

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

S.C. Supreme Court

RESPONDENT,

V.

JAMES CRAIG WHITE,

PETITIONER

Appeal from Lexington County

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 2012-UP-267

Appellate Case No. 2010-170069

A P P E N D I X

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

James White,

Appellant.

Appeal From Lexington County
Alexander S. Macaulay, Circuit Court Judge

Unpublished Opinion No. 2012-UP-267
Submitted April 2, 2012 – Filed May 2, 2012

AFFIRMED

Appellate Defenders Susan B. Hackett and Tristan M. Shaffer, both of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, all

of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

PER CURIAM: James White appeals his concurrent ten-year sentences for two counts of distribution of crack cocaine, second offense. He argues the circuit court erred in determining the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (Act) prevented the circuit court from suspending his sentences. We affirm.¹

Initially, we observe that White failed to preserve this issue for appellate review. See State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (stating an issue must have been raised to and ruled on by the circuit court to be preserved for appellate review); State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."); State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978) ("[An] appellant's failure to timely object to or seek modification of his sentence in the [circuit] court precludes him from presenting the question to [the appellate c]ourt for the first time on appeal.").

However, even if this issue were preserved, White's argument fails on the merits. See State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002) ("[I]n construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."); Omnibus Crime Reduction and Sentencing Reform Act, 2010 S.C. Acts No. 273, § 65 (stating the Act's amendments "[do] not affect pending actions . . . or alter . . . any penalty . . . incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide"). Accordingly, the decision of the circuit court is

AFFIRMED.

PIEPER, KONDUROS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA

 **COPY**

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES CRAIG WHITE,

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APPELLANT
MAY 16 2012

Appeal from Lexington County

SC Court of Appeals

Alexander S. Macaulay, Circuit Court Judge

RECEIVED

Opinion No. 2012-UP-267

MAY 16 2012

PETITION FOR REHEARING

SC OFFICE OF
APPELLATE DEFENSE

On May 2, 2012, this Court affirmed Appellant's sentences for two counts of distribution of crack cocaine, second offense in an unpublished opinion. State v. White, 2012-UP-267 (Ct. App. filed May 2, 2012). Appellant asks this Court to grant his Petition for Rehearing and reverse his sentences and remand for resentencing.

As an initial matter, this Court held the error was not preserved for review. Citing State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 474, 478 (2004), this Court noted that an issue must be raised to and ruled on by the trial judge to be preserved for appellate review. This Court also cited State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) for the legal proposition that a challenge to a sentence must be raised at trial in order to preserve the issue for appellate review. Finally, this

Court, citing State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978), noted that a defendant who fails to object timely to his sentence in the circuit court is precluded from seeking review.

During the plea colloquy, the judge inquired as to the minimum and maximum sentences permitted by law for the charged offenses. R. 4 lines 11-20. Appellant informed the judge of the change in the law. R. 4 lines 21-22. Appellant then began reading Section 44-53-375(B) of the South Carolina Code as amended by the new law. R. 4 line 24 – R. 5 line 4. When the judge asked to review what Appellant was reading, Appellant complied. R. 5 lines 5-11. The judge engaged in an off-the-record bench conference with the attorneys as well. R. 5 lines 10-11. Thereafter, the judge informed the parties he would consider Appellant's argument over lunch. R. 5 lines 12-14.

The statute, as explained by Appellant, provides as follows:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a first offense or a second offense may have their sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

S.C. Code § 44-53-375(B)(emphasis added).

After the lunch break, the judge engaged in a colloquy with Appellant concerning his waiver of constitutional rights. When Appellant had an opportunity to address the trial court, trial counsel stated:

Your Honor, I suppose first just to clear the air and make sure that [Appellant] is well informed, because I did inform him of the change in the law that we had discussed earlier before the recess and that was something of a hope that he had, but obviously per your ruling we know now that it's going to be handled under the old law, so he understands that and I wanted to make sure that he's aware and he's in front of Your Honor pleading under the old law, that he's aware of that.

R. 18 lines 3-11. The trial judge responded that the old law was the "law in effect at the time of the alleged ... admitted criminal offenses." R. 18 lines 12-15. Thus, the record is clear that Appellant

raised the issue of whether the statute prevails over the savings clause to the trial judge and the trial judge ruled upon the issue as evidenced by trial counsel's on-the-record discussion with the trial judge.

In addition, Rule 18(a) of the South Carolina Rules of Criminal Procedure provides that an attorney "shall not attempt to argue further any matter after he has been heard and the ruling of the court has been pronounced." The record is clear that (1) trial judge understood Appellant's argument that the trial judge could suspend his sentence based upon the new law and (2) the trial judge ruled the new law was not applicable to Appellant. Had trial counsel attempted to argue the matter further, he would have been in violation of the Rules.

This Court further held that Appellant's argument failed on the merits. This Court relied upon State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002) for the proposition that in construing statutes, courts give words their plain and ordinary meaning. This Court then quoted section sixty-five of the Omnibus Crime Reduction and Sentencing Reform Act stating that the Act's amendments "[do] not affect pending actions ... or alter ... any penalty ... incurred under the repealed or amended law, unless the repealed or amended provision so expressly provide." 2010 S.C. Acts No. 273, § 65. Appellant agrees with this Court's premise, but respectfully disagrees with this Court's conclusion.

The specific section of the repealed or amended provision begins with the phrase "[n]otwithstanding any other provision of law." S.C. Code § 44-53-375(B). The clear and unambiguous meaning of "notwithstanding" in the statute provides an exception to the omnibus crime bill's "savings clause." Notwithstanding is defined as "in spite of." American Heritage Dictionary, www.ahdictionary.com (last visited May 15, 2012); Dictionary.com Online Dictionary, <http://dictionary.com> (last visited July 28, 2011); The Free Dictionary, www.thefreedictionary.com

(last visited May 15, 2012); see also, Merriam-Webster Online Dictionary, www.merriam-webster.com (last visited May 15, 2012) (defining “notwithstanding” as “despite”); cf. MacMillian Dictionary, www.macmilliandictionary.com (last visited May 15, 2012) (defining “despite” as a preposition “used to say something happens even though there is something to prevent it”). In the statute, “notwithstanding” is being used to show that that part of the code takes priority over “any other provisions of law.” See Shomberg v. United States, 348 U.S. 540, 549 (1955) (providing that “[i]n using ‘notwithstanding’ language in [a statute], Congress clearly manifested its intent that certain policies should override the otherwise broad and pervasive principles of the savings clause”).

Even if this Court were to find that “notwithstanding” is an ambiguous term, then it still must construe the new distribution statute to be retroactive under the rule of lenity. See State v. Blackmon, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991) (stating “when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant”). The rule of lenity both ensures that a person will not be punished for an ambiguous law and “keeps the courts from making criminal law” in the legislature’s stead. See United States v. Santos, 553 U.S. 507, 514 (2008).

In sum, when a statutory clause is prefaced by “notwithstanding any other provision of law,” that clause is put into an authoritative position over other provisions of law. The “notwithstanding” language does not mean the following clause does not withstand any other provision of law. Therefore, the plea court erred in finding that Appellant could not be sentenced under the omnibus crime bill for distribution of crack cocaine. As a general rule a criminal defendant can always take advantage of changes in the law that reduce his sentencing exposure. See State v. Griffin, 315 S.C. 285, 287, 433 S.E.2d 862, 863-864 (1993) (noting changes in law that do not increase punishment

are not ex post facto violations). The omnibus crime bill would allow Appellant's sentence for distribution to be suspended. See S.C. Code § 44-53-375(B).

Respectfully submitted,

Susan B. Hackett for
Tristan M. Shaffer

Susan B. Hackett
Susan B. Hackett
Appellate Defender

This 16th day of May, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CRAIG WHITE,

APPELLANT

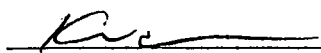
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of May, 2012.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 16th day of May, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

The South Carolina Court of Appeals

The State, Respondent,

v.

James White, Appellant.

Appellate Case No. 2010-170069

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JUN 26 2012

SC OFFICE OF
APPELLATE DEFENSE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded; hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Daniel G. Pieper

J.

U. Ke

J.

John O. Seaton

J.

Columbia, South Carolina

cc:

- Donald V. Myers
- Susan Barber Hackett
- Mark Reynolds Farthing
- John W. McIntosh
- Salley W. Elliott
- Alan McCrory Wilson

FILED

June 20, 2012

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CRAIG WHITE,

APPELLANT

RECORD ON APPEAL

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Appellate Defender

ALAN WILSON
Attorney General

TRISTAN M. SHAFFER
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STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
 COUNTY OF LEXINGTON)
) 2010-GS-32-01711
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STATE OF SOUTH CAROLINA)
)
) vs.) TRANSCRIPT OF RECORD
)
 JAMES CRAIG WHITE)
) DEFENDANT)

August 10, 2010
 Lexington, South Carolina

B E F O R E:

THE HONORABLE ALEXANDER S. MACAULAY, JUDGE.

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

ALTON H. EARGLE, JR., ASSISTANT SOLICITOR
 Attorney for the State

MATTHEW C. BUCHANAN, ASSISTANT PUBLIC DEFENDER
 Attorney for the Defendant

CAROL M. THUEME, RPR
 Official Court Reporter

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EXHIBITS

(There were no exhibits marked.)

1 THE CLERK: James Craig White.

2 Indictment 2010-GS-32-1711, State versus James
3 Craig White, indicted for distribution of crack, third
4 offense. He is pleading to distribution of crack, second
5 offense.

6 Indictment 2010-GS-32-1712, State versus James
7 Craig White, indicted for distribution of crack cocaine
8 within proximity of a school. He is pleading as charged.

9 Indictment 2010-GS-32-1713, State versus James
10 Craig White, indicted for distribution of crack cocaine,
11 third offense. He is pleading to distribution of crack,
12 second offense.

13 Indictment 2010-GS-32-1714, State versus James
14 Craig White, indicted for distribution of crack cocaine
15 within proximity of a school. He is pleading as charged.

16 All indictments are true-billed and he is
17 represented by Mr. Buchanan.

18 Raise your right hand.

19 JAMES CRAIG WHITE, after being duly sworn,
20 testified as follows:

21 THE COURT: Are you James Craig White?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Solicitor, what is the maximum
24 sentence on distribution of crack cocaine, second offense?

25 MR. EARGLE: I believe five to 30 years, Your

1 Honor, and/or a fine up to \$50,000.

2 THE COURT: And proximity of a school?

3 MR. EARGLE: Proximity is 10 to 15, not less
4 than a \$10,000 fine.

5 THE COURT: How much is -- up to 15?

6 MR. EARGLE: Ten to fifteen.

7 THE COURT: Ten to fifteen.

8 MR. EARGLE: And, Your Honor, there is a
9 recommendation that your sentences run concurrent. That
10 would be the extent of the negotiations in this case.

11 THE COURT: All right. Let's see. The
12 distribution, those are straight sentences, aren't they?

13 MR. EARGLE: Yes, sir.

14 THE COURT: And no suspension and no probation?

15 MR. EARGLE: Yes, sir.

16 THE COURT: And the proximity is a minimum?

17 MR. EARGLE: A minimum of ten.

18 THE COURT: Not less than ten?

19 MR. EARGLE: Yes, sir.

20 THE COURT: Yes, sir.

21 MR. BUCHANAN: Your Honor, I believe that with
22 the change in the law --

23 THE COURT: That's what I'm asking about.

24 MR. BUCHANAN: I found a provision that says,
25 "Notwithstanding any other provision of law, a person

1 convicted and sentenced pursuant to this item for a first
2 or second offense may have the sentence suspended,
3 probation granted, and is eligible for parole, supervised
4 furlough, community supervision, work release --"

5 THE COURT: What are you looking at?

6 MR. BUCHANAN: 375(b)(3). I'm sorry, that's
7 Section 44-56-375(b)(3).

8 THE COURT: Let me see what you have there, if
9 you would, please.

10 (A bench conference was held with the judge and
11 attorneys off the record.)

12 THE COURT: I tell you what, it's after 1.
13 Let's come back at 2:15. I have to have some time with
14 this.

15 (A lunch break was taken.)

16 THE COURT: Madam Clerk, you have sworn
17 Mr. White, have you not?

18 THE CLERK: Yes, sir.

19 THE COURT: Thank you, ma'am.

20 All right. Have we decided what the maximum
21 sentence on distribution of crack, second offense is?

22 MR. EARGLE: Yes, sir, Your Honor, five to 30.

23 THE COURT: And fifty thousand?

24 MR. EARGLE: And fifty thousand, yes, sir.

25 THE COURT: And proximity of a school is a

1 minimum of ten to fifteen and fifty thousand?

2 MR. EARGLE: Ten thousand, I believe, Your
3 Honor.

4 THE COURT: Is it ten thousand?

5 MR. EARGLE: I believe it's ten thousand. The
6 minimum is ten thousand.

7 THE COURT: That's not a unwaivable amount?

8 MR. EARGLE: That's correct.

9 THE COURT: All right. Mr. Buchanan, you
10 represent the defendant?

11 MR. BUCHANAN: Yes, I do, Your Honor.

12 THE COURT: Have you explained to the defendant
13 the charges contained in the indictments, the possible
14 punishments and his constitutional rights, to include a
15 right to a jury trial?

16 MR. BUCHANAN: I have, Your Honor.

17 THE COURT: In your opinion, does the defendant
18 understand the charges, the punishments, and his rights?

19 MR. BUCHANAN: Yes, I believe he does.

20 THE COURT: From your investigation into the
21 facts and circumstances of these cases, do you feel the
22 State could produce sufficient evidence to establish
23 defendant's guilt beyond a reasonable doubt and if he
24 stood trial most probably be found guilty?

25 MR. BUCHANAN: That's correct, Your Honor.

1 THE COURT: Are you aware of any physical,
2 emotional, or mental condition that might affect the
3 defendant understanding what he's doing today?

4 MR. BUCHANAN: None, Your Honor.

5 THE COURT: Now, Mr. White, before I can accept
6 a guilty plea, it's necessary for me to make sure that
7 plea is made freely and voluntarily; therefore I need to
8 ask you some questions. If you do not understand the
9 questions or the words I use, please advise me, I'll
10 explain them to you.

11 Also, if at any time during questioning you need
12 to consult with your attorney, you'll be permitted to do
13 that as well. Do you understand this?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: How old are you, sir?

16 THE DEFENDANT: Fifty-six.

17 THE COURT: How far have you gone in school?

18 THE DEFENDANT: Twelfth grade.

19 THE COURT: What kind of work do you do?

20 THE DEFENDANT: I'm a cook.

21 THE COURT: Are you married?

22 THE DEFENDANT: Single, sir. I mean I'm
23 divorced.

24 THE COURT: Do you have any children under 18?

25 THE DEFENDANT: I have one that's 17.

1 THE COURT: And who does that child live with?

2 THE DEFENDANT: He lives with his mother right
3 now.

4 THE COURT: All right. Do you contribute toward
5 the child's support?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you do it voluntarily or through
8 court order?

9 THE DEFENDANT: It started out voluntarily.
10 It's through the court order now.

11 THE COURT: All right. Are you under the
12 influence of any medication, drugs, or alcohol at this
13 time?

14 THE DEFENDANT: No, sir.

15 THE COURT: Are you aware of any physical,
16 emotional or mental problem that may keep you from
17 understanding what you're doing today?

18 THE DEFENDANT: No, sir.

19 THE COURT: You've heard your attorney tell me
20 that he's explained to you the charges against you, the
21 possible punishments and your constitutional rights and
22 that you understand these things; is that correct?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Now you understand that the maximum
25 sentence for distribution of crack, second offense is a

1 minimum five and up to 30 years and a \$10,000 fine.
2 Distribution of crack within proximity of a school, the
3 minimum sentence is ten years, up to 15 years, and a
4 \$10,000 fine. Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: If I should sentence you
7 consecutively, you could be sentenced up to 90 years and
8 \$120,000 in fines. Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Also, these are graduated offenses;
11 in other words, if you're convicted of the same or similar
12 crime in the future, the punishment next time will be
13 greater because you'll have prior offenses. Do you
14 understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: And lastly, do you understand that
17 this will affect your ability to get a driver's license in
18 South Carolina?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: If you're on probation or parole, do
21 you understand that your probation or parole could be
22 revoked and because of your plea today, you could be
23 incarcerated for additional time?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Now do you fully understand, then,

1 the nature of the charges against you and the range of
2 possible punishments?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you understand also that when you
5 plead guilty, you waive or give up certain important
6 constitutional rights?

7 First, you give up your right to remain silent;
8 that is, the right to say nothing at all. You cannot be
9 compelled to testify against yourself or offer evidence
10 against yourself. It's called the right against
11 self-incrimination. Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Second, you give up your right to a
14 jury trial. At a jury trial you'd be presumed to be
15 innocent and all 12 members of the jury would have to be
16 convinced of your guilt beyond a reasonable doubt. And if
17 you decided not to testify or present any evidence at all,
18 the trial judge would instruct the jury they couldn't even
19 consider that against you. Do you understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Third, you give up your right to
22 confront, that is the right to see, hear, and
23 cross-examine any witnesses called against you as well as
24 the right to call and present witnesses on your own
25 behalf. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you understand when you plead
3 guilty you waive or give up any defenses you may have?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Also, if you made an incriminating
6 statement in any of these cases, do you understand when
7 you plead guilty you waive or give up your right to
8 challenge whether or not such statements were given in
9 accordance with your constitutional rights; do you
10 understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you understand when you plead
13 guilty, you admit the truth of the charges against you?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Understanding -- or excuse me.

16 Mr. Solicitor, has the defendant been allowed
17 access to all Brady and other discovery materials?

18 MR. EARGLE: Yes, sir, Your Honor.

19 THE COURT: Is that correct, Mr. Buchanan?

20 MR. BUCHANAN: Yes, Your Honor.

21 THE COURT: Understanding, then, the nature of
22 the offenses and the consequences of a guilty plea, how do
23 you plead to each of these charges, Mr. White?

24 THE DEFENDANT: Guilty.

25 THE COURT: Has anyone promised you anything or

1 threatened you to get you to plead guilty?

2 THE DEFENDANT: No, sir.

3 THE COURT: Are you in fact guilty?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you want to tell me what you did?

6 THE DEFENDANT: Well, on -- I received a phone
7 call on October 6th from a young lady that I know asking
8 me to -- if I could get her -- if I could get some crack
9 cocaine for her. I knew her and I said sure, you know, in
10 the process of trying to form a relationship with her or
11 whatever, and I did it, I went and got her a piece of
12 crack and brought it to her.

13 And October 8th, she called me for the same
14 thing.

15 After that, I realized that she, you know, this
16 was a drug situation and I didn't answer any more phone
17 calls after that.

18 You know, I was in a slump myself because I'd
19 just got out of V.A. Rehab for four months, it was a new
20 program, and I'd just lost my job and I was about to lose
21 my apartment and I was just vulnerable at the time.

22 So after that second situation, I never answered
23 my phone no more for her because I didn't want to have
24 anything to do with it.

25 So I finally got back on my feet again. I got a

1 job at Ryan's in the daytime and working at Wendy's,
2 working two full-time jobs, and four months later I got
3 arrested for sale and distribution of crack cocaine.

4 THE COURT: Well, let me ask you, did you know
5 what you did was wrong?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you believe you'd be convicted if
8 you stood trial?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. As I understand it,
11 there's been no negotiations or recommendations in this
12 case other than to run concurrent?

13 MR. EARGLE: Run concurrent, yes, sir, Your
14 Honor.

15 THE COURT: All right. Is that what you
16 understand, Mr. Buchanan?

17 MR. BUCHANAN: That plus obviously it's also in
18 the record that the charges have been reduced down from
19 thirds down to seconds.

20 THE COURT: All right. Have you fully discussed
21 all aspects of your case with your lawyer, Mr. White?

22 THE DEFENDANT: Excuse me, sir?

23 THE COURT: Have you fully discussed all aspects
24 of your case with your lawyer?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you need any more time to talk to
2 your lawyer?

3 THE DEFENDANT: No, sir.

4 THE COURT: Are you completely satisfied with
5 Mr. Buchanan's services as your attorney?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Has anyone promised you anything or
8 held out any hope of reward to get you to plead guilty?

9 THE DEFENDANT: No, sir.

10 THE COURT: Has anyone threatened you or used
11 force to cause you to plead guilty?

12 THE DEFENDANT: No, sir.

13 THE COURT: Has anyone connected with this case,
14 any police officer, solicitor, or anyone else mistreated
15 you in any way?

16 THE DEFENDANT: No, sir.

17 THE COURT: Have you had enough time to make up
18 your mind as to whether or not you want to plead guilty?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Are you pleading guilty of your own
21 freewill and accord?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Have you understood my questions?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Has anyone told you -- anything

1 you'd like to -- excuse me. Has anyone suggested to you
2 how you should answer my questions?

3 THE DEFENDANT: No, sir.

4 THE COURT: Is there anything you'd like to ask
5 me about what we've been over so far?

6 THE DEFENDANT: No, sir.

7 THE COURT: You may have discussed parole or
8 parole eligibility with your attorney or with other
9 people. No one can tell you when, if ever, or under what
10 conditions you might be eligible for parole. You should
11 assume that you'll serve the entire time in jail that I
12 sentence you to. Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you understand you have the right
15 to appeal your guilty plea and the sentence of the Court,
16 but you must do so within ten days?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right. Solicitor, what are the
19 facts of the case and the defendant's prior record?

20 MR. EARGLE: Yes, sir, Your Honor. May it
21 please the Court.

22 This was an intensive investigation conducted by
23 the Lexington Town Police Department in what's known as
24 the Hilltop area of the town of Lexington which is just
25 west of the courthouse here.

1 Particular to Mr. White's cases, Your Honor, one
2 occurred on October 6th, one occurred on October 8th,
3 where law enforcement used an undercover informant to go
4 in and purchase \$40 worth of crack cocaine on both
5 instances from Mr. White. One measurement was 0.15 grams
6 of crack cocaine, the other one was 0.16 grams of crack
7 cocaine, Your Honor. The buys were videotaped and audio
8 taped and he was prosecuted from a photo lineup that was
9 shown to the informant.

10 Those did occur within a half a mile of
11 Lexington Intermediate School as well as a soccer complex
12 on the other side of Hendrix Street I believe it is up
13 there.

14 His prior record, Your Honor, from the state of
15 North Carolina from 2008, possession of cocaine and a
16 larceny.

17 From the state of South Carolina from 2009, a
18 shoplifting, one to five thousand.

19 From the State of Georgia, in 1997, possession
20 of a controlled substance; theft by shoplifting; a
21 transfer of property subject to security interest. In
22 1998, false information given to law enforcement. In
23 1998, possession of controlled drugs. He also had a
24 probation violation in 1998. In 1999, a theft by
25 shoplifting. In 2001, a criminal trespassing.

1 THE COURT: All right. First of all, did the
2 Solicitor accurately state the facts of these cases?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And, second, did he accurately state
5 your prior record?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Has each and every
8 answer you've given the Court today been absolutely
9 truthful?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: I find there is a substantial
12 factual basis for each of these pleas to each indictment
13 and that the defendant's decision to plead guilty to each
14 indictment is freely, voluntarily, knowingly, and
15 intelligently made with advice and counsel of an attorney
16 with whom the defendant says he is satisfied. The
17 defendant's pleas of guilty are accepted.

18 Now comes the defendant, James Craig White, who
19 in open court in his own proper person pleads guilty to
20 Indictments Nos. 2010-GS-32-1711, 1712, 1713, and 1714,
21 and submits to sentencing of the Court.

22 All right. Anything further from the State?

23 MR. EARGLE: No, sir, Your Honor.

24 THE COURT: Mr. Buchanan, what do you have to
25 say on behalf of Mr. White?

1 MR. BUCHANAN: Thank you very much, Your Honor.
2 May it please the Court.

3 Your Honor, I suppose first just to clear the
4 air and make sure that Mr. White is well informed, because
5 I did inform him of the change in the law that we had
6 discussed earlier before the recess and that was something
7 of a hope that he had, but obviously per your ruling we
8 know now that it's going to be handled under the old law,
9 so he understands that and I wanted to make sure that he's
10 aware and he's in front of Your Honor pleading under the
11 old law, that he's aware of that.

12 THE COURT: That's the law in effect at the time
13 of the alleged --

14 MR. BUCHANAN: He admitted to the --

15 THE COURT: -- admitted criminal offenses.

16 MR. BUCHANAN: That's correct, Your Honor. So I
17 wanted to just certainly point that out.

18 Also now, Your Honor, he is -- as he told you,
19 he is 56 years old. He actually gave you a lot of the
20 information that I planned on giving you. He's a veteran.
21 He actually served between the years of 1973 and 1981 with
22 the U.S. Army. He was deployed to Vietnam during that
23 period of time. He obtained the rank of E5 and he
24 received an honorable discharge.

25 In the time since, he's unfortunately had some

1 struggles with drug addiction. I think his record pretty
2 clearly shows that he's struggled with a drug addiction
3 for quite awhile. As he admitted to you, Your Honor, he's
4 been through rehabs in the past, but basically every time
5 he comes out he basically falls off the wagon any time
6 things get tight and things get rough. And when he was
7 trying to form a relationship, he basically formed a
8 relationship around drugs. Unfortunately, that individual
9 was probably the one who was selling him the -- or was
10 buying drugs from him and informing on him, and here he
11 stands here today.

12 He's got a high school diploma. He's worked up
13 until his arrest. And since his arrest, he's been
14 incarcerated since then. I've added that up to be 165
15 days.

16 He has two adult children as well as the one
17 child he told you was 17 years old and he still supports
18 through court order.

19 Your Honor, this is a fellow that's -- we're
20 grateful for the Solicitor's recommendation for concurrent
21 time. He knows he has to do some actual incarceration.
22 We're hoping that Your Honor will see fit to give him the
23 minimums because he is someone who's served his country
24 and has struggled since and hopefully Your Honor will see
25 fit to give him those minimums and run them all together

1 as the Solicitor has recommended.

2 THE COURT: All right. Mr. White, anything
3 you'd like to say?

4 THE DEFENDANT: Sir, I'd just like to say, well,
5 you know, I regret all this that's happened. It's just
6 that it happened. You know, I regret that it happened
7 during a time of vulnerability when everything was coming
8 down, but at the time of my arrest it seemed like my life
9 had picked up, but I still had to suffer the consequences
10 of my decision I made. I apologize to the Court.

11 MR. BUCHANAN: And, Your Honor, there's one
12 thing I neglected to mention.

13 He had told me that on his own before he was
14 arrested he had made contact back again with the Veteran's
15 Hospital here in Columbia on Garners Ferry Road to
16 re-enroll into an intensive six-month inpatient drug rehab
17 program that provides housing, case workers, gives him a
18 voucher for an apartment to get him back on his feet. It
19 was a program that he had signed up for and he would
20 intend on still enrolling in that program when he's
21 released from incarceration. So that's another reason why
22 we ask Your Honor to consider the minimum sentence in this
23 case.

24 THE COURT: All right. Anything else from the
25 State?

1 MR. EARGLE: No, sir, Your Honor.

2 THE COURT: Mr. Buchanan, anything else from
3 you?

4 MR. BUCHANAN: None, Your Honor.

5 THE COURT: Mr. White, anything else you'd like
6 to say?

7 THE DEFENDANT: No, sir.

8 THE COURT: Indictment No. 2010-GS-32-1713, it's
9 the sentence of the Court that the defendant be committed
10 to the State Department of Corrections for a term of ten
11 years, plus pay the costs and assessments as applicable.

12 Indictment No. 2010-GS-32-1712, it's the
13 sentence of the Court that the defendant be committed to
14 the State Department of Corrections for a term of ten
15 years, plus pay the costs and assessments as applicable.

16 Indictment No. 2010-GS-32-1711, it's the
17 sentence of the Court that the defendant be committed to
18 the State Department of Corrections for a term of ten
19 years, plus pay the costs and assessments as applicable.

20 Indictment No. 2010-GS-32-1714, it's the
21 sentence of the Court that the defendant be committed to
22 the State Department of Corrections for a term of ten
23 years, plus pay the costs and assessments as applicable.

24 All sentences are to run concurrent. Defendant
25 will be given credit for time served. He's to undergo

1 drug and alcohol testing and treatment and run random
2 alcohol testing as directed, to include ATU while
3 incarcerated.

4 All right. Good luck to you, sir.

5 (The proceedings were concluded.)

6 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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STATE OF SOUTH CAROLINA)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

vs.)

Indictment #: 10-GS-32-1711

#: 10-GS-32-1712

#: 10-GS-32-1713

JAMES WHITE,)

#: 10-GS-32-1714

Defendant.)
_____)**RULE 203(B) EXPLANATION**

Pursuant to Rule 203(B)(iv), the undersigned asserts that an issue was raised before the Honorable Judge Alexander Macaulay regarding the wording of the recently changed legislation entitled the "Omnibus Crime Reduction and Sentencing Reform Act," 2009-2010 Bill 1154, affecting the sentencing of drug laws at issue. Specifically, the new law reads:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a first offense or second offense may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.

SC Code 44-53-375(B)(3)

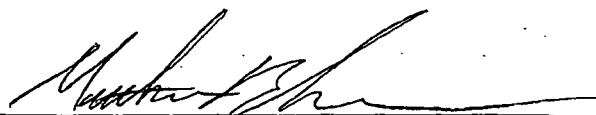
It was asserted during the plea that the phrase "(n)otwithstanding any other provision of law" requires the sentencing judge to consider the new law when fashioning a sentence rather than the old law.

The court ruled that Section 65 of the Act entitled "Savings Clause" required that sentencing be considered under the old law.

Appellant asserts that that ruling was in error. "(W)hen a statute is penal in nature, it is construed strictly against the State and in favor of the defendant. *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991).

Consequently, the appealable issue is the lower court's decision that the Savings Clause overrides the phrase "(n)otwithstanding any other provision of law" during the plea. Rule 201(a), SCACR states that an "(a)ppel may be taken, as provided by law, from any final judgment, appealable order or decision."

Respectfully submitted,



Matthew C. Buchanan
Lexington County Public Defender
407 ½ West Main Street
Lexington, South Carolina
(803) 957-8873

Lexington, South Carolina
September 2, 2010

WITNESSES

Lexington Police Department

Brent Claude Cecil Carter

Law Enforcement Case #: 09019127

AHE

ARREST WARRANT NUMBER

1627378

ACTION OF GRAND JURY

TRUE BILL

M. Meow

Foreperson of Grand Jury

Date: 6/7/10

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010GS3201711

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JUNE TERM 2010

THE STATE

vs.

James Craig White

CDR #: 3016

Indictment for

DISTRIBUTION OF CRACK - 3RD
OFFENSE

§ 44-53-0375 (B) (3)


DONALD V. MYERS, SOLICITOR

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

At a Court of General Sessions, convened on JUNE 2010, the Grand Jurors of Lexington County present upon their oath:

That **James Craig White** did in Lexington County, South Carolina on or about October 8, 2009, knowingly and intentionally distribute less than one gram of methamphetamine or cocaine based controlled substance to wit: Crack Cocaine under provisions of § 44-53-110, et. Seq. and in violation of § 44-53-375(B)(3) Code of Laws of South Carolina, 1976, as amended. Such being the third or subsequent offense.

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



 ASSISTANT SOLICITOR

STA: CAROLINA)
 COUNTY OF Lexington)
 STATE)
 VS.)
 James Craig White)
 AKA:)
 Race: 2 Sex: M Age: 56)
 DOB: SS#)
 Address:)
 City, State, Zip: Lexington, SC)
 DL# SID#)
 *CDL Yes No CMV Yes No Hazmat Yes No

IN THE COURT OF GENERAL SESSIONS



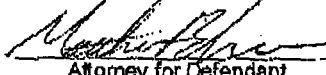
INDICTMENT/CASE#: 2010GS3201711
 AAW#: 1627378
 Date of Offense: 10/8/2009
 S.C. Code §: 44-53-0375(B)(3)
 CDR Code #: 3039

-30411 T/07 0-150,000

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS
 TO: Distribution Crack Cocaine, 2nd
 In violation of § 44-53-0375(B)(2) of the S.C. Code of Laws, bearing CDR Code # 3015
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS \$17-25-45
 (CSC w/min or 1st or Lowd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, (def.'s initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State. (concurrent sentence)

ATTEST:  65343 SC Bar #  Defendant  75740 SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,
 for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____ provided that upon the service of _____ days/months/years and/or payment
 of \$ _____ plus costs and assessments as applicable; the balance is suspended with probation for
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
 incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 08/10/10
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
 Department of Corrections.
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:
 RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____

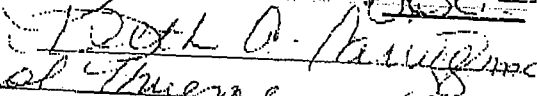
Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

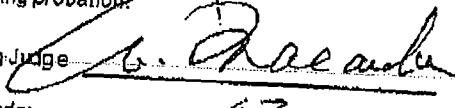
Payment Terms: _____
 Set by SCDPPPS _____
 Obtain GED
 Attend Voc. Rehab. Or Job Corp. _____

Recipient:		
*Fine:		\$ _____
§14-1-206 (Assessments 107.5%)		\$ _____
§14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ 100.00
§14-1-211 (A)(2)(DUI Surcharge)	\$100	\$ _____
§56-5-2995 (DUI Assessment)	\$12	\$ _____
§56-1-286 (DUI Breath Test)	\$25	\$ _____
Proviso 47.9 (Public Def/Prob)	\$500	\$ _____
§14-1-212 (Law Enforce. Funding)	\$25	\$ _____
§14-1-213 (Drug Court Surcharge)	\$150	\$ 55.00
§50-21-114 (BUI Breath Test Fee)	\$50	\$ 100.00
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ _____
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ _____
§44-53-450(C) (Conditional Discharge)	\$350	\$ 5.00
3% to County (if paid in installments)		\$ _____
TOTAL		\$ 200.00

May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol Testing
 Fine may be pd. in equal consecutive weekly/monthly
 pmts. of \$ _____ Beginning _____
 \$ _____ Paid to Public Defender Fund
 Other: _____

Conditional Discharge, §44-53-450(C) requires
 \$350 be paid to the Clerk prior to case disposition
 Appointed PD or appointed other counsel,
 §47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/Deputy Clerk: 
 Court Reporter: Carol Thomas
 SCCA217 (05/2010)

Presiding Judge: 
 Judge Code: 63
 Sentence Date: 08/10/10

WITNESSES

Lexington Police Department

Brent Claude Cecil Carter

Law Enforcement Case #: 09019127

AHE

ARREST WARRANT NUMBER

1627379

ACTION OF GRAND JURY

TRUE BILL

Jm Shaw
Foreperson of Grand Jury

Date: 6/7/10

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010GS3201712

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JUNE TERM 2010

THE STATE

vs.

James Craig White

CDR #: 0108

Indictment for

**DISTRIBUTION OF CRACK COCAINE
WITHIN PROXIMITY OF SCHOOL**

§ 44-53-0445(B)(2)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 DISTRIBUTION OF CRACK COCAINE WITHIN
 PROXIMITY OF SCHOOL

§ 44-53-0445(B)(2)

At a Court of General Sessions, convened on JUNE 2010, the Grand Jurors of Lexington County present upon their oath:

That **James Craig White** did in Lexington County, South Carolina on or about October 8, 2009 distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute a quantity of crack cocaine, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical education center; or a public or private college or university to wit: Lexington Intermediate School in violation of § 44-53-445 (B)(2), 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

STATE OF SOUTH CAROLINA
COUNTY OF Lexington
STATE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS3201712

VS.
James Craig White

AW#: 1627379
Date of Offense: 10/8/2009
S.C. Code §: 44-53-0445(B)(2)
CDR Code #: 0108

AKA:
Race: Sex: M Age: 56
DOB: SS#:
Address:
City, State, Zip: Lexington, SC
DL# SID#

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No

CONVICTED OF or PLEADS

In disposition of the said indictment comes now the Defendant who was
TO: Drugs / Distribute, sell, purchase, manuf. crack cocaine, or pwid, near school

In violation of § 44-53-0445(B)(2) of the S.C. Code of Laws, bearing CDR Code # 0108
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45
(CSC w/minor 1st or Lewd Act)

The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (def.'s initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State

ATTEST:
[Signature] Solicitor SC Bar # 6363
[Signature] Defendant
[Signature] Attorney for Defendant SC Bar # 73740

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,
for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____, plus costs and assessments as applicable*; the balance is suspended with probation for
_____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 02/10/10
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED

Set by SCDPPPS _____ Attend Voc. Rehab. Or Job Corp. _____

Recipient:		
*Fine:	\$	
§14-1-206 (Assessments 107.5%)	\$	
§14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ 100.00
§14-1-211 (A)(2)(DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§50-21-114 (BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$ 280

May serve W/E beginning _____
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal consecutive weekly/monthly
pmts. of \$ _____ Beginning _____
\$ _____ Paid to Public Defender Fund

Other: _____

Conditional Discharge, §44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition
 Appointed PD or appointed other counsel,
\$47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge [Signature]

Judge Code: 63

Sentence Date 03/10/10

Clerk of Court/Deputy Clerk [Signature]
Court Reporter: [Signature]
SCCA/217 (09/2010)

11-15-10 + 210-0000

WITNESSES

Lexington Police Department

Brent Claude Cecil Carter

Law Enforcement Case #: 09019023

AHE

ARREST WARRANT NUMBER

1627375

ACTION OF GRAND JURY

TRUE BILL

Am. Macu

Foreperson of Grand Jury

Date: 6/7/10

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010GS3201713

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JUNE TERM 2010

THE STATE

vs.

James Craig White

CDR #: 3039

Indictment for

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

§ 44-53-0375(B)(3)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
DISTRIBUTION OF CRACK COCAINE - 3RD
OFFENSE

§ 44-53-0375(B)(3)

At a Court of General Sessions, convened on JUNE 2010, the Grand Jurors of Lexington County present upon their oath:

That **James Craig White** did in Lexington County on or about October 6, 2009, distribute to an agent with the Lexington Police Department a quantity of crack cocaine, a controlled substance under Sections 44-53-110, et seq., as amended, such distribution being in violation of Section 44-53-375 (B)(3) of the South Carolina Code of Laws (1976), as amended. Such being the third offense.

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


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
 COUNTY OF Lexington)
 STATE)
 VS.)
James Craig White)
 AKA:)
 Race: 2 Sex: M Age: 56)
 DOB: SS#:)
 Address:)
 City, State, Zip: Lexington, SC)
 DL# SID#)
 *CDL Yes No CMV Yes No Hazmat Yes No

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS3201713
 AW#: 1627375
 Date of Offense: 10/6/2009
 S.C. Code §: 44-53-0375(B)(3)
 CDR Code #: 3039

-30 T16 0-150,000

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS
 TO: Distribution Crack Cocaine, 2nd Offense

In violation of § 44-53-0375(B)(2) of the S.C. Code of Laws, bearing CDR Code # 3015
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS \$17-25-45
 (CSC w/minor 1st or Lewd Act)

The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, (def.'s initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State, (concurrent sentence)

ATTEST: [Signature] 65363 [Signature] [Signature] 75740
 Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,
 for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____ provided that upon the service of _____ days/months/years and/or payment
 of \$ _____ plus costs and assessments as applicable; the balance is suspended with probation for
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
 incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 02/10/10
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
 Department of Corrections.
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:
 RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED
 Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____ May serve W/E beginning _____
 *Fine: \$ _____ Substance Abuse Counseling
 §14-1-206 (Assessments 107.5%) \$ _____ Random Drug/Alcohol Testing
 §14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00 Fine may be pd. in equal consecutive weekly/monthly
 §14-1-211 (A)(2)(DUI Surcharge) \$100 \$ _____ pmts. of \$ _____ Beginning
 §56-5-2995 (DUI Assessment) \$12 \$ _____ \$ _____ Paid to Public Defender Fund
 §56-1-286 (DUI Breath Test) \$25 \$ _____
 Proviso 47.9 (Public Def/Prob) \$500 \$ _____

Other: _____

§14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
 §14-1-213 (Drug Court Surcharge) \$150 \$ 150.00
 §50-21-114 (BUI Breath Test Fee) \$50 \$ _____
 §56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
 Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00
 §44-53-450(C) (Conditional Discharge) \$350 \$ _____
 3% to County (if paid in installments) \$ _____
 TOTAL \$ 250

Presiding Judge: [Signature]

Clerk of Court/Deputy Clerk: Beth A. [Signature] Judge Code: 63

Court Reporter: [Signature] Sentence Date: 02/10/10

10/10/10
WITNESSES

Lexington Police Department

Brent Claude Cecil Carter

Law Enforcement Case #: 09019023

AHE

ARREST WARRANT NUMBER

1627376

ACTION OF GRAND JURY

TRUE BILL

JM Heav
Foreperson of Grand Jury

Date: *6/7/10*

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010GS3201714

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JUNE TERM 2010

THE STATE

vs.

James Craig White

CDR #: 0108

Indictment for

DISTRIBUTION OF CRACK COCAINE
WITHIN PROXIMITY OF SCHOOL

§ 44-53-0445(B)(2)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

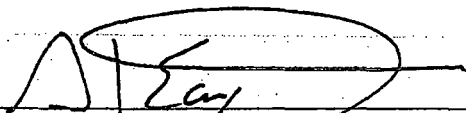
INDICTMENT FOR
DISTRIBUTION OF CRACK COCAINE WITHIN
PROXIMITY OF SCHOOL

§ 44-53-0445(B)(2)

At a Court of General Sessions, convened on JUNE 2010, the Grand Jurors of Lexington County present upon their oath:

That **James Craig White** did in Lexington County, South Carolina on or about October 6, 2009 distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute a quantity of crack cocaine, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical education center; or a public or private college or university to wit: Lexington Intermediate School, in violation of § 44-53-0445(B)(2), 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

STATE OF SOUTH CAROLINA)
 COUNTY OF Lexington)
 STATE)
 vs.)
 James Craig White)
 AKA:)
 Race: Sex: M Age: 56)
 DOB: SS#:)
 Address:)
 City, State, Zip: Lexington, SC)
 DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS3201714
 AWW#: 1627376
 Date of Offense: 10/6/2009
 S.C. Code §: 44-53-0445(B)(2)
 CDR Code #: 0108

SENTENCE SHEET

15-15-10-000

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: Drugs / Distribute, sell, purchase, manuf. crack cocaine, or pwid, near school

In violation of § 44-53-0445(B)(2) of the S.C. Code of Laws, bearing CDR Code # 0108

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45

The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, (def.'s initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTORNEYS:
 Solicitor: [Signature] 65363 SC Bar #
 Defendant: [Signature]
 Attorney for Defendant: [Signature] 73740 SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,
 for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and employment
 of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for
 _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
 incorporated by reference.

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

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

SPECIAL CONDITIONS:
 RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____
 Set by SCDPPPS _____

Recipient:		
Fine:	\$	
§14-1-206 (Assessments 107.5%)	\$	
§14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ 100.00
§14-1-211 (A)(2)(DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§50-21-114 (BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$ 25.00
TOTAL	\$	\$ 250.00

Obtain GED
 Attend Voc. Rehab. Or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol Testing
 Fine may be pd. in equal consecutive weekly/monthly
 pmts. of \$ _____ Beginning _____
 \$ _____ Paid to Public Defender Fund
 Other: ATU

Conditional Discharge, §44-53-450(C) requires
 \$350 be paid to the Clerk prior to case disposition
 Appointed PD or appointed other counsel,
 \$47.12 requires \$500 be paid to Clerk
 during probation.

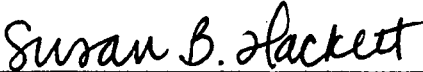
Presiding Judge: [Signature]
 Judge Code: 03
 Sentence Date: 03/10/16

Clerk of Court/Deputy Clerk: Beth A. Curigg
 Court Reporter: Carol Moore
 SCCA217 (06/2010)

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 4th, 2011



Susan B. Hackett
Appellate Defender

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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CRAIG WHITE,

APPELLANT

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

When Appellant distributed crack cocaine in 2009 but Appellant pled guilty after the enactment of the Omnibus Crime and Sentencing Reform Act of 2010, did the plea court err in finding that the “savings clause” prevented the court from suspending Appellant’s sentence subject to the new provisions of the omnibus crime and sentencing reform act of 2010?

STATEMENT OF THE CASE

In June 2010, Appellant was indicted by the Lexington County Grand Jury for two counts of distribution of crack cocaine third offense and two counts of distribution of crack cocaine within proximity to a school that allegedly occurred in 2008. On August 10, 2010, subject to a plea agreement with the Lexington County Solicitor's Office, Appellant pled guilty to two counts of distribution of crack cocaine second offense and the two proximity charges before the Honorable Alexander Macauley. R. 1. Appellant was represented by Matthew Buchanan, and the State was represented by Alton Eargle. R. 1.

During his plea hearing, Appellant argued that he should be sentenced pursuant to the provisions of the then newly enacted Omnibus Crime Reduction and Sentencing Reform Act of 2010. The plea court denied Appellant's request and sentenced him to ten years concurrent for all charges. This appeal follows.

ARGUMENT

When Appellant distributed crack cocaine in 2009 but Appellant pled guilty after the enactment of the Omnibus Crime and Sentencing Reform Act of 2010, the plea court erred in finding that the “savings clause” prevented the court from suspending Appellant’s sentence subject to the new provisions of the omnibus crime and sentencing reform act of 2010.

Relevant Facts

In October of 2009, Appellant was a divorced fifty-five year-old Vietnam veteran who was romantically pursuing “a young lady.” On October 6, 2009, the young lady called Appellant and asked him if he could get her some crack cocaine. R. 12, ll. 6-12. Trying to woo the young lady, Appellant purchased .16 grams and gave it to her. R. 12, ll. 9-12. Two days later she called again requesting crack, and this time Appellant gave her .15 grams of crack cocaine. The “young lady” was actually working as a confidential informant for the Lexington Town Police Department. R. 16, ll. 1-9. Appellant was arrested and charged with two counts of distribution of crack cocaine third offense and two counts of distribution within proximity to a school.

During this time Appellant was a recovering crack cocaine addict, and he had three prior drug *possession* convictions. R. 16, ll. 14-25. However, the Lexington County Solicitor’s Office agreed to allow Appellant to plead guilty to the two distribution charges as second offenses. R. 13, ll. 17-19.

On August 10, 2010, Appellant pled guilty to all of the charges before the Honorable Alexander Macaulay. At his guilty plea, Appellant argued that under the newly enacted sections of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (omnibus

crime bill), the plea court *could* order a suspended sentence for distribution second offense.

R. 4, l. 21—R. 5, l. 9. The specific section argued is as follows:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a first offense or a second offense may have their sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. S.C. Code § 44-53-375(B) (emphasis added)

However, the plea court found that the savings clause prohibited him from reducing Appellant's sentence based on the changes in the omnibus crime bill. R. 18, ll. 1-18; R. 24 (Notice of Appeal Explanation). Appellant was sentenced to ten years concurrent on all charges, which would have been his minimum possible total¹ sentence prior to the omnibus crime bill.

Discussion

As a general rule a criminal defendant can always take advantage of changes in the law that *reduce* his sentencing exposure. *See State v. Griffin*, 315 S.C. 285, 287, 433 S.E.2d 862, 863-864 (1993) (noting changes in law that do not increase punishment are not ex post facto violations). The omnibus crime bill would allow Appellant's sentence for distribution to be suspended. *See* S.C. Code § 44-53-375(B).

The clear and unambiguous meaning of “notwithstanding” in S.C. Code § 44-53-375(B) [the statute] provides an exception to the omnibus crime bill's “savings clause.” *See* S.C. Code § 44-53-375(B); *see also* 2010 Act No. 273, § 65 (amendments do not affect pending prosecutions “unless the repealed or amended provision shall so expressly

¹ In 2008 the minimum total sentence Appellant would have received would be ten years. Appellant would have been facing ten to fifteen years for the proximity charge and five to

provide”); *cf. Binney v. State*, 384 S.C. 539, 543, 683 S.E.2d 478, 480 (2009) (“[L]egislative intent should be found in the plain language of the statute itself. If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning”). Notwithstanding is defined as “without being opposed or presented by.” Dictionary.com Online Dictionary, <http://dictionary.com> (Last visited July 28, 2011). In the statute, “notwithstanding” is being used to show that that part of the code takes priority over “any other provisions of law.” *See Shomberg v. United States*, 348 U.S. 540, 549, 75 S.Ct. 509, 513 (1955) (“In using ‘notwithstanding’ language in [a statute], Congress clearly manifested its intent that certain policies should override the otherwise broad and pervasive principles of the savings clause”); *see also State v. Branham*, 392 S.C. 225, 708 S.E.2d 806, 810 (2011) (In interpreting statutes the Court should give words their “plain and ordinary meaning and will not resort to forced construction that would limit or expand a statute”).

Even if this Court were to find that “notwithstanding” is an ambiguous term, then it *still* must construe the new distribution statute to be retroactive under the rule of lenity. *See State v. Blackmon*, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991) (“when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant”). The rule of lenity both ensures that a person will not be punished for an ambiguous law and “keeps the courts from making criminal law” in the legislature’s stead. *See United States v. Santos*, 553 U.S. 507, 514, 128 S.Ct. 2020, 2025 (2008).

thirty years for each distribution charges. S.C. Code § 44-53-375 (B)(2) (2008 Code); S.C. Code § 44-53-445 (B)(2) (2008 Code).

In sum, when a statutory clause is prefaced by “notwithstanding any other provision of law,” that clause is put into an authoritative position over other provisions of law. The “notwithstanding” language does *not* mean the following clause *does not withstand* any other provision of law. Therefore the plea court erred in finding that Appellant could not be sentenced under the omnibus crime bill for distribution of crack cocaine.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse and remand for resentencing.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

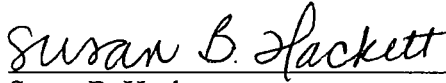
ATTORNEY FOR APPELLANT

This 22nd day of November, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 22nd, 2011



Susan B. Hackett
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CRAIG WHITE,

APPELLANT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of November, 2011.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of November, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Alexander Stephens Macaulay, Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES CRAIG WHITE,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Any issue with Appellant's sentence is not preserved for appellate review because Appellant never raised any objection to his sentence during the plea hearing. Furthermore, even if the issue was preserved for appellate review, the plea judge properly sentenced Appellant to an aggregate ten-year sentence under the applicable statutes in effect prior to the effective date of an amending legislative act, and Appellant's sentence fell within the appropriate statutory sentencing range for the offenses.

STATEMENT OF THE CASE

Appellant James Craig White was arrested following a narcotics investigation conducted by the Lexington Police Department. In June of 2010, the Lexington County grand jury indicted Appellant for two counts of third-offense distribution of crack cocaine and two counts of distribution of crack cocaine within proximity of a school. On August 10, 2010, Appellant entered guilty pleas to two counts of second-offense distribution of crack cocaine and two counts of distribution of crack cocaine within proximity of a school in the Lexington County court of general sessions before the Honorable Alexander Stephens Macaulay, circuit court judge. The plea judge accepted Appellant's guilty plea and sentenced him to concurrent terms of imprisonment of ten years for each of the offenses. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

On August 10, 2010, Appellant James Craig White appeared in the Lexington County court of general sessions to enter guilty pleas to two counts of second-offense distribution of crack cocaine and two counts of distribution of crack cocaine within proximity of a school. (R. p. 3). In exchange for Appellant entering the guilty pleas, the solicitor agreed to recommend concurrent sentences and to reduce the charges from third offenses to second offenses. (R. p. 4; p. 13).

At the outset of the hearing, the plea judge discussed the appropriate sentencing ranges for the offenses with the solicitor and inquired if the sentences for the distribution offenses could be suspended. (R. pp. 3-4). The solicitor informed the plea judge that the sentences for the distribution offenses could not be suspended. (R. p. 4). In response, defense counsel interrupted, and the following exchange occurred:

[DEFENSE COUNSEL]: Your Honor, I believe that with the change in the law –

THE COURT: That's what I'm asking about.

[DEFENSE COUNSEL]: I found a provision that says, "Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a first or second offense may have the sentence suspended, probation granted, and is eligible for parole, supervised furlough, community supervision, work release –"

THE COURT: What are you looking at?

[DEFENSE COUNSEL]: 375(b)(3). I'm sorry, that's Section 44-56-375(b)(3).

THE COURT: Let me see what you have there, if you would, please.

(R. pp. 4-5). Counsel and the plea judge then held a bench conference off the record, and the plea judge indicated he would review the matter during a recess. (R. p. 5).

Subsequently, during the ensuing plea colloquy after the recess, Appellant confirmed he understood the charges, their potential punishments, and his constitutional rights. (R. p. 8; pp. 9-10). Appellant further acknowledged he was facing sentences of five to thirty years along with a fine for the distribution offenses and ten to fifteen years along with a fine for the distribution within proximity offenses, exposing him to a potential sentence of ninety-years imprisonment and \$120,000 in fines. (R. pp. 8-9). Thereafter, Appellant pled guilty to the charges and admitted to the plea judge he purchased crack cocaine for a female acquaintance on two separate occasions. (R. pp. 11-12; p. 14).

The solicitor then recounted the facts related to the offenses. (R. pp. 15-16). The Lexington Police Department conducted an intensive narcotics investigation and used an undercover informant to purchase crack cocaine from Appellant on two separate instances. (R. pp. 15-16). Appellant sold 0.15 grams of crack cocaine to the informant on one occasion and 0.16 grams of crack cocaine on another. (R. p. 16). The transactions were captured in video and audio recordings and occurred within one-half mile of a school and a soccer complex. (R. p. 16).

Additionally, the solicitor noted Appellant's prior criminal record consisted of numerous convictions spread across three different states. (R. p. 16). Appellant was previously convicted of two counts of possession of a controlled substance, two counts of theft by shoplifting, transfer of property subject to a security interest, giving false information to law enforcement, criminal trespassing, and a probation violation in Georgia between 1997 and 2001; possession of cocaine and larceny in North Carolina in 2008; and shoplifting in an amount between \$1,000 and \$5,000 in South Carolina in 2009. (R. p. 16).

Following the solicitor's recitation of the facts and details of Appellant's prior record, Appellant admitted the solicitor's statements were accurate. (R. p. 17).

Accordingly, the plea judge accepted Appellant's guilty pleas. (R. p. 17).

After accepting the pleas, the plea judge offered defense counsel an opportunity to speak on Appellant's behalf. (R. p. 17). Before offering any mitigating factors, defense counsel stated:

Your Honor, I suppose first just to clear the air and make sure that [Appellant] is well informed, because I did inform him of the change in the law that we had discussed earlier before the recess and that was something of a hope he had, but obviously per your ruling we know now that it's going to be handled under the old law, so he understands that and I wanted to make sure that he's aware and he's in front of Your Honor pleading under the old law, that he's aware of that. . . . So I wanted to just certainly point that out.

(R. p. 18). Defense counsel then attributed Appellant's crimes to a struggle with drug addiction and asked for imposition of the minimum sentences. (R. pp. 18-20).

Subsequently, the plea judge sentenced Appellant to concurrent terms of imprisonment of ten years for each of the offenses. (R. p. 21). Thereafter, Appellant raised no objection to the aggregate ten-year sentence imposed. (R. pp. 21-22).

ARGUMENT

Any issue with Appellant's sentence is not preserved for appellate review because Appellant never raised any objection to his sentence during the plea hearing. Furthermore, even if the issue was preserved for appellate review, the plea judge properly sentenced Appellant to an aggregate ten-year sentence under the applicable statutes in effect prior to the effective date of an amending legislative act, and Appellant's sentence fell within the appropriate statutory sentencing range for the offenses.

Appellant maintains the trial judge erred in allegedly finding he could not suspend the sentences for two counts of second-offense distribution of crack cocaine despite the enactment of statutory amendments to the distribution statute prior to the entry of the guilty pleas. Initially, any issue with Appellant's sentence is not preserved for appellate review as Appellant did not object to his sentence during the plea hearing. Furthermore, even if the issue was preserved, the plea judge committed no error in sentencing Appellant to an aggregate term of imprisonment of ten years after Appellant entered guilty pleas to two counts of second-offense distribution of crack cocaine and two counts of distribution of crack cocaine within proximity to a school. The sentences imposed by the plea judge fell within the appropriate statutory sentencing range for the offenses, and the trial judge properly sentenced Appellant under the statutes in effect prior to the effective date of any statutory amendments. Therefore, there is no basis to disturb Appellant's sentence on appeal. Appellant's conviction and sentence should be affirmed.

A. Issue Preservation

In order to preserve a sentencing issue for appellate review, a criminal defendant is required to contemporaneously object to the alleged sentencing error during trial. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998). “[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.” State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). An appellant's failure

to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978).

In the case sub judice, Appellant failed to preserve any issue with his sentence by not raising an objection to the sentence on any grounds before or after it was imposed. At the outset of the plea hearing, defense counsel identified a statutory provision to the plea judge during a discussion over whether the distribution sentences could be suspended. However, defense counsel did not raise any objection at this time, and the trial judge made no ruling on the issue.¹ Then, an off-the-record bench conference was held, but no discussion, objections, or rulings from the conference were placed on the record after it was completed. See State v. Hamilton, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001) (“An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review.”), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Subsequently, as the hearing continued, defense counsel confirmed to the plea judge Appellant was pleading guilty pursuant to the statute in effect at the time he committed the offenses. Thereafter,

¹ On appeal, Appellant contends “the plea court found that the savings clause prohibited him from reducing Appellant’s sentence based on the changes in the omnibus crime bill.” (App. Br. p. 6). However, the plea judge made no reference to the savings clause during the hearing, and this alleged ruling does not appear anywhere in the record from the proceedings. See State v. Williams, 321 S.C. 455, 464, n.4, 469 S.E.2d 49, 55 (1996) (“The burden is on appellant to provide a sufficient record for review.”). To the extent Appellant has referenced defense counsel’s Rule 203(b) explanation as evidence of the plea judge’s alleged ruling, defense counsel’s Rule 203(b) explanation, a document presented to the appellate court as opposed to the plea judge, does not constitute a record of the plea hearing and cannot properly be used to preserve an issue not appearing in the record of that hearing. Appellant is limited to the grounds raised during the plea hearing and not to the grounds argued in a Rule 203(b) explanation submitted to the appellate court after the hearing concluded. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”). As the record from the plea hearing contains no objection to sentencing by Appellant and no ruling on the applicability of the amended statute by the plea judge, Appellant’s issue is not preserved for appellate review. See I’on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”).

Appellant continued with the plea, and the trial judge sentenced Appellant to an aggregate ten-year sentence. At the time the sentence was imposed, Appellant neither objected to the sentence on any grounds nor moved for reconsideration of the sentence. Therefore, as Appellant failed to raise any objection to his sentence to the plea judge, Appellant waived any issue with his sentence.

In order to preserve any issue with his sentence, Appellant was required to contemporaneously raise the issue to the plea judge and object to his sentence after it was imposed. However, Appellant failed to raise any objection to his sentence on the record during the plea hearing. See In re Richard D., 388 S.C. 95, 100, 693 S.E.2d 447, 450 (Ct. App. 2010) (“A bench conference was held off the record after the State began inquiring of Eric if he planned to testify truthfully. This issue may have been discussed at that time, but we cannot review issues not contained in the record.”); see also State v. Hutto, 279 S.C. 131, 132, 303 S.E.2d 90, 91 (1983) (“Appellant has not met its burden of presenting a record which is sufficiently complete to permit this Court to review the lower court’s actions; therefore, we find no error.”). Furthermore and critically, defense counsel affirmatively confirmed to the trial judge that Appellant was pleading guilty to the offenses under the statute in effect prior to any recent amendments. As Appellant specifically acknowledged he was pleading guilty to the offenses under the pre-amendment distribution statute, he cannot now complain of a sentence imposed under that statute. See Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party cannot acquiesce to a ruling on an issue during trial and then complain of an error with the issue on appeal); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct induced.”). Finally, after the sentence was imposed, Appellant offered no

objection to his sentence and did not request modification or reconsideration of the sentence from the plea judge. See State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (“No objection to sentencing was raised at trial and this issue is not properly before the court.”).

By failing to object to his sentence during the plea hearing, Appellant is precluded from raising any issue with his sentence on appeal. See State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) (“By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal.”); see also Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (finding entry of a guilty plea generally constitutes a waiver of non-jurisdictional defects and defenses). For the foregoing reasons, Appellant’s issue with his sentence is not preserved for appellate review. Appellant’s conviction and sentence should be affirmed.

B. Propriety of the Sentence

A sentencing judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). “A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.” State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). “Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the

limits prescribed by statute.” State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

In the case at bar, the plea judge properly sentenced Appellant to a sentence failing within the appropriate sentencing range for the offenses to which Appellant pled guilty. During the plea hearing, Appellant pled guilty to two counts of second-offense distribution of crack cocaine and two counts of distribution of crack cocaine within proximity of a school. A person guilty of a second offense of distributing crack cocaine must be sentenced to a term of imprisonment “not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both[.]” S.C. Code Ann. § 44-53-375(B)(2) (Supp. 2009). Likewise, a person guilty of distribution of crack cocaine within proximity of a school “must be fined not less than ten thousand dollars and imprisoned not less than ten nor more than fifteen years.” S.C. Code Ann. § 44-53-445(B)(2) (2002). Based on the charges Appellant pled guilty to, Appellant was facing a maximum possible sentence of ninety-years imprisonment. The plea judge sentenced Appellant to four concurrent terms of imprisonment of ten years.² Therefore, Appellant’s aggregate sentence fell within the appropriate statutory sentencing limits for his offenses and should not be disturbed on appeal. See State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (“[T]his Court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive.”).

For the first time on appeal, Appellant contends the plea judge erred in finding the sentences for the second-offense distribution charges could not be suspended despite the

² Notably, the plea judge elected not to impose the minimum sentences for Appellant’s second-offense distribution convictions. See S.C. Code Ann. § 44-53-375(B) (Supp. 2009) (permitting the imposition of a minimum sentence of not less than five years or a fine).

fact the controlling statute was amended after the commission of Appellant's crimes. Appellant further maintains that, even if the language in the amended distribution statute was ambiguous, the amended statute should have been applied retroactively pursuant to the "rule of lenity." See, e.g., United States v. Santos, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). Notwithstanding the fact the plea judge never ruled Appellant's sentence for the distribution convictions could not be suspended due to the savings clause and notwithstanding the fact Appellant failed to raise this issue during the plea hearing, the plea judge committed no error in sentencing Appellant in this case.³

After Appellant committed and was arrested for the indicted narcotics offenses, the General Assembly amended the statutory language of S.C. Code Ann. §§ 44-53-375 and 44-53-445 as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010. See Act No. 273, § 38, 2010 S.C. Acts & Joint Resolutions (amending S.C. Code Ann. § 44-53-375); Act No. 273, § 39, 2010 S.C. Acts & Joint Resolutions (amending S.C. Code Ann. § 44-53-445). Pursuant to the legislative amendments, the minimum and maximum sentencing ranges for second-offense distribution of crack cocaine remained unchanged, but the statute was amended to allow for the suspension of a sentence for a first or second distribution offense in the sentencing judge's discretion. Compare S.C. Code Ann. § 44-53-375(F) (Supp. 2009) ("Except for a first offense, as provided in subsection (A) of this section, sentences for violation of the provisions of this section may not be suspended and probation may not be granted."); with S.C. Code Ann. § 44-53-375(B) (Supp. 2010) ("Notwithstanding any other provision of law, a person

³ Contrary to Appellant's argument on appeal, the phrase "savings clause" was never used by the solicitor, defense counsel, Appellant, or the plea judge at any point during the record of the plea hearing. (R. pp. 3-22).

convicted and sentenced pursuant to this subsection for a first or second offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.”). Similarly, the statute prohibiting distribution of crack cocaine within proximity of a school was amended to reduce the maximum and minimum sentencing ranges. Compare S.C. Code Ann. § 44-53-445(B)(2) (2002) (requiring imposition of a term of imprisonment not less than ten years and not more than fifteen years upon conviction); with S.C. Code Ann. § 44-53-445(D)(1) (Supp. 2010) (requiring imposition of a term of imprisonment not more than ten years upon conviction). However, a sentencing judge’s authority and discretion to suspend a sentence for distribution of crack cocaine within proximity of a school existed prior to and remained unchanged by the amendments. See State v. Thomas, 372 S.C. 466, 470, 642 S.E.2d 724, 726 (2007) (holding a sentencing for distribution of narcotics within proximity of a school may be suspended due to the lack of a statutory provision mandating otherwise).

Significantly, in addition to amending S.C. Code Ann. §§ 44-53-375 and 44-53-445, the General Assembly also expressly included a savings clause in the amending act to restrict the effect its amendments would have on any cases pending prior to the effective date of the act.⁴ This savings clause provided as follows:

Savings clause

SECTION 65. The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability

⁴ A “savings clause” or “saving clause” is defined as: “A statutory provision exempting from coverage something that would otherwise be included.” Black’s Law Dictionary 1371 (8th ed. 2004). “A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost.” Id.

incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Act No. 273, § 65, 2010 S.C. Acts & Joint Resolutions. By including this language in the amending legislation, the General Assembly unambiguously mandated that the statutory amendments would have no effect on any pending criminal prosecutions or appeals arising under earlier statutes and no effect on any penalties enforced or existing under earlier statutes unless the amendments expressly provided that they applied to pending actions.

Contrary to Appellant's contentions, the statutory amendments to S.C. Code Ann. § 44-53-375 did not include any language expressly indicating the amended statute should be applied retroactively to pending cases. Although the amended version of S.C. Code Ann. § 44-53-375(B) included a provision stating a sentence for first and second distribution offenses could be suspended and a person convicted of those offenses could be eligible for parole "[n]otwithstanding any other provision of law," this provision did not expressly provide that the amended language or the amended statute as a whole applied retroactively to pending actions. Critically, such an express provision was mandatory in order for the amended language to be applicable in a retroactive manner under the unambiguous requirements of the savings clause. See Act No. 273, § 65, 2010 S.C. Acts & Joint Resolutions (restricting the legislative amendments from applying to pending cases "unless the repealed or amended provision shall so expressly provide").

Instead, the “notwithstanding” language added to the amended statute was included to override other conflicting statutes and to permit offenders convicted of first or second offense distribution charges to be parole eligible even though they would otherwise not be so eligible in the absence of the added language.⁵ See S.C. Code Ann. § 24-13-100 (defining Class A felonies as “no parole” offenses); S.C. Code Ann. § 16-1-90(A) (defining a violation of S.C. Code Ann. § 44-53-375(B) as a Class A felony). Therefore, even if the plea judge had ruled he could not suspend Appellant’s sentences for the second-offense distribution charges, his ruling would have been proper and consistent with the legislative purpose behind the unambiguous language of the savings clause. See, e.g., State v. Morgan, 352 S.C. 359, 366-367, 574 S.E.2d 203, 206-207 (Ct. App. 2002) (“If a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning.”).

Furthermore, even assuming the amended statute did apply retroactively in Appellant’s case and the trial judge had expressly found he could not suspend Appellant’s sentences for second-offense distribution convictions, the plea judge unquestionably could have suspended Appellant’s sentences for the distribution within proximity of a school offenses both before and after any legislative amendments were

⁵ In support of his argument that the “notwithstanding” language of amended S.C. Code Ann. § 44-53-375 (B) should have been applied in his case even though the General Assembly included a savings clause in the amending act, Appellant cites to the United States Supreme Court’s opinion in Shomberg v. United States, 348 U.S. 540 (1955). However, the amending provision in Shomberg specifically stated it applied “notwithstanding” the statutory section containing the savings clause. Id. at 545. The Court further stated: “Only where something in the new law introduces a change, thereby affecting one’s status under the old law, in the savings clause called into play. Only then is a specific exception to s 405[, the savings clause,] required.” Id. at 546 (emphasis added). Critically, unlike in Shomberg, the South Carolina legislature declined to include a specific exception to the amending act’s savings clause in amended S.C. Code Ann. § 44-53-375. Therefore, in the absence of a specific exception to the contrary, the “notwithstanding” language of amended S.C. Code Ann. § 44-53-375 did not override the unambiguous language of the amending act’s savings clause.

enacted, and he elected not to do so.⁶ See Thomas, 372 S.C. at 470, 642 S.E.2d at 726 (holding a sentence for distribution of narcotics within proximity of a school may be suspended due to the lack of a statutory provision mandating otherwise). Accordingly, the plea judge expressly declined to exercise his discretion to suspend Appellant's sentence when he imposed the sentences for those offenses.

Even if Appellant's challenge to his sentence for the distribution offenses was preserved for appellate review despite the fact the issue was never raised to the plea judge, the plea judge imposed a ten-year sentence falling within the appropriate statutory sentencing range for the offenses to which Appellant pled guilty without ever ruling the sentences could not be suspended and without any objection from Appellant. Furthermore, notwithstanding the fact Appellant affirmatively indicated he was entering guilty pleas under the pre-amendment statutes, the plea judge properly sentenced Appellant under the pre-amendment statutes due to the legislature's express inclusion of a savings clause in the amending act. Appellant has failed to meet his burden of establishing error on the part of the trial judge in imposing Appellant's sentence, and there is no basis to overturn that sentence on appeal. See State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) ("The burden is upon the appellant to satisfy this court that there has been prejudicial error."). Appellant's conviction and sentence should be affirmed.

⁶ Critically, Appellant has not challenged his sentences for the distribution within proximity of a school offenses during the plea hearing or on appeal, and those sentences are identical and concurrent to the sentences for the second-offense distribution convictions Appellant is challenging on appeal. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (finding unchallenged and unappealed rulings are the law of the case).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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November 7, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Alexander Stephens Macaulay, Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES CRAIG WHITE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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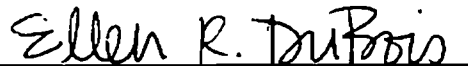
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tristan M. Shaffer, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 7th day of November, 2011.



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