

STATE OF SOUTH CAROLINA)
 COUNTY OF Horry)
 STATE VS.)
Gregory Green)
 AKA:)
 Race: BLACK Sex: M Age: 46)
 DOB: [REDACTED])
 Address: [REDACTED])
 City, State: [REDACTED])
 DL#: [REDACTED])

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS2604803
 A/W#: 2013A2610700004
 Date of Offense: 3/4/2013
 S.C. Code § : 44-53-0370(e)(3)(a)2
 CDR Code #: 0156

SENTENCE SHEET

*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: Trafficking in Heroin, 4-14 grams, 1st offense 7-25 yrs. AND \$50,000

in violation of § 44-53-0370(e)(3)(a)1 of the S.C. Code of Laws, bearing CDR Code # 2361
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

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

ATTEST: M. Travis Hyman SC100285 SC Bar# 14678
Hyman, M. Travis SC Bar# 14678 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 \$ 50,000.00; 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:
 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. credit for time on home detention monitoring while on Bond.
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135. 354 Days

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 _____ days/hours Public Service Employment

Total: \$ _____ plus 20% fee: \$ _____ Obtain GED

Payment Terms: _____ Attend Voc. Rehab. or Job Corp. _____
 Set by SCDPPPS _____ May serve W/E beginning _____

*Fine:		\$ 50,000.00
§ 14-1-206 (Assessments 107.5 %)		\$ 53,750.00
§ 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
3% to County (if paid in installments)	\$	\$
TOTAL		\$ 104,030.00

Random Drug/Alcohol testing
 Fine may be pd in equal, consecutive weekly installments of \$ 25.00 beginning 6/29/2024
 \$ _____ paid to Public Defender Fund
 Other: CAJ report to SCDC on 9/3/14 if Boardman agrees to stay on bond and be on monitoring on 6SP monitoring by Home Monitoring
 Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation. only by

Clerk of Court/ Deputy Clerk Melanie Huggins-Ward
 Court Reporter: Karen Andersen

Presiding Judge _____
 Judge Code: 2134
 Sentence Date: 5/29/14

9-12 year range + \$50,000

ARREST WARRANT

2013A2610700004

STATE OF SOUTH CAROLINA

County/ Municipality of

AFFIDAVIT

ORIGINAL

Form Approved by
U.S. Attorney General
April 21, 2003
DCCA 310

County/ Municipality of

Horry

Horry

Personally appeared before me the affiant Will Lynch

being duly sworn deposes and says that defendant Gregory Green

did within this county and state on or about 3/4/2013

in the following particulars: County/ Municipality of Horry

THE STATE
against

Gregory Green

Address:

Sex: M Race: B Height: 5 8 Weight: 185

DL State: SC DL #: [REDACTED]

DOB: [REDACTED] Agency ORI #: SC0260900

Prosecuting Agency: Horry County - Deu

Prosecuting Officer: Will Lynch - DEUS

Offense: Drugs / Trafficking in Heroin, morphine, etc., 4 g or more, but less than 14 g - 1st offense

Offense Code: 2361

Code/Ordinance Sec: 44-53-0370(e)(3)(a)

This warrant is CERTIFIED FOR SERVICE in the County/ Municipality of

is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Gregory Green on 3/8/2013

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
PO Box 677
1301 2nd Avenue
Conway, SC 29528

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

County/ Municipality of

Horry

Signature of Affiant

WLL

Affiant's Address P.O. Box 1276
Conway, SC 29528

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe the

on or about 3/4/2013

defendant Gregory Green

did violate the criminal laws of the State of South Carolina (or ordinance of

County/ Municipality of Horry

) as set forth below.

DESCRIPTION OF OFFENSE: Drugs / Trafficking in Heroin, morphine, etc., 4 g or more, but less than 14 g - 1st offense

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable. Sworn to and subscribed before me on 3/8/2013

Signature of Judge
Bradley Dwyer Mayers
Judge Code: 5081

(L.S.)

Judge's Address

Conway, SC 29526-5105

Judge's Telephone

(843)915-5290

Issuing Court: Magistrate Municipal Circuit

WITNESSES

Will Lynch 15th Circuit Drug Enforcement Unit

DOCKET NO. 2013-GS-26-04803

The State of South Carolina

County of Horry

Joshua D. Holford

13H01087

COURT OF GENERAL SESSIONS

NOVEMBER, 2013 TERM

ARREST WARRANT NUMBER

2013A2610700004

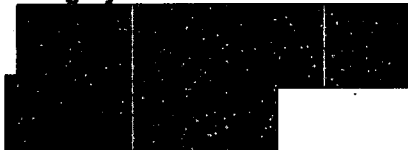
CDR: 0156 44-53-0370(e)(3)(a)2

DOA: 3/5/2013

THE STATE

vs.

Gregory Green B/M



ACTING GRAND JURY

Foreperson of Grand Jury

Date:

ATTORNEY: Axelrod, Stuart M.

VERDICT

Indictment for

TRAFFICKING IN HEROIN

Foreperson of Petit Jury

Date:

Jimmy A. Richardson, II, Solicitor

ORIGINAL

The Supreme Court of South Carolina

Gregory Green, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000488

Lower Court Case No. 2014CP2607332

ORDER

Petitioner has served and filed a notice of appeal from a form order dated February 11, 2016. This order, which indicates that it ends this post-conviction relief case, states "PCR Hearing - DENIED." This order does not indicate that any full written order is to follow. In response to an inquiry from this Court, the attorneys in this case have confirmed that an evidentiary hearing was held prior to the issuance of this form order.

The form order does not contain specific findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80. Accordingly, the order of February 11, 2016, is vacated, the notice of appeal is dismissed without prejudice, and the matter is remanded to the circuit court to enter a written order that complies with the statute.



C.J.

FOR THE COURT

Columbia, South Carolina
March 10, 2016

cc: James Kristian Falk, Esquire
Jessica Elizabeth Kinard, Esquire
The Honorable Melanie Huggins-Ward
The Honorable D. Craig Brown

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STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**
COUNTY OF HORRY) CASE NO.: 2014-CP-26-7332
PCR HEARING

February 11, 2016

BEFORE: The Honorable D. Craig Brown

GREGORY GREEN

Petitioner,

 **ORIGINAL**

vs.

THE STATE OF SOUTH CAROLINA,

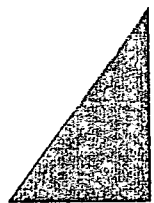
Respondent.

APPEARANCES:

Jessica Kinard, Esq.
Attorneys for the Respondent.

James Falk, Esq.
Attorneys for the Petitioner.

Official Court Reporter
Natalie Dahl, RPR



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I N D E X

WITNESS

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GREGORY GREEN

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STUART AXELROD

Direct Examination by Mr. Falk..... 17

Cross-Examination by Ms. Kinard..... 21

E X H I B I T S

(NO EXHIBITS)

CALL OF THE CASE
P R O C E E D I N G S

1
2 MS. KINARD: May it please the Court. This is
3 the matter of Gregory Green versus State of South
4 Carolina, Case No. 2014-CP-26-7332. This is an
5 application for post-conviction relief filed
6 November 5, 2014. Applicant is presently confined in
7 the South Carolina Department of Corrections pursuant
8 to orders of commitment of the Horry County Clerk of
9 Court. In November 2013 the Horry County Grand Jury
10 indicted the applicant for trafficking in heroin.
11 Mr. Stuart Axelrod represented the defendant.

12 On May 29, 2014, the applicant pled guilty to the
13 lesser included offense of trafficking in heroin, 4 to
14 14 grams, first offense. The Honorable Roger Young,
15 Senior sentenced the applicant to ten years of
16 imprisonment and a fine of \$50,000. The applicant did
17 not appeal his pleadings. The State filed a return
18 and a motion to dismiss on the grounds that all of the
19 applicant's allegations are failure to state a claim
20 upon which relief can be granted pursuant to the
21 Post-conviction Relief Act and Rule 12(b)(6).
22 However, the State is ready to proceed however the
23 Court directs. Mr. Green is here and ready to proceed
24 with his attorney, James Falk.

25 THE COURT: Let's proceed. Mr. Falk.

CALL OF THE CASE

1 MR. FALK: Our initial argument is that the court
 2 had no jurisdiction to accept this plea. Mr. Green
 3 was indicted under the indictment of 44-53-370 E3-A2,
 4 which is trafficking second. He pled to 44 -- under
 5 the idea that he was pleading to a lesser included
 6 offense, he pled to 44-53-370 E3-A1.

7 Our argument is that trafficking first is not a
 8 lesser included offense of trafficking second. The
 9 lesser included offense of any of the trafficking
 10 charges would be possession with intent to distribute.
 11 If you look at Blockburger or any other test, the same
 12 elements that are needed to prove trafficking one
 13 versus trafficking two, the same elements needed to
 14 get the conviction, they are identical. So it is not
 15 a lesser included offense. In order to have the
 16 lesser included offense, the higher offense has to
 17 have one more element of proof.

18 First offense, second offense, that element of
 19 the charge goes to the sentencing, but it doesn't go
 20 to the State's proof. As a result, you have a court
 21 accepting a plea on something that was not indicted
 22 and there was no waiver of the indictment of the Grand
 23 Jury. So at the get-go we have a case where this
 24 court did not have jurisdiction to accept the plea.

25 THE COURT: With all due respect, your motion is

GREGORY GREEN - DIRECT EXAMINATION

1 denied. I think the court certainly had jurisdiction
2 of it.

3 MR. FALK: On the grounds -- just so I'm
4 understanding.

5 MR. GREEN: Well --

6 THE COURT: Hold on, Mr. Green.

7 MR. FALK: You are not accepting the argument
8 that it is a lesser included offense?

9 THE COURT: No, sir, I'm not.

10 MR. FALK: Thank you.

11 THE COURT: The court certainly had jurisdiction
12 to accept the plea. Anything else?

13 MR. GREEN: Yes.

14 MR. FALK: One moment, Your Honor.

15 (Mr. Falk and Mr. Green confer.)

16 MR. FALK: He believes he had a plea agreement in
17 order that he would plead to the lesser included
18 offense.

19 THE COURT: Let's put testimony on it.

20 MR. FALK: May we call Mr. Green?

21 THE COURT: Yes, sir.

22 (GREGORY GREEN, having been duly sworn,
23 testified as follows:)

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GREGORY GREEN - DIRECT EXAMINATION

DIRECT-EXAMINATION

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BY MR. FALK

Q Could you state your name for the record?

A Gregory Green.

Q And were you indicted under -- in Horry County?

A Yes.

Q And what charge were you indicted under?

A Indicted for trafficking heroin charge under South Carolina Code 44-53-370 E3A2, which delineates trafficking second offense. It was my understanding I was pleading to a lesser included offense.

My argument is based on the fact that traffic -- one trafficking charge is not a lesser included offense of another, and because the charge is not a lesser included offense under Murdock versus State, it deprived the Court of jurisdiction. Yes, the Court did have jurisdiction at the beginning. Yes, the Court had jurisdiction, but the Court was deprived of --

Q That issue is for -- we're here for an appeal, but I don't think the Court wants to -- the Court ruled on that already and it is preserved for an appeal.

The next question is, you thought you were going to plead to the lesser included offense?

A Yes. And my argument is based on the fact that

GREGORY GREEN - DIRECT EXAMINATION

1 the charge is not a lesser included offense and it
2 deprived me of the notice of the charge. Under *Smut*
3 versus United States, the elements for the lesser
4 offense has to be subset of the greater offense, and if
5 the elements are not a subset of the greater offense,
6 then it deprives me of notice of the charge. In other
7 words, I got sentenced for a crime that I was not
8 indicted for, and in this country, Your Honor, you
9 can't be sentenced for a crime you are not indicted
10 for.

11 Q So when you thought you would plead to a lesser
12 included offense, what did you think that would be?

13 A Well, in the case of *Matthews versus State*, South
14 Carolina Supreme Court ruled that possession with
15 intent to distribute is a lesser included offense of
16 trafficking, and that was my understanding that I was
17 pleading to a lesser included offense. So there is no
18 South Carolina case law to support the fact that one
19 trafficking is a lesser included offense of another
20 trafficking offense.

21 Q So you thought that you were pleading to the
22 lesser included, which was possession with intent?

23 A Well, at the time -- at the time -- at the time
24 it was to my understanding I was pleading to a lesser
25 included offense, and until I found out later,

GREGORY GREEN - DIRECT EXAMINATION

1 afterwards, that the charge was not a lesser included
2 offense, and then I brought this argument, the fact
3 that the charge was not a lesser included and I was
4 prejudiced because of it. I'm doing an 85-percent
5 sentence, which requires me to do additional prison
6 time. If I was sentenced under the lesser included
7 offense, then I would not have to do this additional
8 time. I would have been sentenced to a crime that I
9 was indicted for. It is my understanding that I was
10 getting a lesser charge, and there is no South Carolina
11 case law to support that one trafficking offense is
12 another lesser included offense of another trafficking
13 offense.

14 Q A moment ago you talked about Matthews versus
15 State, and that is 387 S.E 2d 258?

16 A Yes.

17 Q And the South Carolina court said that possession
18 with intent to distribute -- I think that was a
19 marijuana case --

20 A Right.

21 Q -- was the lesser included offense of trafficking
22 marijuana?

23 A Right. It quotes, Under the legislative scheme
24 we conclude that the legislature intended possession
25 with intent to distribute to be a lesser included

GREGORY GREEN - DIRECT EXAMINATION

1 offense of trafficking based on possession. That is
2 Matthews versus State.

3 Q When you accepted that plea, did you realize it
4 would be 85 percent time?

5 A No, I did not.

6 Q So when you accepted -- had you known it was
7 going to be 85 percent time, what would you have done?

8 A I would have talked to my attorney and made sure
9 that the charge was a lesser charge and make sure I was
10 sentenced correctly.

11 Q If the only deal that was on the table was for
12 you to plead to trafficking first, what would you have
13 done? Would you have taken it to trial?

14 A Would you repeat that?

15 Q All right.

16 A My understanding of the plea was the fact I was
17 pleading to a lesser included offense, and this was --
18 this is what -- this is why I pled guilty.

19 Q Had that offer not been made, what would you have
20 done?

21 A If the offer was not made?

22 Q To plead to the lesser included offense.

23 A Well, if the offer was not made to plead to a
24 lesser included offense --

25 Q Would you have gone to trial?

GREGORY GREEN - DIRECT EXAMINATION

1 A Yes. Because if it -- if the offer wasn't made
2 for the lesser included, I was facing 25 years. This
3 is one of the factors that I had to consider that, you
4 know, I was facing a lot of jail time, okay. We talked
5 and discussed, and it was my understanding I was
6 pleading to the lesser included offense. Under Schmuck
7 versus United States, this is not a lesser included
8 offense, and to my understanding, it violates the
9 notice requirement. An indictment is a notice
10 document, and there is no indictment for South Carolina
11 Code 44-53-370 E3A1. There is no indictment for this
12 charge. It is not included within the indictment. It
13 is totally a different charge.

14 Q I appreciate that. You were facing a charge of
15 -- were you willing to go to trial if you were not
16 going to be given a plea offer?

17 A Your Honor, it is really hard to -- to say what I
18 would have done at that time because the offer was for
19 me to plead to a lesser included offense. So in
20 retrospect, it is hard to go back and say what I would
21 have done at that time. My understanding was I was
22 pleading to the lesser included offense, and this
23 charge is not a lesser included offense. There is no
24 case law to support it, that the one trafficking
25 offense is a lesser charge of another.

GREGORY GREEN - DIRECT EXAMINATION

1 Q Do you have any -- in addition to your argument
2 regarding pleadings to the lesser included offense, are
3 there any other arguments you would like to make?

4 A Well, I mean --

5 Q Do you think you had a plea agreement with the
6 state?

7 A Yes. I wanted another allegation in my -- I had
8 three assignments of error. One was the fact that
9 trafficking was not a lesser included offense of
10 another violation of the notice requirement. Last, but
11 not least, is the fact that -- the breach of the plea
12 agreement, and the State breached the plea agreement
13 because the charge is not a lesser included offense and
14 this is what I actually pled to. On the sentencing
15 sheet it is clearly marked I'm pleading to the lesser
16 included offense, and I would ask -- but this charge is
17 not a lesser included offense.

18 Q So what was your understanding of the plea
19 agreement?

20 A My understanding is I was pleading to the lesser
21 included offense with a 9- to 12-year sentencing range.

22 Q And the significance of it being lesser included
23 is because --

24 A The significance is that I would have served less
25 jail time. It would not be classified as a strike on

GREGORY GREEN- CROSS-EXAMINATION

1 my record, and I would be situated in a lower custody.

2 Q Because the sentence you got was 10 years, and it
3 is inside that range, the 9 to 12? The prejudice was
4 that had you pled to possession with intent to
5 distribute, that did not have the 85 percent rule with
6 it?

7 A Well, the main prejudice is the fact I didn't
8 receive notice of the charge, okay. That is one of
9 them. Then, the fact that the sentencing range is from
10 9 to 12 years, I would have still gotten the 10 years,
11 but it would have been a non-violent. It wouldn't have
12 been violent, wouldn't have been classified as a strike
13 on my record in relation to the three strike law. It
14 would have been a non-violent charge. I would be doing
15 less prison time. In actuality, I'm doing about 21,
16 22, 23 months more prison time because the charge is
17 not a lesser charge. Under Schmuck versus United
18 States --

19 MR. FALK: I have no further questions.

20 THE COURT: Cross-examination.

21 MS. KINARD: Yes, Your Honor, beg the Court's
22 indulgence. My apologies.

23 CROSS-EXAMINATION

24 BY MS. KINARD:

25 Q What was your ultimate goal in pleading to a

GREGORY GREEN- CROSS-EXAMINATION

1 lesser included sentence?

2 A The ultimate goal was to get a lesser charge,
3 lesser punishment, take the strike off -- it wouldn't
4 have been a strike on my record. You know, the
5 ultimate goal was to get a lesser charge, less
6 punishment and severity of the prison time.

7 Q Did you have trafficking charges on your record?

8 A Yes, I'm challenging that also, ma'am.

9 Q Did you have other charges dismissed as a result
10 of this plea?

11 A Yes, I did.

12 Q Do you remember what those were?

13 A I think it was possession with intent.

14 Q Do you recall the mandatory minimum of
15 trafficking first charge?

16 A Mandatory minimum of a trafficking charge? I
17 think it was -- on this particular charge, what I was
18 indicted for carried a mandatory 25 years.

19 Q And the one you pled to, do you remember what
20 that is?

21 A The charge that I pled to carried a mandatory 25
22 years.

23 Q Do you have a copy of your sentencing sheet?

24 A Yes, I do, ma'am.

25 Q Could you look at that plea? I apologize, I

GREGORY GREEN- CROSS-EXAMINATION

1 don't --

2 MS. KINARD: I don't have one to hand up because
3 I -- thank you, Your Honor. May I approach the
4 witness?

5 THE COURT: Yes.

6 MS. KINARD: This is the wrong one.

7 Q (MS. KINARD) Do you agree this says 7 to 25
8 years?

9 A Yes.

10 Q Is this your signature here?

11 A Yes.

12 Q When did you sign this?

13 A The -- on the 29th May of 2014.

14 Q Before or after your plea?

15 A Before.

16 Q So you had a chance to review all of it?

17 A In all due respect, I had about three, four
18 minutes, because they rushed me into court, but the 7
19 to 25 years is -- the minimum carries -- minimum on
20 this one -- this is why -- you have to understand that
21 I was -- you have to understand the fact that 7 to 25
22 years -- is the -- is the same punishment. The minimum
23 has -- the punishment has nothing to do with the
24 charge, just the fact that it is not an element of the
25 crime.

GREGORY GREEN- CROSS-EXAMINATION

1 Q I'm sorry, didn't you testify earlier that the
2 goal was to receive less punishment?

3 A Well, yes. Yes, it is to receive less
4 punishment. The lesser charge was the point here, the
5 lesser charge.

6 Q Because it carried less punishment?

7 A The lesser -- the lesser charge carries 0 to 15
8 years, so 0 to 15. This carried a mandatory minimum of
9 7.

10 Q While you were entering your plea, regardless,
11 did you understand that there was a negotiation for 9
12 to 12 year?

13 A I was trying to get less time than that, but that
14 was all the prosecutor would go down to. My
15 understanding is if I pled to a lesser charge, it would
16 have been a 9- to 12-year sentence that would have been
17 non-violent, not violent.

18 Q Do you recall Mr. Axelrod arguing for less time
19 during your plea hearing?

20 A Of course I did.

21 Q Regardless, you understood that you could have
22 been sentenced to the full 12 years?

23 A I went in there understanding that I could be
24 sentenced between 9 and 12 years.

25 Q Do you disagree that the charge you pled to is

GREGORY GREEN- CROSS-EXAMINATION

1 less serious for lack -- not in the prison
2 classification sentence, but the general sense of the
3 term less serious than the one you were indicted for?

4 A No, I do not agree with that. The charge I pled
5 to is the same charge -- the trafficking charge, one
6 trafficking charge is -- I mean, this particular charge
7 carries a mandatory minimum where the other one carried
8 a mandatory 25 years, this one carried a minimum of 7
9 to 25, but in all actuality it doesn't -- I mean, it is
10 25 years. It is does not carry a lesser punishment.

11 It is a mandatory minimum of 7. If I pled to a lesser
12 included offense like the sentencing sheet said, I
13 would have been pleading to a non-violent charge of 0
14 to 15, maybe the sentencing range would be 9 to 12, but
15 it would be non-violent.

16 Q Regardless, you did sign the sentencing sheet,
17 you saw what it said and you didn't raise an objection?

18 A At the time, I didn't have an understanding, but
19 that doesn't constitute that that is correct.

20 Q Just wanted to clarify that.

21 MS. KINARD: No further questions.

22 THE COURT: Mr. Talk? Anything further.

23 MR. FALK: No redirect.

24 THE COURT: You may step down. Thank you.

25 (STUART AXELROD, having been duly sworn,

GREGORY GREEN - CROSS-EXAMINATION

1 testified as follows:)

2 DIRECT-EXAMINATION

3 BY MR. FALK

4 Q State your name.

5 A Stuart Axelrod.

6 Q Did you represent my client, Gregory Green?

7 A Yes, sir.

8 Q And you represented him on the charge we're
9 discussing today; is that correct?

10 A I did, sir.

11 Q Did you take part in -- did you take part in any
12 plea negotiations with the State?

13 A I did, sir.

14 Q Can you explain the nature of what was going on,
15 what were your goals and what you were looking for?

16 A The ultimate goal was to diminish the sentence
17 that Mr. Green would get. He was facing a trafficking
18 second, a mandatory minimum of 25, and I expressed to
19 the Solicitor, Mr. Hyman, that my client actually got
20 hooked on drugs due to a medical condition over the
21 years. I understand sometimes we have to be punished
22 for something, but I thought a mandatory minimum of 25
23 was excessive. We entered into negotiation, and the
24 lowest I could get the State to go was to a lesser
25 included of trafficking first with a recommendation of

GREGORY GREEN - CROSS-EXAMINATION

1 9 years to 12 years. I do believe that even the
2 Solicitor allowed me to pick what court term that I
3 pled Mr. Green in. We picked, I believe, Judge Young
4 out of Charleston. I felt it was appropriate, maybe
5 more appropriate with an out-of-town judge, maybe we
6 would get a more lenient sentence. In the
7 transcript -- reading the transcript, I argued to the
8 judge that I thought 7 would be appropriate.

9 Q Did you tell him that you were going to try to
10 get him to plea to the first or lesser included
11 offense?

12 A I thought the colloquy we just had was quite
13 exciting, actually. I've been doing this 18 years and
14 maybe learned something today, but I clearly told him
15 that I was going to plead him to a lesser included.
16 Now, I've listened to what occurred here. I told him
17 that. On one other side, I did tell him that it was an
18 85 percent crime that he would plead to, I'll say that.
19 But I looked at the sentencing sheet, and if, in fact,
20 your argument or legal argument that Mr. Green put
21 forth is that a trafficking first is not a lesser
22 included of the trafficking second, then I'm thinking
23 to myself that if the trafficking second is part of the
24 element of the crime, maybe I should have them waive
25 presentment, which I did not have them do.

GREGORY GREEN - CROSS-EXAMINATION

1 It is interesting, because I don't know if you
2 are making new law that could be bad law, because the
3 argument is that the trafficking second is an element
4 like a DUI first or DUI second where you can tell the
5 jury he had a prior DUI for the enhancement to general
6 sessions. So I did tell him it was a lesser included,
7 absolutely told him that. I probably told several
8 thousand people that, and maybe from this day forward
9 I will not say that.

10 Q Is there a sentencing sheet up there?

11 A No, sir. I looked at it on the screen, but I had
12 a good view of it.

13 MR. FALK: May I approach?

14 THE COURT: Yes, sir.

15 Q The sentencing sheet, the boxes are checked
16 "violent" and "non-violent," "violent and serious"?

17 A Yes. Violent and serious, yes, sir. Yes, sir.

18 Q Did you go over the significance of those with my
19 client?

20 A I told him he was pleading to a lesser included
21 charge, and it was a violent and serious and would put
22 a strike against him, and I'm not sure if that was one
23 of the things to put strikes on him. You want it back?

24 Q Yeah.

25 A Okay.

GREGORY GREEN - CROSS-EXAMINATION

1 Q Is it possible that when he went into the plea
2 that day that he thought he was pleading to possession
3 with intent to distribute?

4 A No. What I told him was that I was pleading him
5 to a lesser included charge of trafficking second down
6 to a trafficking first. I told him it was a lesser
7 included charge, and I told him it was still an
8 85 percent. I know I told him that. I told him that I
9 was going to seek, hopefully -- hope that I would get
10 the seven, and he would do six and a quarter. I
11 thought that was the right outcome, and Judge Young
12 gave him 10. I know he knows it was 85 percent because
13 I clearly told him it was a lesser included. If your
14 legal argument holds water with the Court today, I told
15 him that.

16 Q There is no question that you did not advise him
17 of his rights to have trafficking first presented to
18 the Grand Jury?

19 A No, because I tell the Court honestly today that
20 it is an interesting argument. No, I never did. And
21 maybe if it was not a lesser included I would have
22 advised him that the case would have had to have been
23 presented to the Grand Jury or he would have waived
24 presentment. I would have explained the process of the
25 18 grand jurors, 12 raising their hands based on the

GREGORY GREEN - CROSS-EXAMINATION

1 facts, and I would have asked if you wanted it
2 presented to the Grand Jury, or do you want to waive
3 presentment and want to go forward. I never availed
4 him of that opportunity.

5 Q And did you get a chance to read the plea
6 colloquy?

7 A I did, it is not in there.

8 Q And there is no mention from the Court either of
9 his advisement of his rights of the presentment to the
10 Grand Jury?

11 A No. At that time, until now today, I always
12 thought it was a lesser included.

13 MR. FALK: No further questions.

14 THE COURT: Okay.

15 CROSS-EXAMINATION

16 BY MS. KINARD:

17 Q Is your testimony that Mr. Green was certainly on
18 notice of what he was pleading to?

19 A Yes. I told him he was pleading to a lesser
20 included trafficking second, being trafficking first,
21 with 7 to 25, 85 percent and there was no mandatory
22 minimum of 25, yes.

23 Q And he knew the recommended sentencing range?

24 A He knew that the State had a recommendation of 9
25 to 12, because it was on the sheet prior to signing.

GREGORY GREEN - CROSS-EXAMINATION

1 Can I see the sentencing sheet to make sure that one
2 part?

3 MS. KINARD: I also E-mailed it to your clerk so
4 you can have it on the bench.

5 THE COURT: It appears the packet you gave me
6 is -- none of it is relevant.

7 MS. KINARD: No, sir, it is not, my apology.

8 THE COURT: That's all right.

9 A It was on the sentencing sheet. So the
10 recommendation would have been prior been in the 9 to
11 12 year range, plus \$50,000.

12 Q (MS. KINARD) And the 50 thousand dollars was
13 mandatory?

14 A Yes. It is arbitrary, because I don't think the
15 State collects on those things. It comes along with --
16 I look at the years, not the money. I mean, it could
17 have been \$3 million, wouldn't be a difference.

18 Q Regardless, that is not an issue today, I
19 believe. So even though you told him it was a lesser
20 included, regardless of the truth of that or not, he
21 understood that he was pleading to a violent crime?

22 A Yes.

23 Q He understood he probably would serve 85 percent?

24 A I told him that.

25 Q He knew the sentencing range?

GREGORY GREEN - CROSS-EXAMINATION

1 A Yes.

2 Q So regardless, knowing all of that, he still
3 decided to plead?

4 A Yes. I pled him to a lesser included of
5 trafficking second, to trafficking first. I was going
6 to say I clearly know what I said to him, and I called
7 it lesser included for sure.

8 Q And he clearly understood it at the time?

9 A That he was pleading to a lesser included, yes.
10 Yes.

11 Q And he was happy with your services, to the best
12 of your knowledge?

13 A We got along. I can't speculate whether he was
14 happy. I don't think he was happy that he was going to
15 the penitentiary, so I don't know if I can answer that
16 question; you have to ask him that.

17 Q Did he ever voice any dissatisfaction about your
18 representation?

19 A I do not recall.

20 MS. KINARD: No further questions.

21 MR. FALK: No redirect.

22 THE COURT: You may step down.

23 MR. AXELROD: May I be excused today?

24 THE COURT: I don't see your name on any others.
25 I don't have any objection.

ARGUMENTS

1 MS. KINARD: No objection.

2 For the State's case, we don't have any
3 witnesses, but I would like to put on the record that
4 a motion -- actually let me withdraw that. I'm sorry.
5 It is the wrong case. I thought we had a 12(b)
6 motion, but I was provided with amendments yesterday
7 by Mr. Falk, which included the requesting of the
8 indictment. So I just wanted to have that on the
9 record that that is -- when that was provided to the
10 State for consideration. We have no witnesses and
11 defer to Mr. Falk for closing arguments.

12 THE COURT: I'll hear from you.

13 MR. FALK: Your Honor, the only time someone can
14 plead to a charge when the case is not presented to
15 the Grand Jury is when the defendant waives the right
16 of presentment or is pleading to a lesser included
17 offense; otherwise, the right to -- the case has to be
18 presented to the Grand Jury. The transcript of the
19 plea colloquy in here shows there was no waiver of his
20 right of presentment. There was no suggestion of what
21 his Grand Jury rights were. He wound up pleading to a
22 charge. The argument is going to be whether or not
23 first -- any drug offense first is a lesser included
24 of any drug offense second. I have not found any case
25 law to that effect. I have case law certainly, the

ARGUMENTS

1 Baker versus Miller case, I think it is -- or State
2 versus Miller, the one I cited earlier, that said that
3 the lesser included offense of a possession with --
4 possession with intent on marijuana was a lesser
5 included offense of trafficking. That was Matthews
6 versus State. So if my client thought he was pleading
7 to a lesser included offense, the lesser included
8 offense he had a deal with the State that he would
9 plead, he would plead to the lesser included offense,
10 and in this case it would be possession with intent to
11 distribute. Granted that it is not necessarily the
12 years he was prejudiced by because the sentencing
13 range overlap, but the fact it is a strike offense and
14 85 percent, which he thought he was not going to get
15 the strike and be serving less time.

16 THE COURT: All right. Thank you.

17 MS. KINARD: This is a rare situation where I
18 want to say regardless of the case law, I'm not sure
19 it changes the effect of what Mr. Green pled to. In
20 this situation he was told by all parties involved he
21 was pleading to a lesser included. I don't believe
22 there is any testimony that is with the intent to
23 deceive or harm Mr. Green. I believe that was the use
24 of common parlance of you are pleading to a charge
25 not as serious as the one you are originally charged

ARGUMENTS

1 with, and I think that is a synonym for lesser
2 included offense. He knew what he was pleading to,
3 signed the sentencing sheet and understood he was
4 getting a violent strike with 85 percent. He knew the
5 sentencing range and mandatory time. The fact that
6 under the law, as far as it goes by words on a page,
7 what he pled to might not technically be a lesser
8 included offense, it is still the better deal he was
9 working for.

10 You heard Mr. Axelrod testify that he did not do
11 anything to mislead his client, that he, in fact, has
12 told many other clients that if they plead to
13 trafficking first instead of trafficking second, for
14 example, it is a lesser included offense, and that
15 they are getting a better deal than they requested.
16 Because of all of this, I don't think that what
17 Mr. Green is complaining of can be construed to be
18 ineffective assistance of counsel on the part of Mr.
19 Axelrod. He's serving exactly what he thought he was
20 going to serve, and may be upset now, but at the time
21 that is the deal he was signing up for, so because of
22 that, I don't think that Mr. Axelrod can be deemed
23 deficient. He was working in the best of his
24 capacity. He was reasonably effective under
25 professional norms and, therefore, he cannot be

ARGUMENTS

1 deficient, and because he cannot be deficient, he
2 cannot have shown prejudice towards Mr. Green. For
3 these reasons, the State requests that you deny any
4 relief Mr. Green is seeking.

5 THE COURT: Based upon the testimony and evidence
6 that is presented in this courtroom today, certainly
7 the burden is on the applicant to prove the counsel's
8 representation was deficient, and such deficient
9 representation resulted in prejudice to the defendant.
10 Court finds, first and foremost, that applicant's
11 argument concerning lesser included offense is without
12 merit. Certainly understanding that an indictment --
13 an indictment under South Carolina case law is a
14 notice document -- is a notice document to advise the
15 defendant -- a defendant of the elements of the
16 offense for which he has been charged and advise him
17 of what he has to answer for or to defend. Certainly
18 the case -- certainly the defendant has properly been
19 noticed of the charge for which he faced. I do not
20 find that counsel's representation was deficient. I
21 do not find that applicant has proven his
22 representation fell below prevailing professional
23 norms. In fact, in this case the charge was reduced
24 from a second trafficking offense to a first
25 trafficking offense, in essence, reducing the amount

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1 of exposure that this defendant was facing in prison
2 originally being a mandatory minimum 25 year sentence.
3 Furthermore, I do not find, first and foremost, that
4 counsel's representation was deficient, and even if it
5 were deficient, I do not find that the defendant has
6 proven that he was prejudiced in any way. I find that
7 he knowingly, intelligently and voluntarily entered
8 into this plea, and he has failed to show that but for
9 any errors on behalf of the plea counsel, that he
10 would not have pled guilty, but would have insisted on
11 going to trial.

12 If you will prepare an order for me.

13 (Whereupon, the proceedings concluded.)
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CERTIFICATE OF REPORTER

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State of South Carolina)
County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the captioned case, relative to appeal, for Horry County, South Carolina, on the 11th day of February, 2016.

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

May 26, 2016



Natalie Dahl, RPR
Court Reporter