State, 2013-0238. It's before the Court on an application for post-conviction relief.

He was originally charged with trafficking crack cocaine 28 to 100 grams third offense and possession with the intent to distribute marijuana. On July 24th he pled guilty to the lesser included offense of trafficking crack cocaine ten to twenty-eight grams second offense and the other offenses.

Judge Alford sentenced him pursuant to a negotiated plea to 15 years and five years for the possession with the intent to distribute. He also terminated the Applicant's probation relating to prior charges. There was no appeal of the conviction or sentence.

He alleges violations of his Fifth, Sixth, and Fourth Amendment, that his plea was involuntary, and he was unaware of the penalties and violation of his due process, Fourth and Sixth and Fourteenth amendments.

Ms. Moody, have you explained to your client that if he gets the relief that he's requesting that he goes back to facing a mandatory 25 year day for day sentence?

MS. MOODY: Yes, Your Honor. We have talked about that and there is two cases. He has two PCR applications.

1 THE COURT: Under this same case number?

2 MS. MOODY: Not under this same case number.

3 THE COURT: This is the only one that was scheduled for
4 today.

5 MS. MOODY: Right. And I don't know the position of
6 the State in terms of consolidating. We had talked about it
7 briefly, consolidating the two cases.

8 THE COURT: When you have two PCRs, are there different
9 charges?

10 Were they all pled on the same days or different days?

11 MS. WHITE: Different days, Your Honor.

12 THE COURT: Yeah, they'd be heard separately --

13 MS. MOODY: So---

14 THE COURT: -- in the order that they were filed.
15 When did he file the other?

16 MS. WHITE: He filed -- the other one was untimely
17 filed, Your Honor. So the State has already moved to
18 dismiss---

19 THE COURT: You want a conditional dismissal?

20 MS. WHITE: ---and a conditional order has been signed.

21 THE COURT: Uh-huh. (Affirmative.)

22 MS. MOODY: He's responded. He replied to that
23 conditional---

24 THE COURT: Yeah, it will be up to the chief judge to
25 determine whether they'll be a hearing on it or not, but it

1 deals with being untimely. It doesn't, it doesn't have to
2 be a hearing on it. It can be summarily dismissed and it
3 appears that that's what was done. So it is no longer
4 pending before the Court.

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

6 THE COURT: Yes, ma'am.

7 (Pause.)

8 MS. MOODY: Your Honor?

9 THE COURT: Uh-huh. (Affirmative).

10 MS. MOODY: May it please the Court?

11 THE COURT: Yes, ma'am.

12 MS. MOODY: We'd like to call Mr. Colston to the stand,
13 Travis Colston.

14 THE COURT: Well, I need to -- did you discuss with
15 him---

16 MS. MOODY: Oh, I'm sorry.

17 THE COURT: ---that if the Court grants the relief that
18 is been requested he goes back to facing the mandatory
19 minimum of 25 years day for day and a mandatory \$50,000
20 fine?

21 That's just the trafficking charge, not the other
22 charge, the PWID charge.

23 MS. MOODY: Yes, ma'am, we discussed the charge and
24 what we received on this.

25 THE COURT: I'm sorry?

1 MS. MOODY: We discussed the charges that he has on
2 this case as well as that it would start over, the process
3 would start over for him as original.

4 THE COURT: Okay. And knowing that, he still wishes to
5 go forward?

6 MS. MOODY: Yes, ma'am, but I would put on the record
7 that we did also discuss, and I understand the Court's
8 position on this, that you can not consolidate the cases.

9 THE COURT: Uh-huh. (Affirmative).

10 MS. MOODY: We discussed that it did have some impact
11 as far as this case is concerned, and I've explained to him
12 just a second ago here, in terms of his sentence, what he's
13 looking at and what he would of been facing based on the,
14 the way the charges -- when you go to Court and they get
15 enhanced. We talked about that and we talked about that by
16 phone.

17 I just explained to him that you're not able to take
18 over that case and consolidate this, and that's something
19 for the chief judge to handle as well as he's filed his
20 response as to the motion to dismiss that application.

21 THE COURT: Yeah, by Supreme Court order, to streamline
22 PCRs, chief judge, at the motion or on the motion, the AG
23 can summarily dismiss a case and that's what's been done.
24 So as far as I'm concerned, it's dismissed.

25 He has filed an -- a response to that conditional

1 dismissal---

2 MS. MOODY: Yes, ma'am.

3 THE COURT: ---and the chief judge can determine
4 whether he's gonna hear anything further on it, but if it's
5 a clear cut legal issue it's done. And so -- and it has no
6 bearing on---

7 MS. MOODY: This---

8 THE COURT: ---this case going forward that I can
9 discern, and they wouldn't be consolidated anyway since
10 they're not interrelated. They're two separate
11 applications.

12 (Pause.)

13 THE COURT: Yes, ma'am.

14 MS. MOODY: Did I -- I'm sorry.

15 Did I answer the Court's question?

16 Did I clearly answer your question?

17 THE COURT: Yeah, I just need to know if he's ready to
18 go forward.

19 MS. MOODY: Yes, ma'am.

20 THE COURT: Okay. Proceed.

21 And that he's fully informed that he's exposing himself
22 to a whole lot more time than what he got under the
23 negotiated plea?

24 MS. MOODY: Yes, ma'am, and I think what has become
25 confusing is that, based on what he was charged with, I have

1 it as the mandatory minimum of up to five years on one
2 charge and then up to five years up to 30 years --

3 THE COURT: Uh-huh. (Affirmative).

4 MS. MOODY: -- and when you mentioned 25 years---

5 THE COURT: He goes back to his original charge, which
6 is a third and the, and the amount is different. It's --
7 he---

8 MS. MOODY: No, I---

9 THE COURT: He pled to a second, ten to twenty-eight.
10 what he was charged with is a third of twenty-eight to a
11 hundred. whole different ballgame.

12 MS. MOODY: I understand that, Your Honor.

13 THE COURT: Uh-huh. (Affirmative).

14 MS. MOODY: I was just trying to say what he's confused
15 about. When he talked about his charges --

16 THE COURT: Uh-huh. (Affirmative).

17 MS. MOODY: -- what he actually pled to --

18 THE COURT: Uh-huh. (Affirmative).

19 MS. MOODY: -- the sentencing range was zero to five
20 and then five to thirty.

21 THE COURT: Yes, ma'am.

22 MS. MOODY: So on that sentencing range, that's what
23 the maximum on this one was. His question was what were you
24 talking about with the 25 to 30, and so what I was
25 explaining to him is your original charge, if you start all

1 the way over --

2 THE COURT: Uh-huh. (Affirmative.)

3 MS. MOODY: -- is a mandatory minimum based on
4 enhancements, that, if you have a third or subsequent, it
5 carries 25 to 30. So that's when you start over. You start
6 completely over. Not with the offer on the table.

7 THE COURT: Uh-huh. (Affirmative).

8 MS. MOODY: And that's something we discussed by phone
9 as to -- and I make a habit of discussing that with my
10 clients, if they have a plea, that if you got the reduction,
11 you're pleading to a certain range, and if you go back to
12 your original charge where there's an enhancement, there's a
13 mandatory minimum of 25 to 30.

14 So that -- his question to me was what did you mean by
15 25. So I was trying to explain that based on what his
16 original record was and the original charges.

17 THE COURT: Okay. And he understands that?

18 MS. MOODY: Yes, ma'am.

19 THE COURT: Okay. Sir, you understand that you don't
20 start back at this place?

21 You start all over again with your original
22 indictments?

23 THE APPLICANT: Yeah, I understand that, but I was --
24 the reason I asked because my original charge was
25 trafficking twenty-eight to a hundred first offense.

1 THE COURT: Your original charge was trafficking third,
2 one hundred -- 28 to 100 grams, which is a mandatory 25 day
3 for day and a \$50,000 fine.

4 MS. MOODY: And that's based on---

5 THE COURT: So that's where you start back at. You
6 don't start back at a ten to twenty-eight gram charge. So I
7 need you to be clear that that's the only relief this Court
8 will be able to grant and that you're subjecting yourself to
9 a substantial amount of exposure and it is likely that the
10 State will not negotiate with you. They're probably gonna
11 try it.

12 THE APPLICANT: Yes, ma'am.

13 THE COURT: Okay. You understand that?

14 THE APPLICANT: (Nods affirmatively.)

15 THE COURT: All right. Raise your---

16 MR. BERRY: Your Honor?

17 THE COURT: I need you to say yes or no.

18 Yes, sir.

19 MR. BERRY: I just want to make the Court aware, and I
20 know it's reflected in the, in the Court transcript, but
21 Mr. Colston, based on his prior record, was actually served
22 by the State with notice of their intent to seek a life
23 without parole sentence pursuant to 17-25-45.

24 THE COURT: Okay.

25 MR. BERRY: That was served on the -- on Mr. Colston on

Travis Colston - Direct examination
by MS. Moody

1 March 27th based on his prior drug offenses. So it was
2 that originally he was facing a life without parole based on
3 prior drug charges.

4 THE COURT: Okay.

5 Sir, do you understand that and that -- so actually
6 you'd go back to a life without parole notice?

7 THE APPLICANT: Yes, ma'am.

8 THE COURT: And that's what the State would be seeking
9 against you.

10 Do you understand that?

11 THE APPLICANT: Yes, ma'am.

12 THE COURT: And knowing that, do you still wish to go
13 forward with this PCR?

14 THE APPLICANT: Yes, ma'am.

15 THE COURT: Raise your right-hand to be sworn.

16 TRAVIS COLSTON, being first duly
17 sworn, testified as follows:

18 THE COURT: If you would take a seat for me please and
19 state your full name for the record spelling your last name
20 for the court reporter.

21 THE WITNESS: Travis Colston. C-O-L-S-T-O-N.

22 THE COURT: You may proceed.

23 MS. MOODY: Thank you, Your Honor.

24 THE COURT: You welcome.

25 MS. MOODY: May it please the Court?

Travis Colston - Direct examination
by Ms. Moody

1 THE COURT: Yes, ma'am.

2 DIRECT EXAMINATION

3 BY MS. MOODY:

4 Q Mr. Colston, can you please tell the Court where you're
5 currently being held?

6 A Currently being held at Perry Correctional Institution.

7 Q And you're there based off some charges that you pled
8 to back on seven, excuse me, July 24th, 2012?

9 A Say it again.

10 Q 7/24 -- excuse me.

11 July 24th, 2012?

12 A Yes, ma'am.

13 Q Okay. And those charges are possession with the intent
14 to distribute marijuana first --

15 A Yes, ma'am.

16 Q -- is one and then trafficking crack cocaine ten to
17 twenty-eight grams a second?

18 A Yes, ma'am.

19 Q Okay. And your attorney, during that time, was Mr.
20 Berry, Michael Berry?

21 A Yes, ma'am.

22 Q Okay. And you filed your post-conviction relief
23 application against Mr. Berry on April 11, 2013?

24 A Yes, ma'am.

25 Q Okay. And can you please state to the Court your basis

Travis Colston - Direct examination
by Ms. Moody

1 for your application?

2 A Yes, ma'am.

3 I can say something before we getting started up?

4 Q I'm sorry?

5 A I wanted to make -- say something.

6 THE COURT: Sir, you need to answer---

7 Q Well first---

8 THE COURT: ---the question.

9 Q Just -- can you tell me -- we're gonna get to that.

10 A Time out.

11 Q No, no, no.

12 THE COURT: There is no time---

13 A Hold---

14 THE COURT: No.

15 A I'm fixing to say cause that's told me---

16 THE COURT: Time out. The only person that's speaking
17 now is the Court. If there's a question that's answered,
18 you answer the question yes or no. You may explain your
19 answer.

20 THE WITNESS: Ms.---

21 THE COURT: You do not go off on a extemporaneous
22 diatribes. You are not representing yourself. There is no
23 hybrid representation. Ms. Moody is representing you. I
24 suggest you take full advantage of her advocacy and that's
25 the end of it. I'm not gonna have a free-for-all in this

Travis Colston - Direct examination
by Ms. Moody

1 courtroom.

2 THE WITNESS: Can I address the Court?

3 THE COURT: No, sir, you can not. You need to have --
4 answer Ms. Moody's questions.

5 Q Mr. Colston, if you would answer this first question I
6 will give you an opportunity to explain what you need to
7 explain.

8 what is the basis of your application?

9 A I filed ineffective assistance of counsel on my
10 representation.

11 Q Mr.---

12 A Mr. Michael Berry.

13 Q Mr. Berry.

14 Okay. And you pled in this case, correct?

15 A Yes, ma'am.

16 Q Okay. And it was your -- part of your application you
17 said it's an involuntary plea?

18 A Yes, ma'am.

19 Q Okay. You-all said violation -- also said a violation
20 of your due process rights?

21 A Yes, ma'am.

22 Q Okay. Now, you wanted to give me information about
23 this case?

24 Is the response you wanted to give me, is that about
25 this case?

Travis Colston - Direct examination
by Ms. Moody

1 A Yes, ma'am.

2 Q Okay. Go ahead.

3 A Okay. You just told me that when I get up here I could
4 address the judge and ask for a continuance.

5 Q Well, I said if you wanted to ask for that we'll get to
6 that, and the basis of you wanting to get a continuance was
7 because of the two cases that you have pending?

8 A You didn't -- you didn't give me time. You didn't ask
9 me.

10 THE COURT: Sir, I've already addressed that. So
11 there's no need for you to ask for a continuance. I'm not
12 granting one. I've made it clear that, pursuant to the
13 administrative order, that that case has been conditionally
14 dismissed. It is not related to this case. This PCR was
15 filed back in 2013 and it is going to be disposed of today.

16 THE WITNESS: Well, I'm gonna put it like this. I
17 wanted to ask for the continuance. It wasn't dealing with
18 the first PCR. It was dealing with this PCR---

19 THE COURT: Okay.

20 THE WITNESS: ---because I done---

21 THE COURT: Be glad to hear what you have to say.

22 THE WITNESS: I want to ask for a continuance because I
23 don't feel like we, we are ready to move forward. I spoke
24 to her by phone twice. We only have -- I needed a couple
25 witnesses that if I'd of had a chance because we have so

Travis Colston - Direct examination
by Ms. Moody

1 much going on we never really get time to finish doing what
2 we doing because, like I say, it's hard to communicate.

3 Q Let me ask you, what are the witnesses -- who are the
4 witnesses that you want?

5 A I was gonna ask for Mr. Cyrus Henson to be subpoenaed
6 to come and testify and I was gonna ask you if it would
7 seen, seemingly to have Mr. Trent Pruett asked to be
8 subpoenaed so I could question both of them showing -- and,
9 and show where I feel like I was forced into using
10 Mr. Michael Berry when I had other options.

11 Q Well, why don't you tell -- can you tell why you felt
12 you were forced to use Mr. Berry?

13 Do you realize that I can ask the Court to supplement
14 your case?

15 A Explain to me what that means.

16 THE COURT: Sir, you need to tell us why these
17 witnesses are necessary, and what they would add to your
18 case. This is -- you're saying your plea is involuntary.
19 So I need to know what they would testify to and who they
20 are.

21 Q You mentioned Mr. Cyrus Henton.

22 THE COURT: I need him to answer my question.

23 MS. MOODY: Okay.

24 THE COURT: Sir, you need to tell us what witnesses you
25 say are necessary and what they would testify to.

Travis Colston - Direct examination
by Ms. Moody

1 THE WITNESS: I say Mr. Cyrus Henson because we hire
2 him to represent me, and the day that I went to Court I
3 guess he was told by Mr. Berry or prosecutor Kim Leskanic or
4 Judge Alford or whoever that he would be given time to look
5 over the case, that he would have to take me to Court that
6 day, to trial, or he would have to plead me out that day for
7 trial. He could, he could testify to some instances that I
8 explained to him with the situation with me and Mr. Berry or
9 how I didn't feel comfortable or how I didn't feel as if he
10 was putting forth my best, best effort for me and my
11 benefit.

12 THE COURT: You can tell me you feel that. He can't
13 come to Court and tell me that. That's hearsay. He can't
14 come to Court and tell me what you said. And if you feel
15 you were dissatisfied with Mr. Berry, you should be able to
16 articulate that for yourself. He doesn't need to come in
17 here and corroborate that.

18 Now, what's the other witness cause he wouldn't be able
19 to testify to anything you've just said. It's hearsay.

20 THE WITNESS: Mr. Trent Pruett.

21 THE COURT: And what would he be testifying to?

22 THE WITNESS: He would be testifying to, to the fact
23 that I had approached him to be my counsel, and he had
24 agreed, he had agreed to be -- to represent me, but when I
25 went to pay him he changed his mind and didn't want to take

Travis Colston - Direct examination
by Ms. Moody

1 the case. That's what led up to me having to hire Mr.
2 Henson at the last minute not being able to get the, the
3 representation that I feel like I would of been given.

4 THE COURT: How long were these charges pending?

5 THE WITNESS: They was pending from 2011 to 2012.

6 THE COURT: So what took you -- you had three years to
7 get a lawyer.

8 THE WITNESS: I was, I was incarcerated.

9 THE COURT: That doesn't stop people from getting a
10 lawyer.

11 THE WITNESS: It do if you, if you writing the Clerk of
12 Court and you calling the Solicitor's Office and you don't
13 know what's going on with, with, with the charges. I didn't
14 even know if I still was gonna be charged what I was being
15 charged with or nothing.

16 THE COURT: I, I haven't heard -- I don't, I don't
17 understand how any of those witnesses would relate to his
18 PCR claim and they're not necessary. So that would not be a
19 basis for a continuance.

20 If, after exploring the matter, Ms. Moody, you feel
21 they're necessary I would allow you to supplement the
22 record. But, at this point, I can't discern how they would
23 have any testimony that would be relevant or germane to the
24 plea.

25 You may proceed with questioning your client.

Travis Colston - Direct examination
by Ms. Moody

1 MS. MOODY: Thank you, Your Honor.

2 THE COURT: You're welcome.

3 CONTINUED DIRECT EXAMINATION

4 BY MS. MOODY:

5 Q Mr. Colston, you indicated on your application, just to
6 take us back where we were, that Mr. Berry was ineffective
7 assistance of counsel, involuntary -- made -- you had an
8 involuntary plea and it was a violation of your due process
9 rights, correct?

10 A Yes, ma'am.

11 Q On the day that you decided to plead to the charges,
12 can you tell the Court what happened with Mr. Berry?

13 A well --.

14 Q were you made an offer?

15 A I was made an offer for 15 years.

16 Q And did you decide to accept the offer?

17 A I signed off on it. I feel like I didn't have a
18 choice.

19 Q Okay. And why did you feel like you didn't have a
20 choice?

21 A Because I was either gonna accept the offer or going to
22 trial for a life sentence that day, and I felt like the man
23 wasn't, wasn't gonna represent me to the -- which is --
24 might as well like pleaing into a life sentence instead of
25 going to trial.

Travis Colston - Direct examination
by Ms. Moody

1 Q And tell the Court -- can you please tell the Court why
2 you feel like he wasn't gonna represent you?

3 A We had several meetings. I tried to, I tried to
4 explain the situation and the circumstances to the charges
5 to Mr. Berry. Mr. Berry never, never would really take into
6 consideration what I was saying. His, his whole basis was
7 to plea out.

8 I, I explained to Mr. Berry the circumstances to the
9 case. I explained to him like dealing with the
10 investigative report. I explained to Mr. Berry that the
11 officer who wrote the report who said that he was the one
12 that pulled me out the car, searched me, and found the drugs
13 was lying. He didn't pull me out the car. He didn't search
14 me. He didn't find the drugs on me. The other officer was
15 the one who did this. So, therefore, he lying. I explained
16 that to him.

17 Q So let me stop you right there.

18 When you say that -- you're saying based off the way
19 the report was written and who signed off on the report that
20 you had an issue with that?

21 A Yes. Yeah, I had one issue with that. I had an issue
22 with that.

23 Q Okay. And, and, within that report, the officer said
24 that he was the person that pulled you out and searched you
25 and did all of the previous that you just stated?

Travis Colston - Direct examination
by Ms. Moody

1 A Yes, ma'am.

2 Q Okay. And so, in taking that into consideration, what,
3 if anything, did Mr. Berry say about that aspect of the
4 incident reports?

5 A He didn't say anything about it.

6 Q So---

7 A He said, he said if we go to Court, if we go to
8 Court -- if, if I can recollect right. He said if we go to
9 Court, that they're gonna go off the report and pretty much
10 that's it.

11 Q So when you say they are gonna go off the report,
12 you're saying that the State, in prosecuting you, would go
13 off that report?

14 A Yes, ma'am.

15 Q And did he explain to you that, when a witness gets up
16 on the stand, that they don't take the police report up
17 there with them?

18 A I don't think he explained that to me, but --.

19 Q He just told you that they were go off of the report
20 and how the incident occurred?

21 A Yes, ma'am.

22 Q Okay. And you had a problem with that---

23 A Yes.

24 Q ---explanation?

25 A Yes, ma'am.

Travis Colston - Direct examination
by Ms. Moody

1 Q So when you-all talked about it, did y'all talk about
2 it in terms of accepting the offer or how you would prevail
3 in a trial?

4 A This was we -- I don't even think they had made an
5 offer yet. I believe that I was -- it was two offers if I'm
6 not mistaken. I think the first offer was for 25, 30 years.
7 Like I said, I don't -- I seen two -- I only met him twice.
8 By the time that I met him, I tried to explain, like I said,
9 the situations and the circumstances to the case, you know
10 what I'm saying, that was to my benefit, you know what I'm
11 saying.

12 Like I explained to him the, the officers say stopped
13 us for impeding traffic, a traffic violation. I tried to
14 explain to him that we wasn't impeding traffic, that we was
15 parked in someone's yard on private property, and that -- I,
16 I had witnesses that could testify to this. I give him the
17 witnesses.

18 It's like everything that I tried to tell him, to
19 explain to him to do to get him to do for the case to, to
20 see that I had a substantial case, he wasn't, he wasn't
21 doing anything. He wasn't nothing.

22 Q So when you gave him the witnesses name -- the
23 witnesses that could testify in your behalf, did you give
24 him the names and the addresses for him to contact them?

25 A I gave him the names and the addresses that I knew.

Travis Colston - Direct examination
by Ms. Moody

1 The ones that I didn't, I just gave him the names and some
2 of the names I didn't know, but I explained to him how he
3 could get --

4 Q To those persons?

5 A -- get to those people to find out who those
6 individuals were.

7 Q All right. And are you -- is your testimony here today
8 that he didn't attempt to contact those people?

9 A Not, to my knowledge, he didn't.

10 Q Okay. And then this was like the first meeting where
11 you were explaining to him all the circumstances of your
12 case?

13 A Yes, ma'am.

14 Q Okay. So then the second time that you met with him,
15 what did you-all talk about?

16 Was that when you received the offer?

17 A He asked -- the second time I met with him he, he
18 explained to me that the Court -- the prosecutor had made an
19 offer for 15 years, and I explained to him, like I had been
20 doing, I explained to him then that I wasn't sure if I was
21 gonna take a plea, a plea offer or not. I explained to him
22 that I still was in the process of obtaining paid
23 representation.

24 Q So, at, at -- as far as Mr. Berry was concerned, you
25 were still trying to get -- you weren't trying to retain

Travis Colston - Direct examination
by Ms. Moody

1 him?

2 You were trying to retain someone else?

3 A Someone else, yes, ma'am.

4 Q Okay. So -- now, at that same time, did you have other
5 cases that were pending?

6 A No, ma'am.

7 Q Okay.

8 A Just that charge and the possession with intent to
9 distribute marijuana charge.

10 Q Okay. And so when you were still trying to obtain
11 someone he told you about the 15 years.

12 When exactly did you-all get down to the point that you
13 were gonna plead to the 15 years?

14 A The day of Court. I signed the plea probably about a
15 couple minutes before I went in front of the judge.

16 Q All right. So you-all -- you were called to Court
17 obviously. You were asked to come to Court for your Court
18 appearance.

19 Correct?

20 A Yes, ma'am.

21 Q Okay. And so that's the day that you actually signed
22 the plea---

23 A We didn't---

24 Q ---sheet?

25 A We actually didn't go that first day. The second day

Travis Colston - Direct examination
by Ms. Moody

1 we came back and that's the -- when I signed the plea a
2 little while before I went in front of the judge.

3 Q So now were you up on the trial docket at that, at that
4 point or were you just coming to appear, just an appearance?

5 A I -- when I, when I got the letter it was for -- to see
6 if I was gonna be heard. They didn't said if I was on the
7 docket or they didn't know if we was gonna get seen or not.
8 It was just a period -- it's a possibility that we would go
9 to Court or it's a possibility that we could go home.
10 That's, that's how they do it.

11 Q Okay.

12 A Everyone.

13 Q All right. So on that day, did you -- which was
14 apparently July 24th, 2012, correct?

15 A Yes, ma'am.

16 Q Okay. Went -- how long did you meet with Mr. Berry to
17 discuss your case or what information he had uncovered in
18 terms of your witnesses?

19 A We, we didn't.

20 Q So were y'all prepared to -- you weren't prepared to go
21 to trial on that day?

22 It was just---

23 A No, ma'am.

24 Q And you said that it was involuntary in terms of --?

25 A They tell me if I didn't take the plea that we was

Travis Colston - Direct examination
by Ms. Moody

1 going to trial.

2 Q But were you going to trial on that day?

3 A Yes, ma'am.

4 Q Okay. And so, as far as that was concerned, can you
5 tell the Court what your -- you were indicted for the third
6 or subsequent charges, right?

7 A Yes, ma'am, I was indicted. If I'm not -- I was
8 charged with a -- I was served with notice to seek life
9 sentence charges.

10 Q So that means you had a third or subsequent and so you
11 were indicted for trafficking cocaine, crack cocaine?

12 A Yes, ma'am.

13 Q Twenty-eight to one hundred grams?

14 A Yes, ma'am.

15 Q And that was a third offense?

16 A It was a first offense, but later on---

17 Q It became a third?

18 A ---they enhanced it to a third offense and she seek the
19 notice.

20 Q Okay. So you got -- on that day, had you gotten your
21 life without parole notice?

22 A Yes, ma'am.

23 Q Was that the first day that you got it or --?

24 A No, ma'am, I, I got it when I first went to roll call.

25 See I was released -- I had been released from prison.

Travis Colston - Direct examination
by Ms. Moody

1 Q Okay.

2 A I suppose to went to the county, but the county didn't
3 pick me up and they didn't release me to the county. They
4 released me to the street.

5 Q Okay.

6 A So they---

7 Q So you went home?

8 A Yes, ma'am, I went home.

9 Q Right.

10 A So this was like in September or October 2011.

11 Q Okay.

12 A I was -- received the roll call paper April 2012. I
13 appeared in roll call. They remanded me to -- back to the
14 custody of Cherokee County.

15 Q Okay.

16 A I made bond on the charge and I believe I went to roll
17 call again in May. I think that's when I was served with
18 the, with the papers.

19 Q For the -- when you say the papers you're talking about
20 the life without parole?

21 A Yes, ma'am, the notice to seek like.

22 Q Okay.

23 A I was served those papers.

24 Q And, at that time, had -- were you represented by Mr.
25 Berry or you weren't represented by Mr. Berry?

Travis Colston - Direct examination
by MS. Moody

1 A No, ma'am, I wasn't represented by anyone.

2 Q Okay. So you had notice that you were on -- you were
3 already on notice that it was life without parole and on the
4 day that you went to Court with Mr. Berry he told you that
5 they were ready to go to trial on it that day?

6 A Yes, ma'am.

7 Q Okay. And when you went with him to discuss your case,
8 apparently you were talking to him at that time.

9 You discussed the charges, the nature of the charges
10 with him, or you did not?

11 A No, ma'am.

12 Q Okay. So he just told you you were facing the life
13 without parole and the offer was 15 years and then you
14 signed off on your sentencing sheet?

15 A Yes, ma'am.

16 Q Okay. And when you signed off on the sentencing sheet,
17 did you understand, you know, what you were looking at and
18 the time that you had to serve on that charge?

19 A I just signed the paper and I ain't -- I didn't know
20 that they were enhancing the charge when, when -- if it was
21 ignorance not to read the paper or not to ask any questions,
22 but, like I say, dealing with my emotions at the time and
23 dealing with the situation that I already know that I'm
24 gonna have to sign this paper or I'm gonna have to go to
25 trial for a life sentence, I signed the paper and it might

Travis Colston - Direct examination
by Ms. Moody

1 of been my ignorance, but I was under, under, under the --.

2 Q So let me ask you this if I'm, if I'm understanding
3 you.

4 You signed the paper, but you didn't understand the
5 sentencing range that you were suppose to---

6 A I was under the interpretation that the charge was
7 being reverted back to the original charge was, like I say,
8 I thought my original charge was first offense trafficking
9 twenty-eight to a hundred grams.

10 Q Okay. So you thought that the, after---

11 A I thought I was facing seven to twenty-five years and
12 that they was gonna give me 15 years. I didn't understand
13 that they was dropping the charge to 28, 28 grams and making
14 it a second offense and pleading -- and it was five to
15 thirty-five, pleading to 15 years.

16 Q So what's the difference between the seven and
17 twenty-five versus the five and thirty?

18 A See, from, from my understanding, the first offense,
19 I'd of been eligible for parole in, in, in, in the time that
20 I was serving would be shorter than the time that I'm
21 serving.

22 Q Now -- okay. So -- okay. Okay. So this being -- had
23 you ever been charged with trafficking before?

24 A No, ma'am.

25 Q Okay. So are you saying that you were unclear as to

Travis Colston - Direct examination
by Ms. Moody

1 enhancements is not based on the nature -- the type of the
2 charge, but the, that fact that it is a drug charge period,
3 it can be enhanced?

4 A Yes, ma'am.

5 Q So you weren't clear on that?

6 A No, ma'am.

7 Q Okay. And when the judge took your plea, did you-all
8 discuss that?

9 A I can't recall.

10 Q So do you recall in the hearing where you asked the
11 judge to explain serious offenses to you?

12 Do you understand what a serious offense is?

13 A My first, my first time coming into contact was I guess
14 was on -- over a drug charges that I had. It had serious
15 cause of the school zone. It had serious offense on it.

16 Q But you understand the significance of when it's a
17 serious, if you get strikes, they can seek life without
18 parole?

19 A Oh, yes, ma'am.

20 Q So you understood that at the -- when you were
21 pleading, you had to ask the Court on -- Your Honor, I
22 would -- I'm looking at Page 10 of the second transcript.

23 THE COURT: Uh-huh. (Affirmative).

24 Q Do you recall when the Court asked you and you've been
25 able to talk to your lawyer as to the, as to the

Travis Colston - Direct examination
by Ms. Moody

1 consequences and ramifications of those three charges being
2 classified as serious offenses, and your reply was could you
3 explain it to me, Your Honor?

4 Do you recall having that exchange with the judge?

5 A I mean I'm saying which one, which one that is?

6 I don't understand your---

7 THE COURT: I don't understand when you mean second
8 transcript. The only transcript that's relevant to this is
9 where he pled guilty.

10 MS. MOODY: I, I apologize, Your Honor. I got this
11 second transcript and---

12 THE COURT: Yeah, this -- the only transcript that's
13 relevant to this is for 2011-GS-11-367 and 368 from
14 July 24th of 2012.

15 MS. MOODY: I apologize. I picked up the wrong
16 transcript, Your Honor.

17 THE COURT: That's okay.

18 Q So that's gonna come off-the-record.

19 Okay. In terms of your understanding your conversation
20 about this serious offenses and the strikes---

21 A I didn't understand because see that's what had me in
22 the situation that I was in.

23 Q Right.

24 with the life without parole?

25 A Yeah, I didn't -- I really -- I didn't get it.

Travis Colston - Direct examination
by Ms. Moody

1 Q But did you -- what I want to know is did you discuss
2 that with your attorney about the strikes, how you arrived
3 at the life without parole?

4 A Which -- I'm saying which one?

5 Q With Mr. Berry when y'all talked about you pleading---

6 A We---

7 Q Hear me now.

8 when y'all talked about you pleading to the 15 years
9 and he said you were gonna be looking at a trial and it was
10 gonna be life without parole, did y'all discuss how they got
11 to the point that they would charge you with life without
12 parole?

13 A Yeah, we -- he didn't explain that to me. The
14 prosecutor, Kim Leskanic, explained it to me when they
15 served me with the life sentence papers.

16 Q Okay.

17 A I went to her cause it was during roll call. I went to
18 her and I asked her, I was like how you gonna serve me with
19 life sentence papers when the lawyer told me, and I
20 explained to her that the lawyer had told me that the charge
21 wouldn't been considered as an additional strike or
22 additional account. It, it, it still would of been a first
23 offense and under a second strike with, with the rest of my
24 charges.

25 But she explained to me then. She was like he didn't

Travis Colston - Direct examination
by Ms. Moody

1 know what he was talking about or evidently he got -- he was
2 confused. He got it wrong because I can charge you with --
3 that's why you got the notice to life, seek life because I
4 can charge you with a third offense, you know, and that's,
5 and that's where we stood at.

6 Q So, on the day of the trial, the day of the plea, when
7 you went before the judge, you were aware that you could be
8 subject to the life without parole based off of a
9 conversation with the solicitor?

10 A Yes, ma'am, they had told me that's what I was going to
11 court for. If I didn't the plea I was going for the life.

12 Q Okay. So, explain to the Court how it's involuntary --
13 you have involuntary plea?

14 You're alleging that you had an involuntary plea. Your
15 counsel did something that prejudiced you.

16 A Because I feel like he was ineffective because, if he
17 knew the only reason I was pleading, because of, of
18 representation and the, and the things that he haven't done
19 cause, like I said, I ain't -- I really ain't never been one
20 to bite my tongue. He know I wasn't happy with his
21 representation.

22 So if he knew he wasn't ready for trial and he, he --
23 and they try to take me to trial, he was either suppose to
24 recuse himself from the case or ask for a continuance to
25 prepare for the trial to try to, to put together a defense

Travis Colston - Direct examination
by Ms. Moody

1 and to try and find these witnesses.

2 Q Okay. So, on the day of the plea, did he tell you that
3 he attempted to try and find the witnesses?

4 A As I said before, the day of the plea, I might of spoke
5 to the man for about one or two minutes and that was to sign
6 the plea and we went in front of the judge.

7 Q Okay. So what relief are you asking from the Court on
8 this plea?

9 A I want, I want the case to be remanded or, or, or
10 reversed.

11 Q So, on your application, do you recall stating that you
12 wanted the sentence vacated and remanded back to General
13 Sessions and dismissed or the sentence vacated and remanded
14 back to General Sessions and resentenced under the original
15 charge?

16 A Yes, ma'am.

17 Q So when the judge asked you understand that you're
18 facing, you know, a significant amount of time, which was,
19 in this case, a life without parole, that's what you want to
20 be able to face if the Court grants you your relief?

21 A If that's what it comes down to, yes, ma'am.

22 Q Okay. And you understand that makes you start
23 completely over?

24 A Yes, ma'am.

25 Q Okay. Is there any other relief that you're seeking

Travis Colston - Direct examination
by Ms. Moody

1 from the Court?

2 A No, ma'am.

3 Q Okay. Thank you. No further questions. Please answer
4 any questions---

5 THE COURT: Any questions for the witness?

6 MS. WHITE: Just briefly.

7 CROSS-EXAMINATION

8 BY MS. WHITE:

9 Q Mr. Colston, you've testified that you were aware you
10 were going in to plead guilty to a 15 year sentence?

11 A Say it again.

12 Q You testified earlier that you knew you were pleading
13 guilty to a 15 year sentence when you went into the plea?

14 A Yes, ma'am.

15 Q Okay. And the Court read through the facts with you,
16 read through the fact that this was a negotiated sentence on
17 a trafficking second offense, and, in fact, went with you --
18 went over with you about the classification of it being
19 serious and if you got any other drug charges, how that
20 would affect you.

21 Do you recall that?

22 A Say that again.

23 Q Do you recall the judge going over with you the fact
24 that this was a second offense, that there were other drug
25 charges on your record, and that if you got any other ones

Travis Colston - Cross-examination
by Ms. White

1 after this you could get an even higher sentence?

2 A Yes, ma'am.

3 Q Okay. And that also they gave the facts of the case
4 and they asked if you disagreed with them in anyway and you
5 said no, sir?

6 A Yes, ma'am.

7 Q Okay. And when the judge asked you if you were
8 pleading freely and voluntarily you said that you were?

9 A Yes, ma'am.

10 Q Okay. Thank you.

11 That's all I have, Your Honor.

12 THE COURT: Any redirect?

13 MS. MOODY: No, ma'am.

14 THE COURT: Sir, you may step down.

15 Do you have any further witnesses, Ms. Moody?

16 MS. MOODY: No, ma'am.

17 THE COURT: State have any witnesses?

18 MS. WHITE: We would just ask Mr. Berry brief
19 questions.

20 THE COURT: Mr. Berry, if you would raise your
21 right-hand and be sworn.

22 THE WITNESS: Yes, ma'am.

23 MICHAEL BERRY, being first duly
24 sworn, testified as follows:

25 THE COURT: If you would state your full name for the

Michael Berry - Direct examination
by Ms. White

1 record and spell your last name for the court reporter.

2 Sir, your behavior is becoming disruptive, and if it
3 does not cease I will find you in direct contempt of Court.
4 If you have something you want to communicate to Ms. Moody,
5 do that in an orderly fashion and I'm certain she will
6 advocate on your behalf.

7 Mr. Berry, please state your full name for the record
8 spelling your last name for the court reporter.

9 THE WITNESS: Michael Anthony Berry. B-E-R-R-Y.

10 THE COURT: Thank you.

11 You may proceed.

12 MS. WHITE: Thank you, Your Honor.

13 THE COURT: You're welcome.

14 MS. WHITE: If I may.

15 DIRECT EXAMINATION

16 BY MS. WHITE:

17 Q Mr. Berry, just briefly, do you recall representing Mr.
18 Colston at this plea?

19 A Yes, ma'am, I do.

20 Q And is it correct that you were appointed to the case
21 maybe a couple of months before?

22 A That is correct. We opened our file in the Public
23 Defender's Office in Gaffney on May the 17th of 2012.

24 Q And, at that point, had he already been served with a
25 notice for life without parole?

Michael Berry - Direct examination
by Ms. White

1 A Yes, ma'am, he was served -- let me -- looking through
2 my file trying to find the notice again. I had it and the
3 notice was dated March 27th of 2012. It was clocked into
4 the Cherokee County Clerk of Court on the same day --

5 Q Okay.

6 A -- and it had been served when he applied for our
7 services in the Public Defender's Office.

8 Q And in your discussions with him, do you recall
9 discussing with him the level of this being a third offense
10 that he was charged with and the possibility of it being a
11 plea to a second?

12 A I do. Shortly after Mr. Colston applied in the Public
13 Defender's Office he, he began appearing on Court dockets,
14 and when we -- when we get a Court docket in, we, on the
15 same day, generate letters to all of our clients instructing
16 them that they need to call into our office to set up an
17 appointment to meet with us again if they have not already
18 done so.

19 That was done for Mr. Colston. Again, we began
20 representation in the middle of May of 2012. Mr. Colston
21 called our office and set an appointment for June 12th of
22 2012 for 4:00PM and he came in on that day.

23 Mr. Colston referenced an original offer which was
24 given to me by the State on June the 6th of 2012, and the
25 solicitor indicated on her plea offer sheet that the offer

Michael Berry - Direct examination
by Ms. White

1 would expire on the 15th of June of 2012. At that time
2 the offer -- again, he was charged with trafficking in crack
3 cocaine third offense and possession with intent to
4 distribute marijuana third offense. The State, and I'm just
5 reading directly from her plea offer sheet, that the
6 defendant had been served with notice of life. The State
7 would offer a plea of 25 years to the above charges and not
8 seek a life without parole sentence.

9 So all that they were doing at that point was just
10 taking life off the table and a negotiated 25 year sentence,
11 but we did talk about that and I, I clearly would of gone
12 over the mandatory minimum with him at that time, and I
13 showed him the, the plea sheet that I received from the
14 solicitor. She has the charges listed out also with the,
15 the sentencing ranges for those charges as well.

16 In addition, we also looked back at his prior record
17 and talked about the prior drug offenses that they were, in
18 fact, using to enhance this in order to seek their notice of
19 intent to seek life.

20 Q Okay. I'm sorry. So obviously he turned that offer
21 down.

22 You continued to negotiate with the State on his
23 behalf?

24 A That's, that's correct. Mr. Colston, his case was not
25 reached during the June term of Court in Cherokee County,

Michael Berry - Direct examination
by Ms. White

1 and I, therefore, continued trying to negotiate with the
2 solicitor after discussions with Mr. Colston and we did
3 speak about the facts of the case. We went over all the
4 discovery that I had in my possession.

5 You know, the only witnesses that I have any notice
6 about are ones that were already listed in the incident
7 report who gave statements to police officers that the
8 property that the drugs were found in, in fact, belonged to
9 Mr. Colston. At that point I explained to him that those
10 witnesses, if they cooperated, would be called into Court,
11 they would be asked to give their testimony, and certainly
12 statements that they had given could potentially come into
13 evidence if they denied making those statements at a later
14 time.

15 So we did discuss all of that.

16 Q Okay. In regards to the final offer, the offer that he
17 pled guilty to, 15 year negotiated sentence, at the time
18 that you went in and pled guilty, was there any concern or
19 had he indicated to you that he did not want to plead guilty
20 that day?

21 A I do recall Mr. Henson appearing in the Court of
22 General Sessions for -- I don't want to misspeak or mislead
23 the Court. I don't recall if he appeared on Monday for the
24 docket call or if he appeared on the day that we were going
25 to enter the plea. Mr. Henson did appear. We went back in

Michael Berry - Direct examination
by Ms. White

1 chambers and spoke with the judge and Mr. Colston is correct
2 that the offer denied Mr. Henson's request for a
3 continuance. You know, if he was going to be hired, he
4 would have to proceed that week cause the State was ready to
5 go. So he was going to deny any request by any subsequent
6 counsel that was hired to move for continuance.

7 Q Okay. And ultimately, at that point, was your advice
8 to him to accept this plea knowing that otherwise he could
9 receive a sentence of life without parole?

10 A That was my advice to him. It was not all that we had
11 ever talked about. I would say that I listened to Mr.
12 Colston and his version of events. We actually -- I did
13 research on it while he was in my office. I'm looking at
14 some maps that we printed off from Google maps just to show
15 where they were allegedly parked and impeding traffic and we
16 talked about the risk of that.

17 Also, you know, I explained to him that the officer, if
18 he -- it was a traffic violation, he was entitled to stop.
19 I don't know -- this is in the, the transcript, but upon the
20 officer's approach to the car, it was in the report that he
21 noticed an open container of alcohol in the back seat where
22 Mr. Colston was seated, and that was what ultimately led to
23 Mr. Colston being taken out of the car.

24 Q Okay. All right. Thank you, Mr. Berry. That's all
25 the questions I have at this time.

Michael Berry - Direct examination
by Ms. White

1 THE COURT: Ms. Moody, you may proceed.

2 MS. MOODY: Your Honor, if I may beg the Court's
3 indulgence?

4 THE COURT: Certainly. Uh-huh. (Affirmative).
5 (Pause.)

6 CROSS-EXAMINATION

7 BY MS. MOODY:

8 Q Mr. Berry?

9 A Yes.

10 Q Okay. As far as -- you, you testified just a few
11 minutes ago that you went over the nature of the charges
12 with Mr. Colston.

13 You talked about what would happen at a trial I believe
14 you said?

15 A I did, yes.

16 Q Okay. And when you talked about the witnesses, you
17 indicated the witnesses that were in the incident report?

18 A That's right.

19 Q So he didn't give you any other witnesses outside of
20 the incident report?

21 A I, I don't have any names of anyone in my file.

22 Q Okay. So do you recall when he -- well, I guess, if
23 you-all talked about the case before the day of the plea,
24 the first meeting that you-all had where you were appointed
25 to him I believe?

Michael Berry - Cross-examination
by Ms. Moody

1 A That's right.

2 Q Okay. What did you-all talk about at that point in
3 time?

4 Do you recall?

5 A Well, initially, at that point, Mr. Colston began
6 appearing on a docket, and give me -- bear with me just one
7 moment. I don't know that I received discovery too terribly
8 long before that docket was issued because, again, he was --
9 he applied for our services in the middle of May and he
10 appeared on the June trial docket. But, at that point, when
11 he came into the meeting on June 12th, I did have
12 discovery and we sat down and we went over all of the
13 incident reports, again, prior record, the effect of the
14 solicitor's notice of the intent to seek life, and, at that
15 time, the two witnesses that I, I spoke of earlier that were
16 mentioned in the report was Ms. Ashley Smith and a
17 Ms. Byers, Betty Byers.

18 Q And did he give you any other names?

19 You don't recall him talking about who he was with or
20 anybody else?

21 A I don't have any notations in my notes that I made from
22 that meeting where he gave anything. I mean --.

23 Q Now, can you describe your interaction with
24 Mr. Colston?

25 A Well, it was, it was cordial when he came into my

Michael Berry - Cross-examination
by Ms. Moody

1 office on the 12th of June. Certainly by telling someone
2 that they, you know, could potentially face a life sentence,
3 that changed the mood rather quickly. But we, we did go
4 into the case and we started talking about defenses that we
5 might have, and, again, as I said, we started, you know,
6 doing some investigation into it right there and then on
7 that day.

8 That -- these maps that I have printed out where we
9 were looking at the scene where this occurred were dated of
10 June 12th of 2012, which was that day as well. We have
11 some drawings on there that show -- where Mr. Colston,
12 Colston drew on the maps where he alleged that the car was
13 parked and how that differed from what was in the police
14 report.

15 Q So you-all did talk about the differences that he
16 noticed in the police reports such as who pulled him out of
17 the car or had him get out of the car and did what or
18 handled---

19 A I don't, I don't ever recall any conversation about a
20 discrepancy with who actually got him out of the vehicle. I
21 don't have any notations from that meeting about, about
22 that.

23 Q Okay. And then as far as like on the day of the plea
24 when you went forward, was there some kind of -- I mean
25 what -- you know, can you describe generally how Mr. Colston

Michael Berry - Cross-examination
by Ms. Moody

1 responded in terms of accepting the plea?

2 Was it, you know -- were, you know -- was he adamant
3 that he had not done it or was he wanting to go ahead and
4 take the plea?

5 A I will say, again, we have our docket call on Monday
6 mornings in Cherokee County. Obviously Mr. Colston
7 appeared. I don't recall if it was Monday morning when I
8 relayed the offer or if I had relayed that before to him.
9 However, Mr. Colston left, left Court that day because we
10 generally don't begin trials in Cherokee -- we don't bring a
11 jury in until Tuesday morning. So obviously he, he was --
12 his back wasn't against the wall at that point, but it was
13 getting to that point later in the week when the solicitor
14 began pretty much draining their supply of pleas that were
15 gonna be heard in front of Judge Alford.

16 Q So---

17 A In fact, after Mr. Colston's plea I was actually called
18 for trial on another case. But Mr. Colston was called back
19 in with a number of other sentences. I can remember that
20 Judge Alford did a massive qualification of those defendants
21 who had, in fact, signed up.

22 Mr. Colston was reluctant to sign the sentencing sheet.
23 I, I don't think it was anything that I did to make it
24 involuntary. I think it was just his coming to terms with
25 the fact that he was signing a sentencing sheet to go to

Michael Berry - Cross-examination
by Ms. Moody

1 prison for 15 years.

2 Q Now---

3 A Because I don't think there was anything out of the
4 ordinary other than, you know, reluctance to essentially
5 agree to go to prison.

6 Q Okay. Were you prepared to go to trial that day if he
7 decided he didn't want to accept the plea?

8 A The, the trial would of started the next morning and
9 yes, I felt that I was prepared.

10 MS. MOODY: Okay. No further questions for this
11 witness.

12 THE COURT: Any redirect?

13 MS. WHITE: Nothing, Your Honor.

14 THE COURT: Did you have any viable defenses in this
15 case, Mr. Kelly?

16 Mr. Berry. I'm sorry.

17 THE WITNESS: I'm sorry?

18 THE COURT: Did you hear the question?

19 THE WITNESS: I did not, Judge.

20 THE COURT: Did you have any viable defenses to pursue
21 on Mr. Colston's behalf?

22 THE WITNESS: I did not feel like we did and that
23 was -- that was my advice to him. I did not feel that we
24 would be successful in arguing any defense that we might
25 have raised.

1 THE COURT: Did you feel there was any basis to
2 challenge any warrants or searches?

3 THE WITNESS: No, Your Honor. I did not.

4 THE COURT: Did you go over the discovery with him?

5 THE DEFENDANT: Yes, I did, on, on June 12th.

6 THE COURT: And I believe you already said this.

7 You went over the range of penalty with him as well?

8 THE WITNESS: Yes, I did, and, in fact, I'll just throw
9 this out there for the Court. Mr. Colston testified earlier
10 that he thought he was pleading on a trafficking crack
11 cocaine first offense, which would still be classified as a
12 serious offense under the law, and still subjected him to
13 the solicitor's notice of intent to seek life based on his
14 prior convictions.

15 THE COURT: And did you---

16 THE WITNESS: We did talk about it in terms of it being
17 an actual third offense, drug offense.

18 THE COURT: And did you go over his Constitutional
19 rights with him?

20 THE WITNESS: I did, Your Honor.

21 THE COURT: Did you tell him what the State was
22 required to prove and the elements of each charge?

23 THE WITNESS: I did, as with all clients, I always read
24 directly from the indictment and then I turn to the statute
25 in case I feel like the indictment is deficient. I would of

1 done that in his case as well.

2 THE COURT: Are there any questions of the witness as a
3 result of the Court's questions, from the State?

4 MS. WHITE: Nothing, Your Honor.

5 THE COURT: From the Applicant?

6 MS. MOODY: Just one and he may of answered this.

7 RECROSS EXAMINATION

8 BY MS. MOODY:

9 Q Mr. Berry, did you think that he understood all of your
10 advice that you gave him and the rights that you reviewed
11 with him?

12 THE WITNESS: I, I do. And, again, like I, I mentioned
13 earlier, I, I believe the only reluctance was signing the
14 sentencing sheet to a negotiated sentence of 15 years, but
15 yes, I do believe he understood all of our discussions.

16 MS. MOODY: No further questions, Your Honor.

17 THE COURT: Any further questions?

18 MS. WHITE: Nothing further from the State.

19 THE COURT: Any exception to us excusing Mr. Berry,
20 from the Applicant?

21 MS. WHITE: No.

22 THE COURT: From the---

23 MS. MOODY: No, Your Honor.

24 MS. WHITE: I'm sorry.

25 THE COURT: From the Applicant or the State?

1 MS. WHITE: No, Your Honor.

2 THE COURT: Thank you, Mr. Berry. Have a good day. I
3 hope you feel better.

4 THE WITNESS: Thank you, Your Honor. Again, my
5 apologies to the Court.

6 THE COURT: We appreciate you accommodating us.

7 THE WITNESS: Thank you so much. Bye.

8 THE COURT: Anything further from the State?

9 MS. WHITE: Nothing further from the State, Your Honor.

10 THE COURT: Any rebuttal testimony from the Applicant?

11 MS. MOODY: No, Your Honor.

12 THE COURT: Any argument?

13 MS. MOODY: No, Your Honor.

14 THE COURT: Any from the State?

15 MS. WHITE: No, Your Honor.

16 THE COURT: In considering an application for
17 post-conviction relief, the Applicant has the burden of
18 proving that his counsel was deficient, that his conduct
19 undermined the proper functioning of the adversarial
20 process, and that the Court can not rely on the result of
21 the proceedings. In a guilty plea context, he must prove
22 not only that his counsel's performance was deficient, which
23 meaning that it fell below the reasonableness of
24 professional norms, but there is a reasonable probability,
25 but for those errors, he would not have pled guilty, but

1 would have insisted on going to trial. I find the Applicant
2 is failed to meet that burden of proof.

3 What is most persuasive and compelling is the
4 contemporaneous record that -- from the July 24th, 2012,
5 guilty plea, and what is most persuasive is the colloquy
6 between the Court and Mr. Colston. If -- even if I were to
7 believe his testimony in its entirety, it would be
8 contradicted by the answers that he provided to the Court,
9 and anything that he says now that he did not understand at
10 the time was clarified for him, and he had more than ample
11 opportunity to have asked the Court questions, to have asked
12 his counsel questions, and to ask for clarity.

13 But he indicated that he understood everything that was
14 being asked of him and the nature of what he was entering
15 into. I think this is a case of buyer's remorse.

16 He -- it is -- I think Mr. Berry articulated it very
17 well, which is reconciling himself with the worst of -- with
18 the best of two bad choices. It was inevitable, in this
19 instance, that he was facing jail time, whether it be by
20 trial or plea, and even in light of the totality of the
21 circumstances, which is facing a life without the
22 possibility of parole, and I have no problem noting this for
23 the record, that was a very good sentence that was worked
24 out for you. In Charleston they never would of offered it
25 to you. They would of taken you to trial and they would of

1 gotten the LWOP especially if they had a good clear cut
2 case.

3 Mr. Berry worked out an inordinately good deal for you,
4 and I can find no deficits in how he negotiated for you, and
5 apparently he had enough influence with the assistant
6 solicitor to get that type of deal with you especially with
7 your criminal history, which was, at best, extensive. So
8 this would not be your first contact with the system and you
9 indicated yourself that, you know, you'd had some brushes
10 and you made some bad decisions, and they had a cumulative
11 effect on your life.

12 And, you know, I think sometimes people think, when
13 they get convicted of offenses, they have to be a bad
14 person. And that's just not how the law works. You don't
15 have to be a bad person to end up in a bad situation. I
16 just think you, you made some difficult decisions in your
17 life, that while all of us make mistakes, every mistake had
18 a different consequence. Your mistakes had drastic
19 consequences and you were left with, again, two -- the best
20 of two bad choices.

21 And under the circumstances of this case, you were
22 gonna go to jail. It was either gonna be for five to thirty
23 or for a mandatory 25. I find credible Mr. Berry's
24 testimony that you had no viable defenses to this case, and
25 based on what I read in the record regarding the allocution

1 of the facts, there was probable cause to stop you. There
2 was an open container in plain sight between your feet,
3 which you allocuted to, and, at that time, the officers
4 could of issued you a ticket or they could of placed you
5 under arrest and they placed you under arrest, and search
6 incident to arrest, found these drugs and cash, which is
7 evidence of trafficking, when you combine those things --
8 two things together, when you look at the elements of what
9 the State is required to prove.

10 I understand that you say you have some witnesses now
11 that would say your car was not impeding traffic.
12 Generally, in a contest like that, factually a jury's
13 inclined to believe the police, not lay witnesses,
14 especially if they know you or they're of the area where you
15 were stopped, and I'm not convinced that that would of made
16 any appreciable difference if you had gone to trial nor that
17 it would of resulted in you prevailing if you had gone to
18 trial.

19 It is very clear from the transcript in this case that
20 the range of penalty, the strikes, the enhancement, the
21 third strikes, and life without parole was a -- clearly
22 defined and explained to you in great detail and thoroughly
23 explained, and that you agreed that you understood it.
24 That's at Page 5 Lines 18 through 25, Page 6 Lines 1 through
25 11, and 22 through 25, Page 7 Lines 1 through 2, Page 12

1 Line 7 through 10, and Lines 21 through 25.

2 The enhancements, because of the drug offenses, were
3 clearly explained to you at Page 6 Lines 12 through 21, that
4 you understood the penalties and the consequences of your
5 guilty plea at Page 7 Lines 6 through 8, as well as your
6 right to trial, and your right and your ability to present
7 any defenses that you may have had at Page 7 Lines 12
8 through 25 and Page 8 Lines 1 through 21, and that you are
9 waiving those rights, that you understand the nature of the
10 negotiated plea at Page 8 Lines 22 through 25, and Page 9
11 Lines 1 through 8, that there were no promises made to you
12 at Page 9 Lines 18 through 20, and that you were fully
13 satisfied with your attorney's services at Page 9 Lines 21
14 through 25, and Page 10 Lines 1 through 2, that you
15 understood the evidence that the State planned to produce
16 against you at Page 10 Lines 3 through 6, that you
17 understood and had discussed with your lawyer potential
18 defenses at Page 10 Lines 7 through 10, and that if you had
19 the opportunity to present and tell your counsel about any
20 witnesses that may have been available as regard to your
21 defense at Page 10 Lines 11 through 15.

22 Your attorney confirmed, during the mitigating phase of
23 your plea, that he had fully discussed these matters with
24 you as well as the nature of negotiated plea and the
25 consequences of your plea at Page 15 Lines 16 through 19.

1 You clearly allocuted to the facts and admitted the
2 facts at Page 11 Lines 7 through 25, Page 12 Lines 1 through
3 6, and Page 13 Lines 1 through 5, that you clearly
4 understood your right to appeal, and how that would have
5 been dealt with as well as the revocation of your probation
6 at Page 13 Lines 15 through 20 and Lines 21 through 25.

7 You again allocuted to your guilt at Page 11 Lines 3
8 through 5. You indicated to the Court that the plea was of
9 your own free will at Page 10 Line 25 and Page 11 Lines 1
10 through 2, that you had no mental, emotional, or other
11 issues that prevented you from understanding where you were
12 or what you were doing at Page 10 Lines 21 through 24, and
13 that you were not under the influence of any drugs or
14 alcohol at Page 10 Lines 16 through 20.

15 The other thing I found persuasive in, in terms of you
16 understanding the nature of what you were doing is found at
17 Page 16 Lines 14 through 24 where you clearly tell the Court
18 and ask the Court to honor the 15 year negotiated plea so
19 that you could have a life with your family, that you were
20 through with drugs, that this last incident had cured you
21 of -- and, in your own words, you said it several times
22 through, and that you asked the Court to please accept the
23 negotiated plea so that you would have the ability to come
24 out and have the ability to have a fresh start with your
25 family.

1 I do not find credible any testimony that you believed
2 this was a first. With your considerable history, that is
3 just not believable. You clearly would of had to have known
4 that there was an enhancement as you were on probation for
5 two distribution -- a distribution of cocaine case base and
6 a proximity case, which were the probation cases
7 2011-GS-11-367 and 368 where you received ten years
8 suspended to nine years, and where it is a clear reference
9 that you had a total of six other charges.

10 So clearly you had an extensive history with the system
11 and an awareness of your rights and responsibilities and
12 what you were doing cause that certainly was not the first
13 sentence sheet you had ever signed nor your awareness of the
14 first sentence sheet.

15 The Court finds credible Mr. Berry's testimony that he
16 was ready to go to trial if necessary, that, again, there
17 were no viable defenses, that he did, in fact, go over the
18 discovery with the Applicant, the range of penalty, his
19 Constitutional rights, the elements of the charges and what
20 the State was required to prove. And I also find credible
21 his testimony that there were no viable defenses regarding
22 any challenge of the search warrant -- not search warrant --
23 of the search at the scene, search incident to arrest, or of
24 the stop. There meaning probable cause to have stopped the
25 vehicle.

1 Based on what has been presented to the Court, the
2 application for post-conviction relief is denied.

3 The State is directed to provide the Court with a
4 proposed order within ten -- twenty days of today in word
5 format. Please copy Ms. Moody on that order and you're to
6 make any finding of fact or conclusions of law consistent
7 with the record.

8 Thank you very much.

9 MS. WHITE: Thank you, Your Honor.

10

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12 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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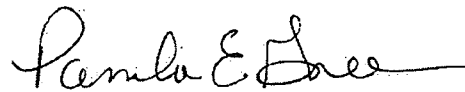
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C E R T I F I C A T E

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 Common Pleas Nonjury for Spartanburg County, South Carolina, on the 15th day of January, 2015.

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

June 23rd, 2015



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

Travis Lamar Sentell Colston, #240843,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2013-CP-11-0238

ORDER OF DISMISSAL

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Plea Counsel:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Leah B. Moody, Esquire
Suzanne H. White, Esquire
Michael A. Berry, Esquire
January 15, 2015
Pamela E. Green

FILED IN COURT OF
COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
CHEROKEE COUNTY, S.C.
JAN 20 2 07 PM 11 09
BRANDY W. MCNEE

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 11, 2013. The Respondent made its Return on or about March 18, 2014. An evidentiary hearing into the matter was convened on January 15, 2015, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. By consent of the parties, Michael A. Berry, Esquire, was sworn and testified via telephone.¹ This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

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SKY

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. He was indicted at the June 2011 term of the Cherokee County Grand Jury for Trafficking in Crack Cocaine 28-100 Grams-Third Offense² (2011-GS-11-0367) and Possession with Intent to Distribute (PWID) Marijuana³ (2011-GS-11-0368). Michael A. Berry, Esquire, represented the Applicant. On July 24, 2012, the Applicant pled guilty to the lesser-included offense of Trafficking in Crack Cocaine 10-28 Grams-Second Offense⁴ and PWID Marijuana. The Honorable Lee S. Alford sentenced the Applicant, pursuant to a negotiated sentence, to concurrent sentences of fifteen (15) years for Trafficking in Crack Cocaine and five (5) years for PWID Marijuana. Judge Alford also terminated the Applicant's probation on Indictment Number 2011-GS-11-367⁵ and gave the Applicant credit for six (6) months time served, pursuant to S.C. CODE ANN. § 24-13-40 (2011). The Applicant did not appeal his conviction or sentence.

ALLEGATIONS

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

¹ Michael A. Berry, Esquire was ill on the date of the hearing and confined to his home due to the nature of this illness.

² Trafficking in Crack Cocaine 28-100 Grams-Third Offense is a violent, serious offense punishable by "a mandatory minimum term of imprisonment of not less than twenty-five [(25)] years and not more than thirty [(30)] years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars [(\$50,000.00)]. S.C. CODE ANN. § 44-53-375(C)(2)(c) (2011); S.C. CODE ANN. § 16-1-60 (2011); S.C. CODE ANN. § 17-25-45 (2011).

³ PWID Marijuana-First Offense is a felony punishable by imprisonment for "not more than five [(5)] years" or a fine of "not more than five thousand dollars [(\$5,000.00)], or both." S.C. CODE ANN. § 44-53-370(b)(2)(2011).

⁴ Trafficking in Crack Cocaine 10-28 Grams-Second Offense is a violent, serious offense punishable by "a term of imprisonment of not less than five [(5)] years nor more than thirty [(30)] years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars [(\$50,000.00)]. S.C. CODE ANN. § 44-53-375(C)(1)(b) (2011); S.C. CODE ANN. § 16-1-60 (2011); S.C. CODE ANN. § 17-25-45 (2011).

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1. Ineffective assistance of counsel, in that;
 - i. Counsel violated the Applicant's 5th, 6th, and 14th amendments,
2. Involuntary guilty plea, in that;
 - i. The Applicant was not made aware of the charges he was pleading to or the penalties,
3. Violation of due process, in that;
 - i. The Applicant's 4th, 5th, 6th, and 14th amendments were violated.

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At the hearing, the Applicant proceeded only on the following grounds: Counsel was ineffective for failing to advise the Applicant of the charges he was facing, the associated penalty ranges, and the consequences of his plea agreement; therefore, the Applicant argues his guilty plea was involuntary. This Court finds the Applicant failed to present any testimony or evidence regarding any other claims raised his Application; therefore, all allegations other than those presented at the hearing are deemed abandoned by the Applicant, denied, and dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Concurrent PCR Cases and Motion to Dismiss

At the commencement of the evidentiary hearing, the Respondent moved to dismiss the Applicant's PCR Application based on the following grounds: the Applicant filed an additional Application for PCR under Case Number 2013-CP-11-238, which was subject to a conditional

⁵ See Tr. 4:14-15; 14:21-25. The Applicant does not challenge the disposition of this offense and termination of his

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dismissal pursuant to the South Carolina Supreme Court's April 12, 2013 Administrative Order.

The Respondent contends that the Applicant's Reply was untimely. Pursuant to S.C. CODE ANN.

§ 17-27-70 (2011):

When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

S.C. CODE ANN. § 17-27-70 (2011). "Generally, successive applications for post-conviction relief are viewed with disfavor and the applicant has the burden of showing that a new ground for relief could not have been raised in a previous application." Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987) (citing Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). "If the applicant meets this burden, a hearing must be afforded despite the successiveness of the application." Id. (citing Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982)). Where the Circuit Court conditionally dismisses an application for PCR, the applicant must reply to that dismissal and show cause as to why the application should not be summarily dismissed. See Lewis v. State, 368 S.C. 630, 630 S.E.2d 464 (2006); Edith v. State, 369 S.C. 408, 632 S.E.2d 844 (2006). The Applicant's PCR application regarding Case Number 2013-CP-11-238 is not properly before the Court. Thus, the Court proceeded with the hearing.

Motion for Continuance

The Applicant requested a continuance based on the following grounds: the Applicant requested this hearing be continued because of concurrent PCR case pending as Case Number

probationary case on collateral review before this Court.

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2013-CP-11-238. The Applicant also requested a continuance so that he could subpoena O. Cyrus Hinton, Esquire and Trent Pruett, Esquire to testify on his behalf. The Applicant testified they were necessary witnesses because the Applicant attempted to hire them to represent him on his underlying charges and, although he had other options, he was forced to be represented by Counsel. The Applicant argued that when he tried to hire Hinton, the judge and Assistant Solicitor initially told him that he would be given time to secure counsel, but then said he would have to go forward and plead guilty or go to trial. The Applicant argued that Pruett agreed to represent the Applicant, but was unable to take his case at the last minute. The Applicant also contended that he was not sure of the charges he was facing while incarcerated.

The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citing Bridwell v. Bridwell, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983)). See Hudson v. Blanton, 282 S.C. 70, 74, 316 S.E.2d 432, 434 (Ct. App. 1984) (noting a moving party must show the absence of some material evidence and due diligence on his part to obtain such evidence to justify a continuance). Cf. Beasley v. Kerr-McGee Chem. Corp., 273 S.C. 523, 532, 257 S.E.2d 726, 730 (1979) (finding a movant failed to show due diligence to justify a continuance when he had eight months from filing of the complaint until trial to prepare). The bald assertion that the Applicant or his counsel were not ready to go forward and the Applicant was unprepared is not a sound basis for granting a motion for continuance. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996); Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2001) (“[T]he denial of a motion for a continuance on the ground that [a party] has not had time to prepare is rarely disturbed on appeal.”).

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This Court finds that the witnesses' purported testimony is not relevant to the Applicant's PCR Application. This Court denied the Applicant's motion for continuance. This Court finds that at the time of the Applicant's plea hearing, his case had been pending for a year; therefore, the Applicant's argument that he was prejudiced by his inability to hire private counsel on the eve of trial is disingenuous, dilatory, and a delay tactic. This Court can discern no legitimate basis to grant the Applicant's motion for continuance. However, the Court advised the Applicant that if he could establish any relevant or germane evidence supporting his claims, his PCR attorney could supplement the record on his behalf. Thereafter, the Court proceeded with the Applicant's evidentiary hearing.⁶

Summary of the Testimony

The Applicant testified that he was currently in prison at Perry-Lieber Correctional Institute on the charges of Trafficking Crack Cocaine 28-100 Grams-Second Offense, and PWID Marijuana, following his guilty plea on July 24, 2012. The Applicant testified that he accepted and "signed off on" the plea offer of fifteen (15) years on the day of his plea because he felt he had no choice. He testified that he could either plead guilty or proceed to trial that day and face a possible life without parole sentence.

The Applicant testified that he had several meetings with Counsel and that he tried to explain the circumstances of his charges, but his attorney never understood what he was facing. The Applicant alleged the arresting officer was lying and that he never pulled the Applicant out of the car before the officer performed his search and found the drugs; the Applicant claimed that the other responding officer pulled him out of the vehicle. The Applicant further testified that Counsel never advised him about the police report, would not allow witnesses to take the police report up to the stand, and never explained why. The Applicant characterized Counsel's advice:

⁶ The Applicant declined to supplement the record after his hearing.

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if the Applicant went to court, the State would go off the police report, and that's it. The Applicant stated that he had a problem with Counsel's explanation.

The Applicant testified that he met with Counsel twice. At the first meeting, The Applicant asked Counsel to investigate whether or not the traffic stop was legal and the discrepancies with the incident report. The Applicant testified he was parked lawfully on the lawn. The Applicant testified that he provided Counsel with several names and addresses of witnesses he knew of and explained how to find other individuals, but The Applicant does not believe that Counsel tried to contact any of those witnesses. At their second meeting, Counsel conveyed the State's fifteen (15) year offer. The Applicant testified that he was scheduled for a court appearance on the date of his plea and he signed the sentencing sheets a few moments before the plea because he was told that if he did not accept the offer that day, he would proceed to trial. He explained that he was not sure whether he wanted to accept the offer because he was in the process of retaining an attorney, was not sure whether Counsel had uncovered evidence regarding his potential witnesses, and Counsel was not prepared to go to trial.

Additionally, the Applicant testified that he was released from the South Carolina Department of Corrections and was supposed to go to the Cherokee County Detention Center for roll call in April 2012. He then testified that he bonded out of the Cherokee County Detention Center and at roll call in May 2012, he was served with LWOP notice. He testified that at that time, he was not represented by anyone. The Applicant testified that he thought the charge was being reverted back to a Trafficking in Crack Cocaine 28-100 grams-First Offense, with a penalty range of seven (7) to twenty-five (25) years and he was pleading to the fifteen (15) year offer, instead of the reduced Trafficking in Crack Cocaine 10-28 grams-Second Offense, with a range of five (5) to thirty (30) years. The Applicant admitted that it was ignorance for him not to

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read or ask about the sentencing sheet before signing it, but that he was emotional and did not discuss the nature of the charges with Counsel at that time.

Finally, the Applicant testified he was unaware of the drug enhancement scheme, the plea colloquy, and the violent and serious nature of the Trafficking offense. The Applicant testified that he asked the Assistant Solicitor about his LWOP eligibility during roll call and asked the judge to explain serious offenses. He alleged the Solicitor said that he did not understand and Counsel said that his Trafficking offense was not considered as a strike because it was a first offense, not a second. However, on cross examination, the Applicant admitted that he knew he was pleading to the fifteen (15) year offer and remembered that he reviewed the nature of the Trafficking in Crack Cocaine-Second Offense penalty, drug enhancements, and the facts during the plea colloquy. The Applicant also admitted that during the colloquy he stated that his plea was free and voluntary.

Counsel testified that he represented the Applicant, the Applicant applied for the services of the Cherokee County Public Defender's Office, his office opened a file for this case in May 2012, and that he was appointed a few months before the Applicant's plea on May 17, 2011. Counsel understood that The Applicant was served with a clocked and filed copy of the State's notice to seek life imprisonment without parole on March 27, 2012. Counsel testified that he met with the Applicant and reviewed the elements of the charges, sentencing ranges, and constitutional rights he would give up if he pled guilty. Counsel testified that he received the court's general sessions docket that the Public Defender's Office sent notice to his client of his appointment on June 12, 2012, and he met with the Applicant at 4:00 PM on that day to discuss the original posture of the Applicant's case. The State's original offer, which was extended on June 6, 2012, was to withdraw LWOP in exchange for a negotiated plea to twenty-five (25) years

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on the Trafficking in Crack Cocaine 28-100 Grams-Third Offense and PWID Marijuana-Third Offense. Counsel testified the offer expired on June 15, 2012. Counsel testified, "clearly [I] would have gone over the mandatory minimums at that time." Counsel testified that he and the Applicant reviewed the sentencing sheets received from the Assistant Solicitor, which listed the charges and noted the penalty ranges. Thereafter, Counsel testified, he reviewed the Applicant's prior record for drug enhancements to determine whether the Applicant was LWOP eligible and reviewed the indictments and applicable statutes. Counsel testified that when the case was not reached on the June docket and after the Applicant rejected the initial offer, he continued to negotiate on the Applicant's behalf.

At that time, Counsel reviewed the facts of the case and discovery materials with the Applicant. Counsel testified that he had only two first names of potential witnesses in his file but could not discern their identities and could not recall whether he had noted any other names. Counsel denied that the Applicant provided him any leads. He believed the only witnesses were listed in the incident report and had already given statements that the property where the drugs were found belonged to the Applicant. He explained to the Applicant that those witnesses would be called to court to testify to that effect and that their statements would be admissible. Additionally, Counsel testified that he listened to the Applicant's version of the events, researched the case by reviewing maps of the area, and researched and explained the law on traffic stops and search and seizure law with the Applicant in his office. Counsel explained that he could not challenge the search because the officer was entitled to stop and search the vehicle based upon the fact that there was an open container in the vehicle where the Applicant was seated in the back. Counsel testified that he could not recall the Applicant's description of a home.

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Counsel testified that he does not recall whether Hinton appeared at the docket sounding or at the Applicant's plea date. At the time the Applicant's case was called on the docket, in chambers the plea judge denied the Applicant's motion to continue his case in order to hire Hinton and they had to be ready to plead guilty or go to trial. Counsel testified that the Applicant then received the fifteen (15) year offer. Although Counsel could not recall whether he relayed the offer to the Applicant on the Monday of the docket sounding or on the day of his trial, Counsel advised the Applicant to accept the State's offer based upon the fact that The Applicant was facing a sentence of life without parole at trial. Counsel noted that the Applicant was cordial during their interactions in June 2012, but his mood turned somber, perhaps when he realized he was LWOP eligible. Counsel felt the Applicant was reluctant to sign the sentencing sheet, which he interpreted as the Applicant's reluctance to go to prison for fifteen (15) years, and which he felt was nothing out of the ordinary, but Counsel was adamant in his advice for the Applicant to accept the deal. Finally, Counsel testified that had the Applicant rejected the offer, his trial would have commenced the next morning and he was adequately prepared to go forward.

Ineffective Assistance of Counsel

In a PCR action, "the burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant 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, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

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

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See id. at 117-18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). 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." Id. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

The Applicant alleges he received ineffective assistance of counsel. This Court finds the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations raised in the Application, the Amended Application, and at the hearing. This Court finds Counsel is a criminal practitioner who has experience in the trial of serious offenses. This Court finds Counsel provided credible testimony during the Applicant's evidentiary hearing.

Counsel conferred with the Applicant on numerous occasions, reviewed all discovery

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materials with the Applicant, and determined there were no viable defenses or challenges to the stop or search and seizure. During conferences with the Applicant, Counsel discussed the pending charges, the elements of the charges and what the State was required to prove, the Applicant's version of the facts, the Applicant's constitutional rights, and his possible defenses or lack thereof. The record reflects that Counsel effectively explained the charges, their associated penalty ranges, and the consequences of pleading guilty. This Court finds that Counsel was prepared to proceed to trial if necessary, but was able to work out a very good plea offer on behalf of the Applicant. This Court can find no deficiency in Counsel's representation in this matter. The record further reflects that the Applicant's plea was entered freely, voluntarily, knowingly, and intelligently.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687-88, 104 S. Ct. 2052, 2064-65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064-65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev'd on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that Counsel's representation did not fall below an objective standard of reasonableness.

Inability to Retain Private Counsel

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The Applicant argues that the plea court should have allowed him to fire Counsel, continue his case, and hire one of two (2) private defense attorneys to represent him. A motion to relieve counsel is addressed to the discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). Likewise, the grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citing Bridwell v. Bridwell, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983)).

The defendant bears the burden of showing satisfactory cause for removal. State v. Graddick, 345 S.C. 383, 386, 548 S.E.2d 210, 211 (2001). In analyzing a defendant's motion to relieve counsel, the court may consider the following factors: "timeliness of the motion, adequacy of the trial [court]'s inquiry into the defendant's complaint, and whether the attorney-client conflict was so great that it resulted in a total lack of communication, thereby preventing an adequate defense." State v. Sims, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991). "It is well-established that a defendant may waive the right to counsel and proceed *pro se*." Dearybury v. State, 367 S.C. 34, 39, 625 S.E.2d 212, 215 (2006) (citing Faretta, 422 U.S. at 834, 95 S.Ct. at 2525. "Although a defendant's decision to proceed *pro se* may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. (citing Faretta, 422 U.S. at 834, 95 S.Ct. 2525). "The trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel." Id.

This Court finds credible Counsel's testimony that at the docket sounding, as the Applicant's case was called to trial, the Applicant still had not secured private representation.

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Counsel further testified that the plea court advised him that the Applicant's case would not be continued so that the Applicant could retain private counsel. Once the Applicant's case was called to trial, the plea court advised, his trial would not be continued and thus the Applicant would be required to proceed *pro se*. See id.; State v. Williams, 312 S.C. 455, 459, 469 S.E.2d 49, 52 (1996) (where fifteen months had passed since counsel was retained and defendant could not show satisfactory cause to grant motion to relieve counsel, trial court did not abuse its discretion by denying defendant's motion on the eve of trial). This Court finds that the trial court's refusal to relieve Counsel and grant the Applicant a continuance on the eve of trial was not an abuse of discretion. This Court finds that the Applicant's case had been pending for approximately one (1) year and he still had not secured private counsel. Therefore, his motion to relieve Counsel and for continuance was a dilatory delay tactic and without merit. Accordingly, the Applicant's assignment of error is without merit.

Failure to Investigate

The Applicant claims Counsel was ineffective for failing to fully investigate his case and discover potential witnesses. This Court finds the Applicant has failed to show the potential benefit of any further investigation; this Court will not speculate as to the result of such investigation.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), *overruled on other grounds*, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result."

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Porter v. State, 368 S.C. 378, 385–86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Wiggins v. Smith, 539 U.S. 510, 521–22, 123 S. Ct. 2527, 2535 (2003).

Our Courts have repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant’s mere speculation as to what a witness’ testimony would have been by itself cannot satisfy the Applicant’s burden of showing prejudice. Id. (citing Glover, 318 S.C. at 498–99, 458 S.E.2d at 540). See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (“So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.”); Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066) (“Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

This Court finds credible Counsel’s testimony that he fully and thoroughly investigated the Applicant’s case, including reviewing maps of the scene of the crime and performing legal research. This Court further finds credible Counsel’s testimony that he received and reviewed all discovery with the Applicant prior to his plea. This Court finds the Applicant’s uncorroborated

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assertions that Counsel failed to investigate potential witnesses, whose names he provided to his attorney, is not credible. Ultimately, the Applicant failed to present the favorable testimony of such witnesses at his evidentiary hearing. Therefore, this Court finds that Counsel adequately investigated the Applicant's case and finds no basis to speculate as to the results of any further investigation. Thus, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to fully investigate his case.

Failure to Advise of Penalty and Sentencing Consequences

The Applicant alleges Counsel was ineffective for failing to inform the Applicant of the penalty ranges associated with his charges, the potential sentences he was facing, the terms of the plea offer, and the consequences of entering his plea, specifically the violent and serious classification of his Trafficking offense. This Court finds this allegation is wholly without merit. This Court finds credible Counsel's testimony that he informed the Applicant of the following: the elements of the charged offenses; the penalty ranges of the offenses; the potential sentences associated with his charges; and his LWOP eligibility. This Court finds most credible Counsel's affirmation that he certainly would have discussed the mandatory minimum sentences with the Applicant during their first meeting and that after investigation into the Applicant's prior criminal record, informed the Applicant of the potential drug enhancements.

This Court finds Counsel was not deficient in this regard and his performance did not affect the outcome of the Applicant's proceeding. See Randall v. State, 356 S.C. 639, 641–42, 591 S.E.2d 608, 609–610 (2004) (citing Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002)) (failure to advise of collateral consequences of parole eligibility before the applicant proceeds to trial not ineffective assistance of counsel); Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000), *overruled on other grounds*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (counsel is not

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ineffective for failing to advise a defendant regarding parole eligibility in connection with his guilty plea because it is a collateral consequence of sentencing); Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997) (unless counsel gives erroneous advice, parole information is not a ground for collateral attack of a guilty plea); Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991) (guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence).

"A defendant must be advised of a mandatory punishment for the offense to which he is pleading." State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). Despite counsel's alleged failure to advise his or her client regarding the mandatory minimum sentences, the trial judge cures any misconception by properly advising the defendant of the penalty ranges at the plea hearing. Knox, 340 S.C. at 86, 530 S.E.2d at 889 (citing Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998)). Cf. Smith v. State, 329 S.C. 280, 284–85, 494 S.E.2d 626, 628–29 (1997) (enumerating collateral consequences of burglary conviction and holding that guilty plea not rendered invalid for counsel's failure to advise of each consequence associated with violent crimes). This Court finds that any deficiencies in the Applicant's personal understanding of the ramifications of his plea were cured during the plea court's colloquy. Specifically, the Applicant was advised of and understood the charges against him (Tr. 4: 4–15), the associated penalty ranges (Tr. 5:18–7:5), and the potential drug offense enhancements (6:12–7:5). The Applicant indicated he understood the nature and terms of the negotiated plea (Tr. 8:25–9:17).

Additionally, this Court finds that the Applicant's assertion that he thought his Trafficking charge was a first offense and that he did not understand the ramifications of pleading guilty to a violent, serious offense is without merit. The Applicant's criminal history is extensive at best—including a distribution of crack conviction, a distribution of crack within

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proximity to a school charge, another PWID charge, and a PWID within proximity to a school charge, for a total of six (6) prior offenses—and indicates that he was aware of the criminal justice system and sentencing process. Moreover, the Applicant admitted the State served him with a clocked and filed LWOP notice prior to his trial date, which would have included the prior offenses on his record that made him eligible for life imprisonment without possibility of parole. Thus, this Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective in this regard.

Failure to Challenge the Search and Advise of Defenses

The Applicant alleges that he attempted to explain to Counsel that the search of his vehicle and seizure of the drugs was invalid but Counsel failed to raise the illegal search as a defense and thus was ineffective. This Court finds that Counsel was not ineffective for failing to challenge the search, seizure, and the Applicant's arrest and advising the Applicant that he had no defenses. This Court finds that the Applicant had no defenses to raise at trial and that Counsel had no basis to challenge the search or admission of the drugs. Moreover, the Applicant cannot establish prejudice because any challenge regarding the search would not have been successful at trial.

"Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

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Generally, the Fourth Amendment requires the police to have a warrant in order to conduct a search. Robinson v. State, 407 S.C. 169, 182, 754 S.E.2d 862, 868 *cert. denied*, 134 S. Ct. 2888 (2014) (quoting State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007)). "Evidence seized in violation of the warrant requirement must be excluded from trial. . . . However, a warrantless search may nonetheless be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement." Id. (citing State v. Moore, 377 S.C. 299, 308–09, 659 S.E.2d 256, 261 (Ct. App. 2008)). The exceptions to the warrant requirement are: "(1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) the plain view doctrine; (6) consent; and (7) abandonment." State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Furthermore, if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant. See Colorado v. Bertine, 479 U.S. 367, 372–73, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987).

A police officer "may . . . stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity." State v. Pichardo, 367 S.C. 84, 97–98, 623 S.E.2d 840, 847 (Ct. App. 2005). Reasonable suspicion is something more than an "inchoate and unparticularized suspicion" or hunch. Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868 (1968). "Instead, looking at the totality of the circumstances, reasonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity." Robinson, 407 S.C. at 182, 754 S.E.2d at 868 "[P]olice may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if (1) the arrestee is 'unsecured and within reaching distance of the passenger compartment at the time of the search,' or (2) it is reasonable to believe the vehicle contains evidence of the crime of arrest. Absent either of those two instances, 'a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that

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another exception to the warrant requirement applies.” *Id.* at 188–89, 754 S.E.2d at 872 (citing Arizona v. Gant, 556 U.S. 332, 343, 129 S.Ct. 1710, 1710 (2009)).

Here, the officer’s lawful traffic stop of the vehicle and suspicion that potential criminal activity was afoot gave rise to reasonable suspicion to briefly detain the Applicant. See Robinson, 407 S.C. at 183, 754 S.E.2d at 869 (stop justified upon officer’s reasonable suspicion that passengers were potentially committing a misdemeanor criminal offense). The Applicant was discovered in the back seat of the car with an open container on the floorboard in between his feet. Therefore, probable cause existed supporting his arrest. The officers then performed an appropriate search incident to lawful arrest. Accordingly, the detention and seizure of the Applicant and search of his vehicle was valid and Counsel was not ineffective for failing to raise the search as a defense.

During his testimony, the Applicant made passing references to potential witnesses who could refute the State’s assertion that the vehicle was in the Applicant’s dominion and control and thus he had constructive possession of the drugs at the time of the arrest. “Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found.” State v. Fripp, 397 S.C. 455, 458, 725 S.E.2d 136, 138 (Ct. App. 2012) (citing State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996)). “Mere presence is insufficient to prove constructive possession.” State v. Heath, 370 S.C. 326, 329-30, 635 S.E.2d 18, 19 (2006) (citing State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973)). In order to prove constructive possession, the “State must show a defendant had dominion and control, or the *right to exercise dominion and control* over the [illegal substance].” *Id.* (citing State v. Halyard, 274 S.C. 397,

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400, 264 S.E.2d 841, 842 (1980)) (emphasis added). "Further, the State may establish constructive possession by either circumstantial or direct evidence." *Id.* "The defendant's knowledge and possession may be inferred if the substance was found on premises under his control. *Id.* (citing State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987)) (emphasis added).

However, as referenced above, the Applicant failed to present the favorable witness testimony supporting his purported defense at his evidentiary hearing. Therefore, the Applicant's assertion of error is overruled. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)).

Involuntary Guilty Plea

In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the

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truth of those statements. Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566, 566 (4th Cir. 1976).

When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill, 474 U.S. at 52, 106 S. Ct. at 366; Roscoe, 345 S.C. at 20, 546 S.E.2d at 419 (citing Hill, 474 U.S. at 52, 106 S. Ct. at 366; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (citing State v. Hazel, 275 S.C. 392, 394, 271 S.E.2d 602, 602 (1980)). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000)). See Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea." Id. (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A defendant's knowing and voluntary waiver of statutory or

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constitutional rights must be established by a complete record and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). "Under the procedure, a defendant, before his guilty plea may be accepted, is examined under oath on the voluntariness of his plea, including particularly its freedom from coercion by threat." Edmonds, 546 F.2d at 567. When a defendant pleads guilty on the advice of counsel, the plea may be attacked through only a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (1999)).

Moreover,

a signed document that informs a defendant of the charges against him, such as a sentencing sheet, gives rise to a presumed regularity in the proceedings and signifies that the defendant has been notified of the charges to which he has pled guilty. . . . In a criminal case, a defendant who chooses to plead guilty has ample opportunity to be fully notified of the charges he is pleading guilty to. . . . [A] defendant may check a box to indicate that he wishes to plead guilty. In addition, a defendant may sign the sentencing sheet, indicating the defendant is informed of the choices and has selected the box that corresponds to the course of action the defendant wants to take in the case. As a result, we believe that all of these factors indicate that the Defendant had notice of the charges to which he chose to plead guilty.

State v. Smalls, 364 S.C. 343, 347, 613 S.E.2d 754, 756 (2005).

This Court finds that the Applicant failed to meet his burden of proof as to this claim. This Court finds the transcript of the guilty plea to be most compelling. Based on the record of the Applicant's plea hearing, the Applicant's assertion that he believed he was pleading guilty to a first offense and did not understand the terms of his plea offer is not credible (Tr. 4: 4-15; 5:18-7:5; 8:25-9:17). This Court finds that The Applicant was advised of and understood the charges against him (Tr. 4: 4-15), the associated penalty ranges (Tr. 5:18-7:5), and the potential drug offense enhancements (6:12-7:5). The Applicant indicated he understood the nature and

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terms of the negotiated plea (Tr. 8:25-9:17). The Applicant told the court that he was pleading freely and voluntarily, and was satisfied with his attorney. (Tr. p. 9-11). The Applicant was advised by and agreed with the plea court regarding his prior record; that the present offense was his third strike; that a component of the State's plea deal was waiving LWOP; and that he was subject to drug crime enhancements (Tr. 12:7-13:8). He stated for the record that he his decision to enter into a negotiated plea agreement and plead guilty was not based on any promises (Tr. 9:18-20).

The Applicant was fully advised of and waived his constitutional rights and his ability to raise any defenses on his behalf at trial (Tr. 7:10-8:21). The Applicant stated that he was satisfied with his attorney's representation (Tr. 9:21-24); that he and his attorney had fully discussed all the charges, evidence, and witnesses against him, as well as any possible defenses, (Tr. 9:25-10:10); and that he gave the names of all potential witnesses to his attorney to assist in his defense (Tr. 10:12-15). Counsel also acknowledged during mitigation that he fully discussed the Applicant's case and all possible outcomes with his client (Tr. 15:16-19).

Furthermore, The Applicant allocuted to the facts of the offense and admitted his guilt. (Tr. 11:3-5). The Applicant affirmed to the plea court that he was not under the influence of drugs or alcohol (Tr. 10:16-20), experienced no mental or emotional issues (Tr. 10:21-24), and he was pleading guilty of his own free will (Tr. 10:25-11:2). The Applicant told the plea court that he understood his right to appeal his conviction and sentence (Tr. 13:15-20). Finally, the Applicant specifically requested the plea court to honor the fifteen (15) year negotiated plea offer so that he could have a life with his family after release from incarceration. (Tr. 16:14-24). Therefore, this Court finds that the Applicant has failed to meet his burden of showing that his guilty plea was not entered freely, voluntarily, knowingly, and intelligently.

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Due Process Violations

Although pled in his application, The Applicant did not proceed on this allegation at his PCR hearing. Therefore, this Court finds that the Applicant voluntarily abandoned this claim.

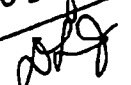
All Other Allegations

As to any and all allegations that the Applicant raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations. Therefore, they are hereby denied and dismissed.

CONCLUSION

This Court finds in regards to the allegations of ineffective assistance of counsel and involuntary guilty plea, Applicant's testimony as a whole was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in her representation, and that Counsel's conduct did not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant. The Applicant failed to show that Counsel's performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by Counsel's representation. See id. The Applicant's complaints concerning Counsel's performance are without merit and are denied and dismissed.

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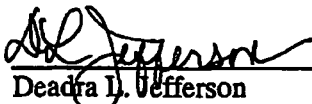
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 454, 409 S.E.2d 395, 396 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. The Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

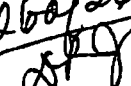
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 31st day of March, 2015.


 Deadra L. Jefferson
 Presiding Judge
 Seventh Judicial Circuit

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DOCKET NO. **11-GS-11-0367**

The State of South Carolina

County of Cherokee

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

JUN 16 2011

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THE STATE
vs.

Travis Lamar Sentell Colston

Indictment for

TRAFFICKING IN CRACK COCAINE

SC Code: 44-53-375

WITNESSES

Gaffney Police Dept.

[Signature]

ARREST WARRANT NUMBER

M525646

ACTION OF GRAND JURY

Charles W. Lunde

Foreperson of Grand Jury

Date:

6-16-11

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

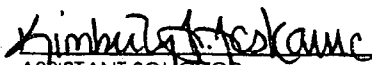
INDICTMENT

At a Court of General Sessions, convened on JUN 16 2011 the
Grand Jurors of Cherokee County present upon their oath:

TRAFFICKING IN CRACK COCAINE

That Travis Lamar Sentell Colston, did in Cherokee County on or about April 5, 2011, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or did knowingly actually or constructively possess, or did knowingly attempt to actually or constructively possess (28) twenty-eight grams or more, but less than (100) one hundred grams of Crack Cocaine, a schedule II controlled substance, in violation of §44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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



ASSISTANT SOLICITOR