

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 24 2016

Appeal from Horry County

S.C. SUPREME COURT

Honorable D. Craig Brown, Circuit Court Judge

GREGORY GREEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000658

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

CAITLIN HASTINGS
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

INDEX i

GUILTY PLEA TRANSCRIPT DATED MAY 29, 20141

APPLICATION FOR POST-CONVICTION RELIEF21

RETURN AND MOTION TO DISMISS.....29

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED FEBRUARY 11, 2016.....33

ORDER OF DISMISSAL.....62

INDICTMENT.....70

1 STATE OF SOUTH CAROLINA)
) Court of General Sessions
 2 COUNTY OF CHARLESTON) Case No. 2013-GS-26-4803
)
 3 _____)
)
 4 STATE OF SOUTH CAROLINA)
)
 5 vs.) Transcript of Record
)
 6 GREGORY GREEN,)
)
 7 Defendant.)
)
 8 _____) DATE: May 29, 2014

8

9 B E F O R E:

10 The Honorable Roger M. Young, Sr.

11

12 A P P E A R A N C E:

13 Michael Travis Hyman
Assistant Solicitor for the State

14

15 Stuart Mark Axelrod
Attorney for the Defendant

16

17 Karen V. Andersen, RMR, CRR, CSR
18 Circuit Court Reporter

18

19

20

21

22

23

24

25



1 (Whereupon, the defendant is sworn.)

2 MR. HYMAN: If it please the Court. Your Honor,
3 this is the State of South Carolina, County of Horry, vs.
4 Gregory Green, charged with Indictment No. 2013-GS-26-04803.
5 He's indicted for trafficking in heroin, 4 to 14 grams,
6 second offense.

7 He's pleading guilty to lesser-included offense of
8 trafficking in heroin, 4 to 14 grams, first offense. Carries
9 7 to 25 years, Your Honor.

10 The recommendation being made by the State is a
11 range between 9 and 12 years. And per the statute, there's a
12 \$50,000 fine that appears to be mandatory based on my reading
13 of the statute. If I may approach.

14 THE COURT: You are Gregory Green?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right. You are here today on a
17 trafficking heroin charge. The one that you are pleading
18 guilty to is 4 to 14 grams, first offense. Mandatory minimum
19 is 7; max is 25 and a \$50,000 fine. I'm told you want to
20 plead guilty to that; is that correct?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: All right. You have some rights that
23 you give up when you plead guilty, namely, the right to
24 remain silent and the right to a jury trial. If you want a
25 trial, you stop me, we will arrange that for you. The State

1 then has to present enough evidence to convince 12 jurors you
2 are guilty beyond a reasonable doubt. All 12 jurors have to
3 agree you are guilty in order to convict you. And if
4 convicted, you have the right to appeal.

5 You can challenge the State's evidence. Put up
6 evidence of your own. Testify if you want. And if you don't
7 want to testify, the judge will tell the jury not to hold
8 that against you while deliberating.

9 Do you understand those rights?

10 THE DEFENDANT: Yes, sir, Your Honor.

11 THE COURT: Do you want to give those rights up and
12 plead guilty today?

13 THE DEFENDANT: Yes, sir, I do, Your Honor.

14 THE COURT: All right. Now, you are pleading guilty
15 to this charge because you are guilty of it?

16 THE DEFENDANT: Yes, sir, Your Honor.

17 THE COURT: Now, you understand this is a strike
18 offense?

19 THE DEFENDANT: Yes.

20 THE COURT: Did you all talk about that? You've
21 talked about that with your lawyer?

22 THE DEFENDANT: Yes, sir, we did.

23 THE COURT: So I don't know what your prior record
24 is yet, but if -- you got a prior trafficking?

25 THE DFENDANT: Yes, sir, Your Honor.

1 THE COURT: All right. Well, this will be your
2 second one of the three-strike type. So next time you pick
3 up one of these, you are going to jail for the rest of your
4 life without the possibility of parole. Do you understand
5 that?

6 THE DEFENDANT: Yes, sir, Your Honor.

7 The court: All right. Now, are you under the
8 influence today?

9 THE DEFENDANT: No, sir, Your Honor.

10 THE COURT: Do you have any mental, emotional or
11 physical conditions which keeps you from understanding what
12 you are doing?

13 THE DEFENDANT: No, sir, Your Honor.

14 THE COURT: You are standing there next to your
15 lawyer. Are you satisfied with his representation?

16 THE DEFENDANT: Yes, sir, Your Honor.

17 THE COURT: Do you need more time with him?

18 THE DEFENDANT: No, sir, Your Honor.

19 THE COURT: Now, you and he talked about the
20 evidence the State has against you?

21 THE DEFENDANT: Yes, we did, Your Honor.

22 THE COURT: And you don't want to go to trial?

23 THE DEFENDANT: No, Your Honor. I think that the
24 evidence is too strong, Your Honor.

25 THE COURT: All right. He told you what the law is?

1 THE DEFENDANT: Yes, he did.

2 THE COURT: All right. You don't want to get up and
3 tell your side of the story to the jury?

4 THE DEFENDANT: No, Your Honor. I think they would
5 find me -- pretty much find me guilty, Your Honor.

6 THE COURT: All right. You don't want him to try to
7 suppress any of that evidence?

8 THE DEFENDANT: If he could, but, Your Honor, I
9 don't think it will be a case that we could win, Your Honor.
10 I think the evidence is too strong.

11 THE COURT: Is this your decision and your decision
12 alone?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: The State is recommending that I give
15 you a sentence somewhere in the 9- to 12-year range. Other
16 than that recommendation, did anyone promise you anything or
17 threaten you to get you to plead guilty, other than that and
18 they dropped some charges and reduced this from a second to a
19 first offense?

20 THE DEFENDANT: No, sir, Your Honor.

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

22 THE DEFENDANT: I'm 46, Your Honor.

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

24 THE DEFENDANT: Two years of college, Your Honor.

25 THE COURT: And did you work before you got

1 arrested?

2 THE DEFENDANT: Yes, Your Honor. I'm legally
3 disabled now since the year 2000. I have avascular necrosis
4 of both hips. I have had total hip replacements.

5 THE COURT: Married?

6 THE DEFENDANT: Yes, Your Honor, for 18 years.

7 THE COURT: You got children?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Does he understand what he's doing,
10 Mr. Axelrod?

11 MR. AXELROD: He does, Your Honor.

12 THE COURT: I find his pleas freely, voluntarily and
13 intelligently made. What would the State like to tell me?

14 MR. HYMAN: Your Honor, this took place on March
15 4th, 2013. By way of background information, on that date,
16 the defendant was on home detention for a distribution heroin
17 third offense and a possession with intent to distribute
18 heroin third offense. Those charged he received in March
19 2012.

20 So while he's on home detention, the drug
21 enforcement unit received information that the defendant had
22 been selling heroin out of his house. They got in touch with
23 home detention and the Sheriff's Department and decided to go
24 out to the gentleman's residence with a canine. He had
25 signed consent to search his residence at any time in the

1 home detention contract.

2 They went in the house, did a canine sniff. Canine
3 alerted to the presence of narcotics in his bedroom. They
4 found 46 slips of heroin in his nightstand. Confronted him
5 about it, asked him if there was any more heroin. Then they
6 went on to find 41 more slips of heroin, along with a plastic
7 bag of heroin that came back to be 5.293 grams in that bag
8 alone. A substantial amount of heroin.

9 Also seized about \$2,200 in cash out of his closet
10 out of one of his sports coats.

11 Obviously, this is a very serious offense. Carries
12 a mandatory minimum of prison time 25 years if the State
13 would have gone forward as it was indicted. The State, in my
14 opinion, has shown a great deal of mercy in being willing to
15 drop this down to a first offense, put it in a range where he
16 isn't looking at 25 years in prison. Based on his prior
17 record, we would be arguing for a sentence on the upper end
18 of that spectrum in that range.

19 Between negotiations between Mr. Axelrod and I, we
20 were able to craft a recommendation where we both could get
21 up here and argue our positions and put sentencing in Your
22 Honor's hands as it is well deemed fit.

23 As far as the record goes, he was convicted of
24 distribution cocaine, two counts in '89; '93, possession of
25 cocaine; and then in 2004, trafficking cocaine, 10 to 28

1 grams, second offense, where he received a sentence of five
2 years.

3 In conjunction with the plea, the State has agreed
4 to dismiss the distribution of heroin third and the
5 possession with intent to distribute heroin third offense
6 which he was originally on home detention for to begin with.

7 THE COURT: All right.

8 Mr. Axelrod, what would you like to say?

9 MR. AXELROD: Thank you, Your Honor.

10 Your Honor, this is a sad case. I've represented
11 Gregory for little bit more than a year at this point. Your
12 Honor, he brings to the table today a marriage of 18 years,
13 seven children, five grandchildren, his sister that is here,
14 his wife, Shondelle. They are going to speak to the Court at
15 the appropriate time.

16 Your Honor, my client, as he told the Court, he has
17 vascular necrosis of the hips. He had one hip replaced in
18 the year 2000. Your Honor, he tells me that when he gets out
19 of the hospital, they put him on pain pills. And before he
20 can get through whatever he's doing, he is hooked on heroin.
21 As the Court is well aware how insidious people on pain pills
22 and stuff like that, they end up on heroin.

23 My client's in jail last year and he can't walk in
24 jail. He's crawling on the floor. And we were able to
25 craft -- Judge James gave us a bond of \$125,000, I do

1 believe. And my client was able to bond out of jail. And he
2 had a hip replacement while on bond.

3 He completed that hip replacement March of this
4 year. He had a full hip replacement on, I believe, the left
5 side, on the left side, Your Honor. He's had both hips
6 replaced now.

7 Your Honor, he's got a bad record. He's got
8 horrific charges. What I'm asking the Court -- and we will
9 go through it, but I'm asking the Court to give my client the
10 mandatory minimum of the seven years. And it will be the
11 Court's discretion what it does. My client wants to come
12 forward. And he understood that this day would come.

13 What we did was, we worked to the point that we were
14 able to get him out of surgery, so he's able to stand up here
15 with a cane. I'm going to hand up two letters to the Court.
16 I spoke to the solicitor about it. We want to do the plea
17 today, Your Honor. We absolutely want to do the plea and we
18 want our client sentenced.

19 If the Court would, I have a letter from a doctor
20 saying that he's under his care until September of 2014. I
21 asked the solicitor if he was opposed to a sentencing today
22 and my client turn himself in on the first Monday in
23 September to the jail. I'm going to hand them up to the
24 Court.

25 In speaking with my client and his wife, the first

1 six months after a hip replacement is extremely crucial. He
2 has a follow-up X-ray on June the 15th. And if the Court was
3 to allow him to be out, he can take care of that. But I do
4 want to hand up to the Court a letter from Dr. Gerald
5 Congdon, MD. Gregory Green is under the care of Gerald
6 Congdon for the diagnosis of enthesopathy of the hip region.
7 The patient will be under his care at least until September
8 2014.

9 In speaking with the family, they've agreed that on
10 the first Monday, if the Court would allow it, they would
11 turn in -- on September the 3rd. Mr. Green's never run from
12 anybody. He's come to court. He is the example of the
13 heroin epidemic in our country. He tells me that the heroin
14 he had, and even while he was on home detention, Your Honor,
15 he's on home detention and he knows they can come in and
16 search him, he gives consent, and there's heroin in there,
17 because he told me he sold heroin or he had heroin because he
18 was hooked on the heroin from the time of this pain, unable
19 to get off of it.

20 Your Honor, I would like to hand these letters up to
21 the Court. And then his sister, Etta, and wife, Chantel,
22 would like to address the Court.

23 THE COURT: All right.

24 MR. AXELROD: May I approach, Your Honor? And if
25 both of you could come up.

1 MS. GREENE: My name is Etta Greene. My last name
2 is G-r-e-e-n-e. I am Gregory's sister. When you look at my
3 brother's record, you see the negative issue that he deals
4 with. He's an addict. And, unfortunately, I wish I could
5 say that that's the only addict in my family, but he's an
6 addict. However, he has been dealing with this hip issue for
7 quite some time. There have been times when we had to just
8 pick him up because he couldn't move.

9 I'm asking the Court today -- and I know his charges
10 are awful. I'm asking the Court today to have mercy, not
11 necessarily only for Greg, but when Greg is not in the
12 picture, his whole family suffers. I'm his sister and I help
13 as much as I can. I'm employed at Horry County schools.
14 Going to be the director of adult education for Horry County
15 starting July. My brother here is caregiver for the
16 children, his grandchildren. And he fills a void for his
17 family.

18 His bond was quite expensive, but we felt the need
19 to try to get him out because there's an issue that we -- he
20 keeps getting in trouble. But we got to figure out how we
21 going to help him with the issue. The issue is greater than
22 just wanting to sell drugs, because he didn't have anything
23 to show for it. Truly, an addict at his worse condition.

24 However, I would like to see my brother get some
25 help so that we can stop this recurring issue of him coming

1 before the court system for drug-related charges. I really
2 would like to see him get some assistance as far as finding a
3 root cause to this addiction that has plagued my family,
4 especially the males in my family. Thank you.

5 MS. GREENE: My name is Chantel Greene, G-r-e-e-n-e.
6 First I would like to speak as his wife of 18 years. Gregory
7 is definitely a caregiver when he's fully functioning. He
8 takes care of the children. He picks them up. I go to
9 school and I work two jobs. He is that person that does all
10 the household things. When he's not there, there is a void.

11 However, there are times when I didn't know what
12 Gregory was doing. It's sad. It's sad because you don't
13 know how to ask for help. It's sad because you don't know.

14 Gregory has been on opiates for 14 years. I've
15 watched him take his first, and before I knew it, he was a
16 heroin addict. And when I found out about his first arrest,
17 it was embarrassing. I didn't tell anybody. I kept it to
18 myself, because I thought it was something that would go
19 away.

20 Upon the second arrest, I did my own research to see
21 what I was dealing with. When I found out what I was dealing
22 with, I felt like we were all in turmoil as a family.

23 As his friend, I ask the Court for help. For the
24 first time I can say that he needs some help. Gregory has
25 extensive drug issues. His charge is deep. I'm a little

1 embarrassed that I didn't know myself. Because of pain
2 pills, they all have the same effect from the research and
3 what's being shown, they all have the same effect. So when
4 he's nodding off sleeping, I'm thinking pain pills.

5 He was taking four pills a day to a maximum of 120
6 milligrams. So I think maybe he's sleeping from that. And
7 he's sleeping from heroin addiction.

8 When he went to jail both times, he was in detox
9 severely. I picked him up the first time, he went on home
10 detention, and they told me that he was a heroin addict. The
11 officer actually told me before he went, when they arrested
12 him. I guess whatever happened at the incident, they knew
13 that he was a heroin addict. They told me then that they
14 would be back. Still not knowing what I was dealing with, I
15 just hoped that it would go away.

16 I ask the Court today to have leniency for my
17 family. I have a 9-year-old daughter who is at school right
18 now not knowing what the fate of her father is. We have six
19 grandchildren. We have seven children, all girls. And he is
20 a key to our family when he's full functioning. And we ask
21 for help so he can become the person I know he is.

22 I've been with him for 18 years because there's an
23 inside of him. There's a side of him that needs some type of
24 intervention to find out exactly what the core problem with
25 drugs is. And if the Court would have some mercy on that

1 today, our entire family would be grateful, Your Honor.

2 MR. HYMAN: Your Honor, if I may. May I respond to
3 that?

4 THE COURT: Uh-huh.

5 MR. HYMAN: There has been a lot of discussion about
6 him being an addict, and that may be true. But there's
7 absolutely no question in my mind from looking at this case
8 and the other cases, that he is also a dealer. He's been
9 selling at least for the last 25 years. The amount of heroin
10 that was found in his house proves he's a trafficker. He's
11 been convicted of trafficking. The one bag of heroin weighed
12 5.2 grams. That's trafficking weight alone.

13 The 41 slips of heroin, that didn't even weigh half
14 a gram. And then 48 other slips of heroin weighed just at --
15 just under 4 grams. I mean, this is substantial.

16 I know that doesn't seem like a very large quantity
17 of drugs, but that's a substantial amount of heroin. And no
18 addict, no user could use that much heroin. That would be as
19 dead as Phillip Seymore Hoffman. There's no question he's a
20 dealer. There's no question he's a trafficker. And we would
21 ask Your Honor to impose a substantial sentence.

22 He's been given a lot of mercy already by us being
23 willing to come off of the charge. And I just wanted to add
24 that before you impose your sentence.

25 THE COURT: All right. I don't think I've heard

1 from Mr. Greene yet.

2 MR. AXELROD: May we continue?

3 THE COURT: Yes.

4 THE DEFENDANT: Yes, Your Honor. Your Honor, I've
5 been dealing with this problem for a long time, Your Honor.
6 Dealing with my hips, that's no excuse, Your Honor, but I
7 fell into addiction, Your Honor, and started using heroin.
8 And the addiction had such a hold of me, Your Honor. I did
9 anything I possibly could to keep heroin, Your Honor. I'm
10 ashamed of it. I let my family down. I let society down.
11 But, Your Honor, I was trying to kick the habit, Your Honor,
12 but it had a grip on me, Your Honor.

13 I was on house arrest, Your Honor. And I knew that
14 I'm not supposed to do -- have heroin in the house, but I
15 could not kick the habit. And it had a hold on me. You
16 know, I stay home. I'm disabled. I can't work. My legs are
17 so bad. I was in pain for the last 13, 14 years. And it's
18 hard dealing with it. And I was using opiates for a long
19 period of time. It's just progressed.

20 And before I knew it, Your Honor, I was using
21 heroin. I was using 30, 40 bags a day, Your Honor. I was
22 using it. It was crazy.

23 And when I got arrested, Your Honor, I thanked God
24 for it, okay, because it stopped. You know, and I said, my
25 God, thank you.

1 And, Your Honor, I know these charges are horrific.
2 I can't really understand -- well, I can understand. But,
3 Your Honor, to be in this position, I've never thought I
4 would grow up to be a heroin addict and be facing this amount
5 of time. I've been married to my wonderful wife, and my kids
6 and everybody is at the house, and I'm sitting there facing
7 25 years for a heroin addiction.

8 I take full responsibility for my problems. I'm not
9 trying to push it off on anyone. I'm just trying to let the
10 Court know that I definitely have an addiction problem. And,
11 Your Honor, if there's any way possible, Your Honor, you can
12 help me here today, I need help, Your Honor. I'm not a
13 violent person. I'm just sick.

14 I had a total hip replacement on March the 3rd and
15 it's healing up. That was one of the main sources of the
16 pain and the problems. So I went and had the hip fixed to
17 alleviate the pain. Also, after I did that, Your Honor, I
18 went to the Shoreline, to rehabilitation place, and signed up
19 myself to get some help on this drug addiction.

20 So, Your Honor, I'm asking the Court to have mercy
21 on me today because I'm sorry about this situation. And I
22 would ask the Court to have mercy, please.

23 MR. AXELROD: Your Honor, in finishing, I thought it
24 was necessary that we did whatever we had to do to get
25 Gregory out to have the hip replacement, because if he went

1 to prison without the hip being replaced, then I knew some
2 day, if he got out, came out of jail, he would be exactly
3 where he was. He's had both hips fixed now. There's no
4 reason that he has to go back on the heroin. I saw him in
5 jail where he couldn't walk. And by the grace of God, cloud
6 opened up, and he got a bond. The family got all the money
7 together and he got out and he had the surgery. And that was
8 a challenge in itself.

9 Two things, Your Honor. He was on home detention.
10 If the Court wants to give him credit for that, he can. I
11 know when he was on home detention, he got arrested. I do
12 know that he considers that, in a way, a gift that the
13 insanity ended, Your Honor.

14 I ask the Court -- I think if he didn't have the
15 necrosis of the hips, chances are he might not have become a
16 heroin addict. We might not be here. Maybe he would have; I
17 don't know.

18 Your Honor, he's an example of what's happening in
19 our society today. All across the news and in the magazines,
20 we hear lawyers and doctors and teachers and plumbers and
21 electricians and people at McDonald's, everybody is hooked on
22 heroin. It has become, in my opinion as a defense attorney,
23 number one drug right now of addiction. You don't even hear
24 the words crack anymore over here, Judge. You hear heroin.

25 And a lot of times, and many, many times you hear,

1 well, I was in an auto accident, I was on painkillers, and
2 then I couldn't get any more painkillers, so I went to
3 heroin. It's no excuse, but it's just a sad -- it's a sad
4 state of affairs for Gregory and for our society.

5 And, Your Honor, I ask the Court if it would impose
6 the mandatory seven years and allow Gregory to report the
7 first Monday in September, if the Court would allow. He's
8 never run from anybody.

9 And you know what, I just close with one thought,
10 Your Honor. He's been married for 18 years, 7 kids, and his
11 wife is really a nice lady. There is something inside of
12 Gregory that is good. I truly believe that. He's not the
13 average person that stands in front of you, Your Honor. But
14 he stands with the most horrific crimes anybody could stand
15 in front of you. Thank you, sir.

16 THE COURT: All right. Well, again, there's one of
17 these problems with what you got on the prior, you've got a
18 tremendous break by them letting you plead down. Here's what
19 I can do for you.

20 You got 10 years in the Department of Corrections
21 and a \$50,000 fine. I will give you credit for the time that
22 you were on home detention monitoring. I think it's allowed
23 under the statute now. You can report to SCDC on September
24 3rd if a bondsman agrees to stay on the bond and you remain
25 on GPS monitoring. You can only go out for doctor visits

1 only. Good luck.

2 MR. AXELROD: Thank you, Your Honor.

3 (Proceedings are concluded.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

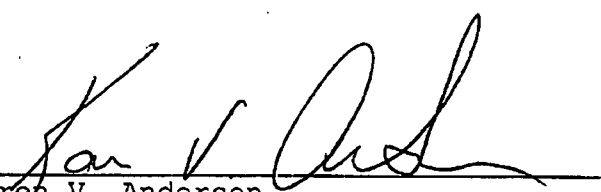
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter, and Notary Public for the State
of South Carolina at Large, do hereby certify that the
foregoing transcript is a true, accurate and complete
Transcript of Record of the proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.

Witness my hand, I have hereunto affixed my official
seal this 9th day of December, 2014, at Charleston,
Charleston County, South Carolina.



Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter
My Commission expires:
September 14, 2016

FORM 5

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
GREGORY GREEN # 196495)
 Full name and prison number (if any) of Applicant.)
)
 v.)
)
 State of South Carolina)
)

IN THE COURT OF COMMON PLEAS

20 14 CP26 7332

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention EVANS CORR. Inst
2. Name and location of Court which imposed sentence Horry County Gen. Session
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013GS2604803 - Trafficking in illegal drugs 44-53-370.6(x3)(a)2
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) MAY 29, 2014 - 10 year sentence Violent 85%
 - (b) _____

- (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence? *NO*

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. _____
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) *Did Not meet deadline to file* _____
 - (b) _____
 - (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Trafficking, First offense, is Not a lesser included offense of trafficking, Second offense.
- (b) Violation of Notice requirement guaranteed by U.S. & S.C. Const. & Statutes
- (c) Breach of the Plea agreement

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

- (a) S.C. Code Ann. 44-53-370(a)(3)(a) is not a lesser included of 44-53-370(a)(3)(a)(2)
- (b) There is no indictment alleging a violation of S.C. Code Ann. 44-53-370(a)(3)(a)
- (c) The offense in which Applicant pleaded guilty is not a lesser included offense.

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

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

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

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

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? *No*

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) *Time Frame expired to file direct appeal*

(b) *" " " " "*

(c) *" " " " "*

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? _____
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

- (a) the name and address of each attorney who represented you:
 - i. STUBET Axelrod 614 N. Middle Beach St 29577
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. At Sentencing Hearing / Date of Plea, a
 - ii. _____
 - iii. _____

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

To Vacate Conviction or allowed to plea to PWID - the correct charge.

20. Are you now under sentence from any other court that you have not challenged? NO

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

20 14 CP26 7332

I, Gay Green, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Gay Green
Applicant

SWORN or affirmed to and subscribed before me this
31st day of October, 2014

J Oullan
Notary Public

My Commission Expires: 2/24

FILED
CLERK OF COURT
NOV 13 2014

STATE OF SOUTH CAROLINA)

County of Horry)

2.

VERIFICATION

14

7332

I, Gay Green, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Gay Green

SWORN to and subscribed before me this 31 day of October, 2014.

S. Outlaw (L.S.)
Notary Public

My Commission Expires: 2/24

10 OCT 2014 13

Clerk of Court
 1301 2nd Avenue
 Conway SC 29526

Date 10-31-14

Re: Return Stamp Copy

Dear Mrs. Huggins-WARD

I am submitting this letter along with Application For Post Conviction Relief. Could you please send me a Stamp Copy. I am also curious about the length of Time it will take to Appoint an Attorney? I have a special request, "Do NOT Appoint Paul Archer to This Case, we have a SERIOUS CONFLICT OF Interest." Preferably, Bobby Fredericks. (:) Thought I would plant that seed. Thanks

(P.S) I am currently cutting a check to the clerk for indictment # 2013GS2604803 and the sentencing sheet dated may 29, 2014. It will arrive ASAP. (Traffic in illegal drug)

Respectfully submitted
 Gregory Green

Notary Public of South Carolina
 expires to and subscribed before me on 31 day of October 2014
 South Carolina
 My Commission Expires 3/24/15

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
)	
Gregory Green, #196495)	Case No. 2014-CP-26-7332
)	
Applicant,)	
)	
v.)	RETURN AND MOTION TO DISMISS
)	
State of South Carolina,)	
)	
Respondent.)	
)	

Respondent, making its Return to the Application for Post-Conviction Relief filed November 5, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In November 2013, the Horry County Grand Jury indicted Applicant for Trafficking in Heroin (2013-GS-26-04803). Stuart Mark Axelrod, Esquire, represented Applicant. On May 29, 2014, Applicant pled guilty to the lesser included offense of Trafficking in Heroin, 4 - 14 grams, 1st offense. The Honorable Roger M. Young, Sr., sentenced Applicant to ten (10) years imprisonment and a fine of fifty thousand dollars (\$50,000). Applicant did not appeal his plea or sentence.

II.

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

1. "Trafficking, first offense, is Not a lesser included offense of trafficking, second offense"
 - a. "S.C. Code Ann. 44-52-370(e)(3)(a)1 is not a lesser included of 44-53-370(e)(3)(a)2"
2. "Violation of Notice requirement guaranteed by U.S & S.C Statues (sic)"

a. "There is no indictment alleging a violation of S.C Code Ann 44-53-370(e)(3)(a)1"

3. "Breach of the Plea Agreement"

a. "The offense in which Applicant pleaded guilty is not a lesser included offense."

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

Applicant's allegation that Trafficking – First Offense is not a lesser included offense of Trafficking – Second Offense is without merit. The Respondent submits that the elements of Trafficking remain the same for either a First or Second Offense; distinction is made for sentencing purposes only. State v. Scriven, 339 S.C. 333, 338, 529 S.E.2d 71, 73 (Ct. App. 2000) ("Although [the statute] contains provisions for sentence enhancement upon conviction for a second or greater offense, these provisions are not elements of the offense." (citations omitted)). Respondent contends this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCP.

IV.

Applicant's allegation regarding his indictment is without merit. An indictment is a notice document and any insufficiency in the indictment does not deprive the circuit court of jurisdiction. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 499(2005). Rather, challenges to the indictment must be raised

voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him." (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)). Likewise, Applicant was advised at this plea of the consequences of pleading guilty, including the sentencing range. See Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (any possible errors by counsel regarding sentencing advice cured by plea colloquy). Therefore, Respondent requests this allegation be dismissed pursuant to Rule 12(b)(6), SCRCP.

VI.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

VII.

WHEREFORE, having made its return, Respondent requests this application be denied and dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

July 1, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

GREGORY GREEN, #196495)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

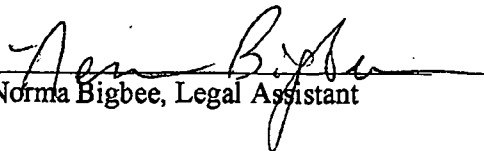
2014-CP-26-7332

AFFIDAVIT OF SERVICE BY MAIL

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

James Kristian Falk, Esquire
3 Broad Street
Suite 450
Charleston, SC 29401

DATED this 1ST day of July, 2015


 Norma Bigbee, Legal Assistant

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

4 -----
5 February 11, 2016

6 BEFORE: The Honorable D. Craig Brown

7 -----
8 GREGORY GREEN

9 Petitioner,



10 vs.

11 THE STATE OF SOUTH CAROLINA,

12 Respondent.

13 -----
14
15
16 APPEARANCES:

17
18 Jessica Kinard, Esq.
Attorneys for the Respondent.

19 James Falk, Esq.
Attorneys for the Petitioner.

20
21 Official Court Reporter
22 Natalie Dahl, RPR
23
24
25

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

I N D E X

WITNESS	PAGE
GREGORY GREEN	
Direct Examination by Mr. Falk.....	6
Cross-Examination by Ms. Kinard.....	13
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
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

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:)

24

25

GREGORY GREEN - DIRECT EXAMINATION

1 DIRECT-EXAMINATION

2 BY MR. FALK

3 Q Could you state your name for the record?

4 A Gregory Green.

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

6 A Yes.

7 Q And what charge were you indicted under?

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

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

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

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

25 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

ARGUMENTS

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.)

14

15

16

17

18

19

20

21

22

23

24

25

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

CERTIFICATE OF REPORTER

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

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Gregory Green, #196495,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-26-7332

ORDER OF DISMISSAL
(Ends action)

HORRY COUNTY
 2015 MAR 11 PM 1:21
 KENNIE JUGGINS-WARD
 CLERK OF COURT

This matter came before the Court by way of an Application for Post-Conviction Relief filed November 5, 2014. The Court convened an evidentiary hearing into the matter on February 11, 2016, at the Horry County Courthouse. Applicant was present and represented by James K. Falk, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and Applicant's plea counsel, Stuart Axelrod, Esquire, testified at the hearing. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In November 2013, the Horry County Grand Jury indicted Applicant for Trafficking in Heroin (2013-GS-26-04803). Stuart Mark Axelrod, Esquire, represented Applicant. On May 29, 2014, Applicant pled guilty to the lesser included offense of Trafficking in Heroin, 4 - 14 grams, 1st offense. The Honorable Roger M. Young, Sr., sentenced Applicant to ten (10) years imprisonment and a fine of fifty thousand dollars (\$50,000). Applicant did not appeal his plea or sentence.

copy

II. ALLEGATIONS

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

1. "Trafficking, first offense, is Not a lesser included offense of trafficking, second offense"
 - a. "S.C. Code Ann. 44-52-370(e)(3)(a)1 is not a lesser included of 44-53-370(e)(3)(a)2"
2. "Violation of Notice requirement guaranteed by U.S & S.C Statues (sic)"
 - a. "There is no indictment alleging a violation of S.C Code Ann 44-53-370(e)(3)(a)1"
3. "Breach of the Plea Agreement"
 - a. "The offense in which Applicant pleaded guilty is not a lesser included offense."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Summary of Testimony

At the call of the case, Applicant moved for his application to be summarily granted on the basis that the trial court did not have jurisdiction to accept his plea to trafficking 4-14 grams, first offense, because it is not technically a lesser included offense of trafficking 4-14 grams, second offense. The Court accepted argument from both sides on this notion, with Applicant's contention being that the proper lesser included offense of a trafficking charge is one of possession with intent to distribute. The importance of this distinction, he argued, was that by proceeding on the trafficking charge, Applicant was pleading to a crime for which he was not indicted. Respondent argued that an indictment is merely a notice document and, even without having an indictment specifically for

possession with intent to distribute, the Applicant knew the reason he was in court and the facts of the situation at issue. This Court denied Applicant's motion, and testimony followed.

Applicant took the stand first, and very eloquently described his understanding of the law regarding lesser included offenses. His main contention was that he was deprived of notice of the charge because he was not indicted by the grand jury on that specific charge, nor did he waive presentment. He further testified that he did not know that this charge was an eighty-five percent (85%) offense. On cross examination, Applicant testified that he wanted a non-violent sentence. While the Court appreciates his thorough research and presentation, it finds his testimony not to be credible, as Applicant had already pled to and served time for a trafficking charge, and his testimony contradicts the very credible testimony of plea counsel.

Plea counsel testified second and agreed that, if Applicant's understanding of the law was correct, then he would have erred in his advice with Applicant and potentially thousands of other criminal clients. His understanding of the term "lesser included offense" was anything less than what the defendant was charged with, and he believed that to be the common understanding of the term. Plea counsel further testified that, regardless of the terminology used, Applicant knew he was pleading to a violent offense, getting a strike, and would serve eighty-five percent (85%). Regarding sentencing, plea counsel testified that he thought the sentence would be approximately seven (7) years and Applicant would serve roughly six and a quarter (6 ¼) years.

B. Ineffective Assistance of Plea Counsel

In a post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, Applicant must prove plea counsel's "conduct so undermined the proper

functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether plea counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. In the context of a guilty plea, Applicant must show there is a reasonable probability that, but for plea counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The Court finds Applicant failed to meet his burden to show plea counsel rendered ineffective assistance of counsel. The plea hearing transcript shows no misunderstanding of the charge that Applicant was present for, or of the consequences that he faced. In fact, it was discussed on the record that Applicant had a prior trafficking charge and that this was a second strike on his record. At the plea hearing, Applicant acknowledged that he had been given sufficient time to consider his options with counsel, and that he had done everything requested. Plea counsel spent a great deal of time discussing

Applicant's physical health and how that related to his time served and his addiction that led to trafficking drugs. Accordingly, the Court finds plea counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

C. Involuntary Guilty Plea

This Court also finds Applicant's allegation that his guilty plea was involuntary is without merit. A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (citing Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both. Holden at 573, 713 S.E.2d at 615 (citing Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999)). The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id.

In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the

guilty plea, and also from the record of the PCR hearing. Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

"[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (2007). Further, "a defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Brady v. U.S., 397 U.S. 742, 757 (1970).

Based on the guilty plea transcript as well as evidence at the PCR hearing, this Court is firmly convinced that Applicant's guilty plea was entered into freely, voluntarily, knowingly, and intelligently. This is reinforced by Applicant's statements during his plea hearing, when he admitted to the judge that he believed he would be found guilty if he proceeded to trial. Applicant presented no evidence at the PCR hearing that he or anyone else involved thought he was entering an improper plea, or that knowledge of it would have caused him to choose a trial. There can be no question that Applicant was fully aware of his sentence and its collateral consequences at the time of the plea hearing. As a result, he has failed to meet his burden, and this allegation is denied and dismissed.

D. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION


Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. The record shows no prejudice to the Applicant, nor does it show any action by plea counsel that would be deficient under the terms provided by Strickland. Specifically, this Court finds that Applicant's argument regarding this not being a lesser included offense is without merit. The indictment is a notice document to advise a defendant of elements of a crime and advise him of what he must defend. This Court finds that Applicant was properly notified, and that plea counsel was not required to challenge the indictment. Plea counsel was not deficient and did not perform at a level that fell below prevailing professional norms. Even if he had, there is no evidence to show prejudice to this Applicant. Additionally, Applicant has failed to show that his guilty plea was anything other than knowingly, intelligently, and voluntarily entered, and has not shown that, but for the defects he alleges in his plea, he would have proceeded to trial. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7 day of March, 2016.


The Honorable D. Craig Brown
Presiding Judge

Florence, South Carolina

WITNESSES

Will Lynch 15th Circuit Drug Enforcement Unit

DOCKET NO. 2013-GS-26-04803

The State of South Carolina

County of Horry

Joshua D. Horkord

13H01087

COURT OF GENERAL SESSIONS

NOVEMBER, 2013 TERM

ARREST WARRANT NUMBER

2013A2610700004

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

DOA: 3/6/2013

ACTION OF GRAND JURY

RETURN

Foreperson of Grand Jury

Date:

[Signature]

VERDICT

Gregory Green

B/M



ATTORNEY: Axelrod, Stuart M.

Indictment for

TRAFFICKING IN HEROIN

Jimmy A. Richardson, II, Solicitor

ORIGINAL

