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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County

Honorable Thomas A. Russo, Circuit Court Judge

DEAN HENRY COLE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000557

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY)

THE STATE OF SOUTH	)	2012-CP-26-02010
CAROLINA,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	
	)	August 7, 2013
DEAN HENRY COLE,	)	
	)	
Defendant.	)	

THE STATE OF SOUTH	)	2012-CP-26-02015
CAROLINA,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	
	)	August 7, 2013
ANDRE LEE HENRY,	)	
	)	
Defendant.	)	

B E F O R E:

Honorable Larry B. Hyman
Horry County Courthouse
Conway, South Carolina

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

M. Travis Hyman, Esquire
Attorney for Plaintiff

J. Eric Fox, Esquire
Attorney for Defendant Cole

Barbara W. Pratt, Esquire
Attorney for the Defendant Henry

Kay H. Richardson, CVR
Circuit Court Reporter

State v. Cole and State v. Henry
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E X H I B I T S

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No.IDEV

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(There were no exhibits marked during the hearing.)

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25

State v. Cole and State v. Henry
BY MR. HYMAN

3

1 (August 7, 2013)

2 DEAN HENRY COLE AND MR. ANDRE LEE

3 HENRY, HAVING BEEN SWORN, TESTIFIED AS FOLLOWS:

4 MR. HYMAN: Your Honor, The State of South Carolina
5 versus Dean Henry Cole, true-billed indictment number 2013-GS-
6 26-02010, indictment for trafficking in cocaine over 400
7 grams. Also this is the State of South Carolina versus Andre
8 Henry, true-billed indictment number 2013-GS-26-02015, again,
9 indicted for trafficking in cocaine over 400 grams, an offense
10 that carries twenty-five to thirty years. I've prepared the
11 arraignment findings on each individual.

12 THE COURT: It's a minimum mandatory of twenty-five,
13 isn't it?

14 MR. HYMAN: Yes, sir.

15 THE COURT: Or a minimum of twenty-five?

16 MR. HYMAN: On anything 100 grams or more.

17 THE COURT: All right. Who is Mr. Cole?

18 MR. COLE: Here.

19 THE COURT: All right. Mr. Cole -- and you are Mr.
20 Henry?

21 MR. HENRY: Yes.

22 THE COURT: Mr. Cole, you are represented by Mr. Fox?

23 MR. COLE: Yes, sir.

24 THE COURT: Has he had an opportunity to explain to you
25 the nature of your offense, that is what constitutes the

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

4

1 offense of trafficking in cocaine?

2 MR. COLE: Yes, sir.

3 THE COURT: All right. And has he gone over the evidence
4 in this case with you?

5 MR. COLE: Yes, but I feel that I need another lawyer.

6 THE COURT: Well, that's not before me. I'm asking you
7 if he's gone over the evidence with you?

8 MR. COLE: Evidence, yes, sir.

9 THE COURT: All right. And has he explained to you that
10 you have a right to a jury trial?

11 MR. COLE: Yes, sir.

12 THE COURT: And do you understand that you do not have to
13 plead guilty to anything. You have an absolute right to a
14 jury trial.

15 MR. COLE: Yes, sir.

16 THE COURT: Do you or are you aware of the fact that this
17 offense carries up to thirty -- up to thirty years; do you
18 understand that?

19 MR. COLE: (Indicates affirmatively.)

20 THE COURT: And it carries a minimum of twenty-five; do
21 you understand that?

22 MR. COLE: Yes, sir.

23 THE COURT: Okay. The State has made an offer to you to
24 allow you to plead guilty to what?

25 MR. HYMAN: It would be reduced down, Your Honor, to the

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

5

1 28 to 100 gram trafficking, first offense, that carries seven
2 to twenty-five years and the offer was a range of ten to
3 fifteen years,

4 THE COURT: All right. Do you understand that they're
5 reducing the level of your trafficking and offering to
6 recommend a range of ten to fifteen years; do you understand
7 that?

8 MR. COLE: (Inaudible.)

9 THE COURT: Speak up.

10 MR. COLE: Yes, sir.

11 THE COURT: Okay. And do you understand that this offer
12 is being made today, it will not be made again, you will not
13 get a better offer; do you understand that?

14 MR. COLE: Yes, sir, but am I too late to get another
15 lawyer because I feel it's not in the best of my interest.

16 THE COURT: What's not in the best of your interest?

17 MR. COLE: I feel I need another lawyer.

18 THE COURT: What for?

19 MR. COLE: Because ---

20 THE COURT: Was this lawyer appointed for you?

21 MR. COLE: Yes, sir.

22 THE COURT: Well, why do you not want this lawyer?

23 MR. COLE: Because I don't want to go to trial.

24 THE COURT: Well, I can tell you right now, you've got
25 one of the most experienced trial lawyers in the county. And

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

6

1 I'm not gonna give you another lawyer. If you want to go to
2 lawyer -- to trial without a lawyer, I'll qualify you on that.
3 I just have to make sure that you understand what you're
4 doing. But I'm not going to give you a new lawyer at this
5 late date when we're looking to go to trial in September. I'm
6 not gonna do it. Now, do you reject this offer or not?

7 MR. COLE: If I reject it, sir, what will happen?

8 THE COURT: You're gonna go to jury trial or you're gonna
9 have a trial and you're gonna be looking at twenty-five to
10 thirty years.

11 MR. COLE: I'll take what you say, sir.

12 THE COURT: You'll what?

13 MR. COLE: I'll take the, the ---

14 THE COURT: Are you saying that you'll take the plea?

15 MR. COLE: So, the plea is fifteen to ten?

16 THE COURT: Ten to fifteen years in that range.

17 MR. COLE: So, that's as low as it'll go, sir?

18 THE COURT: That's as low as it's gonna go. You will not
19 be made another offer. Mr. Hyman's boss, Mr. Richardson,
20 requires him to make an offer and once that offer is made,
21 there's a deadline set and that deadline is today. If you do
22 not accept it today, the offer is withdrawn and you do not get
23 that offer or a better offer again. Do you understand? Now,
24 do you want the offer or not?

25 MR. COLE: Can I speak with my lawyer?

State v. Cole and State v. Henry
ANDRE LEE HENRY - BY THE COURT

7

1 THE COURT: Yes, you may.

2 (REPORTER'S NOTE: Mr. Cole confers with Mr. Fox.)

3 THE COURT: Mr. Cole ---

4 MR. HENRY: Henry.

5 THE COURT: Mr. Henry. It's my understanding that the
6 same offer has been made to you. Are you aware of that?

7 MR. HENRY: Yes.

8 THE COURT: Now, has Ms. Pratt gone over the evidence in
9 your case and explained to you how it it'd be used against you
10 if you had a jury trial?

11 MR. HENRY: Yes.

12 THE COURT: Do you want to have a jury trial?

13 MR. HENRY: Yes.

14 THE COURT: Okay. You wish to reject your offer?

15 MR. HENRY: Yes.

16 THE COURT: Pardon?

17 MR. HENRY: Yes.

18 THE COURT: So, you are not going to take your offer?

19 MR. HENRY: No.

20 THE COURT: Very well. You can look forward to be tried
21 in September.

22 Ms. Pratt, any reason why you would not be ready?

23 MS. PRATT: I think we're waiting on possibly some
24 fingerprint results if that's going to be done. Otherwise, I
25 don't see any reason why we would not be ready, Your Honor.

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

8

1 THE COURT: All right.

2 MS. PRATT: May my client and I be excused then?

3 THE COURT: Yes, you may.

4 MS. PRATT: Thank you very much, sir.

5 (REPORTER'S NOTE: Ms. Pratt and Mr. Henry exit courtroom.)

6 MR. FOX: All right, Your Honor. I think he's ready to
7 provide to a final answer to Your Honor.

8 THE COURT: Did you want to take the offer or reject it?

9 MR. COLE: I'll take it, sir.

10 THE COURT: You're taking it?

11 MR. COLE: Yes, sir.

12 THE COURT: All right. Are you ready to go forward?

13 MR. HYMAN: I have prepared a sentencing sheet, Your
14 Honor. The only condition I would add, this is a case
15 involving three codefendants and we would ask since the State
16 is gonna be going forward with the trial against the other two
17 codefendants, in order for him to get the benefit of the ten
18 to fifteen-year offer that has technically expired, we would
19 just ask for a formal statement on the record.

20 THE COURT: And allocution.

21 MR. HYMAN: An allocution, correct.

22 THE COURT: All right.

23 All right. Mr. Cole ---

24 (REPORTER'S NOTE: Mr. Cole confers with Mr. Fox.)

25 THE COURT: All right. Mr. Cole, you are, as I have

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

9

1 determined represented by Mr. Fox.

2 MR. COLE: Yes, sir.

3 THE COURT: And has he had an opportunity to discuss with
4 you the nature of this charge, that is trafficking in cocaine,
5 now reduced to 28 to 100 grams.

6 MR. COLE: Yes, sir.

7 THE COURT: And that, Mr. Cole, is a seven to twenty-five
8 year sentence but my understanding is that you're pleading
9 under a recommendation of the State of a not-less-than-ten or
10 more-than-fifteen-year sentence; is that correct?

11 MR. COLE: Yes, sir.

12 THE COURT: Now, Mr. Cole, do you understand what a jury
13 trial is?

14 MR. COLE: Excuse me, sir?

15 THE COURT: You understand what a jury-trial is?

16 MR. COLE: Yes, sir.

17 THE COURT: Put that microphone under there, Mr. Fox.
18 I'm sure that my court reporter can't hear him because I
19 can't.

20 Do you know how a jury trial works, generally speaking?

21 MR. COLE: Do I know how a jury trial works?

22 THE COURT: Do you know how it works, generally speaking?

23 MR. COLE: I'm sorry; I've never been in a jury trial.

24 THE COURT: All right. Let me tell you how a jury trial
25 works. We come into court and there's a panel of jurors that

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

10

1 are brought in. Your attorney and the Solicitor both get to
2 participate in the selection of twelve jurors. Those jurors
3 will decide your case. The State will put up evidence to
4 prove the case. The State must meet its burden, which is a
5 burden to convince each juror of your guilt beyond a
6 reasonable doubt. You may testify if you wish but you do not
7 have to testify in your case. You can remain silent. If you
8 choose to remain silent, I will tell the jury they cannot use
9 that against you. You can call any witnesses that you wish to
10 call -- in addition to that -- during your trial. At the end
11 of the trial, I instruct the jury as to the law and they go
12 back and determine whether or not the State has proven that
13 you are guilty beyond a reasonable doubt. Do you understand
14 how a jury trial works?

15 MR. COLE: Yes.

16 THE COURT: Okay. Now, do you wish to have a jury trial
17 in this matter?

18 MR. COLE: No, sir.

19 THE COURT: Do you understand that by pleading guilty,
20 you are forever waiving your right to a jury trial?

21 MR. COLE: Yes, sir.

22 THE COURT: Okay. Now, if you do that, you also give up
23 the many, many rights that go along with your jury trial,
24 things like your right to remain silent. As I told you a
25 moment ago, you do not have to testify. You can if you wish.

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

11

1 If you decide not to, I will even tell the jury they can't use
2 that against you. You have the right to have an attorney with
3 you every step of the way during your trial and you have the
4 right to require the state to prove your guilt beyond a
5 reasonable doubt. And there are many other rights. Do you
6 understand that if you plead guilty, you are waiving these
7 rights along with your general right to a jury trial?

8 MR. COLE: Yes, sir.

9 THE COURT: All right. Now, tell me about Mr. Fox. Has
10 -- is there anything else you want him to do for you?

11 MR. COLE: No, sir.

12 THE COURT: Okay. Has he done everything you wanted him
13 to do?

14 MR. COLE: Yes, sir.

15 THE COURT: All right. I see your fifty-six; is that
16 right?

17 MR. COLE: Yes, sir.

18 THE COURT: And are you married?

19 MR. COLE: No, sir.

20 THE COURT: Do you have children?

21 MR. COLE: Yes, I have a daughter.

22 THE COURT: And is she under eighteen?

23 MR. COLE: Ah, she's over eighteen.

24 THE COURT: Okay. What kind of work do you do, Mr. Cole?

25 MR. COLE: I did construction work.

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

12

1 THE COURT: Okay. How far did you go in school?

2 MR. COLE: Eleventh grade.

3 THE COURT: And have you ever had any mental health
4 problems or addiction issues ---

5 MR. COLE: No, sir.

6 THE COURT: --- that might keep you from understanding
7 what we're doing here today?

8 MR. COLE: No, sir.

9 THE COURT: Have you had any drugs or alcohol in the last
10 twenty-four hours?

11 MR. COLE: No, sir.

12 THE COURT: Okay. Is there anything going on in your
13 life that might prevent you from understanding what we're
14 doing?

15 MR. COLE: No, sir.

16 THE COURT: Okay. Mr. Cole, listen carefully. Mr. Hyman
17 is going to tell me why you're charged with this offense,

18 MR. HYMAN: Thank you, Judge. On April 14th of 2012, the
19 Horry County Drug Enforcement Unit was working with a
20 confidential informant. They got a tip from that informant
21 that a silver in color four-door Dodge Charger was going to be
22 parked behind the Staybridge Suites located on Fantasy Harbour
23 here in the Myrtle Beach section of Horry County on this day
24 at this time, parked beside this dumpster on the west side of
25 the hotel. DEU sent an officer with Myrtle Beach Crime Scene

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

13

1 Unit out there, verified the tip. The informant also relayed
2 that Michael Tyson and his uncle and another guy were gonna be
3 in the car. The police got out there, the car matching the
4 exact description -- I forgot to add that the CI told him the
5 car was coming up from Miami and was gonna have Florida tags.
6 The car in fact had the Florida tags. DEU gets the gentlemen
7 out of the car, they had a canine, the canine positively
8 alerted to the detection of narcotics in the vehicle and then
9 searched the vehicle. Initially, didn't find any drugs. As
10 you can tell, Dean Cole is in a wheelchair. He was sitting in
11 the passenger side seat of that car. Under here were two seat
12 cushions. When they searched the car and looked again, they
13 found over a kilo of cocaine, Judge, in one of those seat
14 cushions. Three drug reports came back. There were three
15 BEST kits, and the exact weight of that, Your Honor, was 1,169
16 grams. It comes out to over two-and-a-half pounds of cocaine,
17 very substantial amount of cocaine, Your Honor. Codefendants
18 in this case are Michael Tyson and Andre Henry. Dean Cole is
19 obviously the one that was closest in proximity to those
20 drugs. The recommendation in this case was a ten-to-fifteen
21 year range. I spoke with Defense attorney for his client
22 there, Mr. Fox, and for the record wanted to clarify any
23 potential discovery issues. Two of the three BEST kits,
24 according to Dean Bishop, Commander with the Drug Enforcement
25 Unit, the glue was melted on the BEST kits. I've provided

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

14

1 this information to all three attorneys, told them everything
2 that I know. I haven't looked at it but my understanding is
3 that one BEST kit had clearly perfect condition of the BEST
4 kit and there was well over 100 grams in that BEST kit alone.
5 The other two that there were potential -- there were
6 potential issues with, whether or not they got into evidence
7 at trial, not -- not a certainty but none the less with one
8 BEST kit alone, we'd have had well over 100 grams, Judge. At
9 the appropriate time, since we are going to be going to trial
10 on the other two codefendants, I would ask for a full
11 allocution whether or not I ask the questions or ---

12 THE COURT: All right. Mr. Cole, you are charged with
13 trafficking. Trafficking is nothing more than a possession
14 offense here in South Carolina. The allegation is that you
15 were in actual or constructive possession or attempted to be
16 in actual or constructive possession of a quantity of cocaine.
17 In this case, at least 28 grams, which is an ounce up to 100
18 grams, which is less than 4 ounces. Is that correct?

19 MR. COLE: Yes, sir.

20 THE COURT: And who else was involved in this with you?

21 MR. COLE: Mike Tyson.

22 THE COURT: Who is Mike Tyson? Is he a codefendant?

23 MR. COLE: Yes.

24 THE COURT: And did he know about the drugs in the truck
25 -- in the car?

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

15

1 MR. COLE: Yes, sir.

2 THE COURT: How about the other person?

3 MR. COLE: No.

4 THE COURT: Who was the other one? Who was the other
5 one?

6 MR. COLE: Andre Henry.

7 MR. HYMAN: Andre Henry.

8 THE COURT: Andre Henry. Are you telling me that Andre
9 Henry had no knowledge of these drugs being in the vehicle?

10 MR. COLE: Yes.

11 THE COURT: Yes, he did not have any knowledge?

12 MR. COLE: No, he didn't have no knowledge.

13 THE COURT: He had no knowledge of it, he was simply
14 there?

15 MR. COLE: Yes, sir.

16 THE COURT: Anything further?

17 MR. HYMAN: Your Honor, could we inquire into his
18 relationship with Andre Henry?

19 THE COURT: What's your relationship to Andre Henry?

20 MR. COLE: He's my nephew.

21 THE COURT: He's your nephew. Okay. All right.

22 MR. HYMAN: Could we ask a couple of more questions, Your
23 Honor, about the vehicle?

24 THE COURT: Sure.

25 MR. HYMAN: Who owned the vehicle?

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

16

1 THE COURT: Whose vehicle was it?
2 MR. COLE: I don't know, sir.
3 THE COURT: It was not yours?
4 MR. COLE: No, sir.
5 THE COURT: Okay.
6 MR. HYMAN: Was it rented?
7 THE COURT: Was it a rental?
8 MR. COLE: I guess, I don't know, sir.
9 THE COURT: You don't know.
10 MR. COLE: No.
11 THE COURT: Okay.
12 MR. HYMAN: Where did Michael Tyson pick him up from?
13 MR. COLE: My apartment.
14 MR. HYMAN: In what city and state?
15 MR. COLE: Miami, Florida.
16 MR. HYMAN: There was an agreement to come up to South
17 Carolina from Miami, Florida in a rental vehicle with the
18 drugs?
19 MR. COLE: No, no, sir. I was coming up to see my
20 daughter and my mother.
21 THE COURT: Okay.
22 MR. HYMAN: Nothing further.
23 THE COURT: All right. Mr. Cole, has anyone promised you
24 anything, threatened you in any way to get you to plead
25 guilty?

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

17

1 MR. COLE: Ah, no, sir.

2 THE COURT: Has -- have you had all the time you need to
3 think about it?

4 MR. COLE: I guess, sir, yes.

5 THE COURT: Do you need any more time with your attorney?

6 MR. COLE: Ah, yes, I'd like to talk to him.

7 THE COURT: All right.

8 (REPORTER'S NOTE: Mr. Cole confers with Mr. Fox.)

9 MR. FOX: Thank you, Your Honor. We're prepared to
10 continue.

11 THE COURT: All right. Are you pleading freely and
12 voluntarily?

13 MR. COLE: Yes, sir.

14 THE COURT: Do you -- again, I want to ask you, have you
15 now had enough time with your attorney?

16 MR. COLE: Yes, sir.

17 THE COURT: Okay. Have you been truthful with me?

18 MR. COLE: Yes, sir.

19 THE COURT: Okay. And do you believe that this is the
20 best way for you to resolve this case?

21 MR. COLE: Yes, sir.

22 THE COURT: All right. I -- let me tell you, Mr. Cole,
23 you have a right to appeal what I do here today so long as you
24 file a notice of intent to appeal within the next ten days.
25 I'm sure you don't know how to do that or where to do it but

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

18

1 Mr. Fox does. He can assist you with that if you decide you
2 want to appeal. Do you understand that?

3 MR. COLE: Yes, sir.

4 THE COURT: All right. I find that there's a substantial
5 factual basis for this plea and it's made freely, voluntarily,
6 knowingly and intelligently after the advice of a very
7 competent attorney with whom he says he's satisfied and I'm
8 going to accept his plea.

9 Okay. Mr. Fox?

10 MR. FOX: Thank you, Your Honor. Mr. Cole has already
11 told you, he's fifty-six years old. He's from Miami. Judge,
12 one thing stands out is that he's reached that age, he does
13 have a couple of arrests in his background but has never been
14 convicted of anything at fifty-six years old. He is the first
15 of these three Defendants who has come to court and pled and
16 admitted his guilt. He has essentially up till this point,
17 everyone has maintained a tight lip. He's the first one
18 that's said anything of the three Defendants. I point that
19 out, specifically regarding Mr. Tyson. Judge, what he's told
20 me and what he's told Your Honor, he came up here, his motive
21 was coming to visit family in Abbeville. Mr. Tyson rented the
22 car, the Mr. Tyson is the one that picked him up, Mr. Cole.
23 Mr. Tyson is the one that packed the car including the cushion
24 that lifts out of his wheelchair and then you transport it and
25 put it in a golf cart or car or whatever, and it just unzips.

State v. Cole and State v. Henry
DEAN HENRY COLE - BY THE COURT

19

1 A great deal of drugs, Your Honor, but it was not -- when you
2 think of a thousand grams or a kilo, you think of a brick of
3 something but when you see the picture, it was many, many,
4 many small baggies with smaller amounts totaled up to a great
5 deal. Mr. Cole, isn't -- he's paralyzed from the waist down.
6 He's told you and he's pleading to having constructive
7 possession and knowing that there were drugs in the car. I do
8 truly not -- I believe truly he did not realize how much. He
9 literally didn't know what he was sitting on. He cannot feel
10 from the waist down. But regardless, he's pleading to a very
11 serious offense. As Your Honor knows, it's a no-parole
12 offense, which means a minimum service of eighty-five percent
13 of the sentence. We'd ask, Your Honor, to consider because of
14 his age, his disability, his lack of a record, the fact that
15 he is in fact pleading guilty, allocuting, assisting the State
16 very much in hopefully resolving the case against the
17 remaining Defendants that Your Honor consider even going below
18 the ten-year recommendation that carries a minimum of seven
19 and he would still be behind bars for a great deal of time,
20 even at that level. We'd ask for any mercy Your Honor can
21 show.

22 THE COURT: All right. You want to tell me anything, Mr.
23 Cole?

24 MR. COLE: What he said, no.

25 SENTENCE OF THE COURT:

State v. Cole and State v. Henry
SENTENCE OF THE COURT

20

1 THE COURT: All right. Sentence of the Court is that he
2 be confined for a period of ten years.

3 | Thank you.

4 MR. HYMAN: Thank you, Your Honor.

5

6 (Adjourned.)

7

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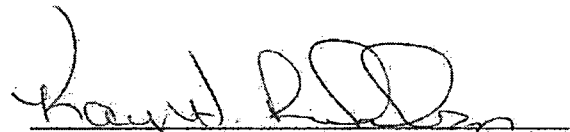
State v. Cole and State v. Henry
CERTIFICATE OF COURT REPORTER

21

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, 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 plea held in the case of The State versus Dean Henry Cole and the case of The State versus Andre Lee Henry, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on August 7, 2013.

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



Kay H. Richardson, CVR

Official Reporter

September 22, 2013.

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DEAN Henry Cole #081665
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

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 Allendale Correctional Institution
2. Name and location of Court which imposed sentence Horry County Courthouse, Conway SC.
3. Name(s) of co-defendant(s) (if any) Michael Tyson Jr, Andee Henry
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Warrant Number M972249 / trafficking in Cocaine, 400 grams or more.
 - (b) /
 - (c) /
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 7, 2013 sentence 10 years, trafficking Cocaine -
 - (b) more than 28 grams but less than 100 grams.

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty yes
- (b) after a plea of not guilty N/A
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
~~Did you appeal from the judgment of conviction or the imposition of sentence?~~ NO (didn't have knowledge I can appeal)
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. N/A
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. N/A
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. N/A
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. N/A
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Attorney didn't give me right knowledge to file appeal
- (b) Never knew I could appeal the decision
- (c) Never understand the full meaning of an appeal
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: ineffective assist counsel & due process violation

- (a) I was sentence to lesser Charge, than I was Original Charge with
 (b) Grand Jurors never signed a true bill on the lesser offense I was sentence
 (c) Never got to confrontation witness or co-defendants to prove my ~~innocence~~ ^{NOT} guilty.

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

in (10): No True bill signed by Grand Jurors on Lesser offense on sentence date.

(a) Brady vs Maryland, 373 U.S. 383, 10 L. ED. 2d 215, 83 S. Ct. 1194

(b) US. vs Agurs and State vs. Mison, 274 S.E. 2nd 406 (1981)

(c) Never got proper Confrontation by Attorney on due process / Confrontation Co-defendants
ineffective assist of counsel Witnesses

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

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

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

(a) the specific nature thereof:

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

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

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

(c) the disposition thereof:

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

- iv. N/A
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. N/A
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. N/A
- 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. N/A
- iii. _____

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

- i. _____
- ii. N/A
- 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) ineffective assist of counsel, not informing me my right to appeal
- (b) or file an pcc. Do to my disability I never could do
- (c) much of my own in finding ways to appeal or file a pcc with lack of my knowledge of law.

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

YES

- (a) your arraignment and plea? YES
- (b) your trial, if any? NO
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

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

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

- i. Eric Fox
- ii. Public Defender Horry County
- iii. 203 Laurel St. Conway SC 29526 phone 843-915-5385

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

- i. Sentence Date, plea agreement, preliminary hearing
- ii. _____
- iii. _____

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

Vacate sentence, time reduction, a Probation Attorney to help with (PCR) ^{Post conviction relief Appeal}

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

NO

STATE OF SOUTH CAROLINA

County of Horry

VERIFICATION

I, Dean H. Cole ¹⁴ ~~CR166~~, 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. 231de

Dean H. Cole

SWORN to and subscribed before me this 14
day of April, 2014.

Virginia Smith (L.S.)
Notary Public

My Commission Expires: 12-12-22

14 APR 21 AM 8:02
CLERK OF COURT
JIS-WARD

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

14

23de

I, Dean H. Cole #081465, 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.

Dean H. Cole
Applicant

SWORN or affirmed to and subscribed before me this
14 day of April, 2014.

Virginia Smith
Notary Public

My Commission Expires: 12-12-22

14 APR 21 AM 8:02
CLERK OF COURT

STATE OF SOUTH CAROLINA
County of Horry

IN the COURT OF GENERAL SESSIONS
Horry County

THE STATE,

VS

DEAN HENRY COLE
Defendant,

Notice to Request proceed
indigent and appointed
an ATTORNEY

21 AM 8:02
CLERK OF COURT

To: Honorable
Mekia Huggins-Ward
Clerk of Court

The above defendant is submitting a request to proceed indigent on PER Application that's ATTACK. The above defendant incarcerated at Allendale C.I. and is bound to wheel chair paralyze has no funds or monies at his disposal. He has file his PER Application on one ground, INEFFECTIVE assist Counsel. Ask that the Court please appoint him an Attorney to represent him do to his physical conditions and indigent status. The above defendant on above day 13th day of April 2014.

The defendant being sworn to law upon oath deposes says: I have Certified that I have served a hand written copy of this Notice to request to proceed indigent and appointed an ATTORNEY to Horry County Clerk Office via U.S. postage legal mail. upon Receipt of this Notice to Request please Check stamp, file and Return Receipt in Requested within the 10th day after service thereof

Submitted Respectfully
Dean H. Cole # 081665
Dean Cole # 081665
Allendale C.I.
F3-B27
PO Box 1151
Fairfax VA 22027

3. "Grand Jurors never signed a true bill on the lesser offense I was sentence"
4. "Never got to confrontation witness or co-defendants to prove my not guilty"

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, SCRPC.

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.

Respondent submits Applicant's allegation of ineffective assistance of plea counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 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, the applicant must prove "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 the attorney 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). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing 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, the Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the court measures an attorney'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 the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

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

IV.

Applicant also alleges due process violations. These allegations appear to be merely recitations of his grounds for ineffective assistance of counsel. Therefore, Respondent submits these allegations are without merit and incorporates its response in Part III, supra.

In the event Applicant alleges independent claims of due process violations, he fails to set forth with specificity any facts supporting his claim that he was denied due process of law. The Uniform Post-Conviction Procedure Act requires that the applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In a post-conviction relief application, the applicant must make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) ("It is, therefore, incumbent upon the applicant to make at least a *prima facie* showing entitling him to relief." (citing Babb v. State, 240 S.C. 235, 125 S.E.2d 467 (1962); Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962); Tillman v. Manning, 241 S.C. 221, 127 S.E.2d 721 (1962); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965))).

Since Applicant has failed to make even a *prima facie* showing, Respondent would submit this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCPP, for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. In the alternative, Respondent would submit Applicant should be required to provide a more definite statement pursuant to Rule 12(e), SCRCPP, because this allegation is so vague and ambiguous Respondent cannot reasonably be required to frame a response.

V.

Applicant's allegations regarding the indictment are without merit. Subject matter jurisdiction is the power of a court to hear a particular class of cases. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). An applicant may challenge the subject matter jurisdiction of the trial court at any time. Id. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Id. at 101, 610 S.E.2d at 499. Thus, an applicant challenging jurisdiction must

present evidence that his case is of some class over which the circuit court does not have the authority to preside. Furthermore, an indictment alleging a complete offense vests the court with power to dispose of any lesser offenses. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006) (citations omitted). Applicant's trafficking plea involved a criminal charge in General Sessions Court for which he was indicted of a greater trafficking offense. Thus, the circuit court had subject matter jurisdiction and this allegation should be dismissed pursuant to Rule 12(b)(6), SCRPC.

VI.

Respondent submits Applicant's allegation regarding confronting his witnesses should be dismissed. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Applicant's allegation regarding confronting his witnesses is an inappropriate challenge to the sufficiency of the evidence. Simmons, 264 S.C. at 423, 215 S.E.2d at 885 ("[T]he Uniform Post-conviction Procedure Act 'shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.'" (citing Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))). Furthermore, a knowing and voluntary guilty plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)). Because Applicant admitted his guilt at the plea hearing, he cannot now challenge the sufficiency of the

evidence against him. See Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("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." (citing Blackledge v. Allison, 431 U.S. 63 (1977))). Therefore, Respondent request these allegations 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 an evidentiary hearing be held on those issues requiring one.

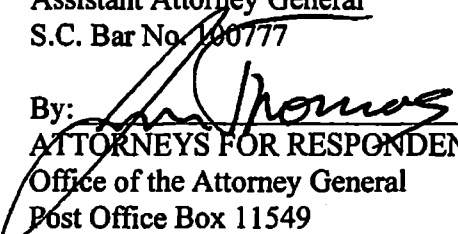
Respectfully submitted,

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

December 17, 2014

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

DEAN HENRY COLE, #081665

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

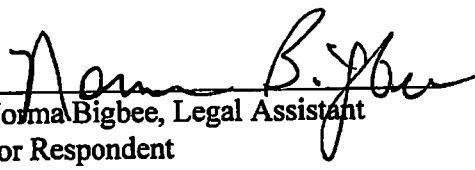
2014-CP-26-2366

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 on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Steven W. Fowler, Esquire
 1019 Highway 17 South #222
 North Myrtle, SC 29582

DATED this 17TH day of December, 2014.


 Norma Bigbee, Legal Assistant
 For Respondent

1 State of South Carolina) Court of Common Pleas
2 County of Horry) 2014-CP-26-02366

3

4

5 Dean Henry Cole)

6

vs.

Transcript of Record

7

8 State of South Carolina)

9

10

ORIGINAL

November 12, 2015

Conway, South Carolina

11

BEFORE:

12 Honorable Thomas A. Russo, Judge.

13

APPEARANCES:

14

Steven Fowler, Esq.

15

Attorney for the Applicant

16

J. Croom Hunter, Esq.

17

Attorney for the State

18

19

20

Teresa J. F. Bautz, RPR
Official Court Reporter

21

22

23

24

25

I N D E X

	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	Dean Henry Cole				
4	Mr. Fowler	5	--	36	--
5	Mr. Hunter	--	29	--	39
6	Eric Fox				
7	Mr. Hunter	41	--	--	--
8	Mr. Fowler	--	48	--	--

E X H I B I T S

NO.	DESCRIPTION	ID	EV
13	No exhibits submitted.		

14

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25

1 (The hearing commenced at approximately
2 11:45 a.m.)

3 THE COURT: Which one is this?

4 MR. HUNTER: Cole.

5 THE COURT: It's Cole, okay. All right.

6 MR. HUNTER: May it please the Court.

7 THE COURT: Yes, sir.

8 MR. HUNTER: This is Dean Henry Cole versus the
9 State of South Carolina, Case No. 2014-CP-26-2366. Mr.
10 Cole is presently confined with SCDC pursuant to the
11 Horry County Clerk of Court's orders. In May 2013 he
12 was indicted by the Horry County Grand Jury for
13 trafficking cocaine, over 400 grams. That indictment
14 number was 2013-GS-26-2010. He was represented by
15 Mr. Eric Fox.

16 On August 7, 2013, Mr. Cole pled guilty to
17 trafficking cocaine, 28 to 100 grams in exchange for a
18 recommendation by the State for a sentencing range for
19 10 to 15 years. Judge Hyman accepted the
20 recommendation and sentenced the Applicant to ten years
21 imprisonment. He did not appeal his plea or his
22 sentence.

23 In his application he alleged -- or whoa, back up.
24 He filed this application for post-conviction relief on
25 April 21st, 2014. In that application he alleged,

1 ineffective assistance of counsel and due process
2 violation. I was sentenced to a lesser charge than I
3 was originally charged with. Grand jurors never signed
4 a true bill on the lesser offense I was sentenced, and
5 never got to confront witnesses or codefendants to
6 prove that he was not guilty.

7 He is represented here today by Mr. Fowler. The
8 State is ready to proceed.

9 THE COURT: All right. Mr. Fowler?

10 MR. FOWLER: Yes, sir, Your Honor. At this time
11 we would like to call Mr. Cole to the witness stand,
12 please.

13 THE COURT: Mr. Cole, if you would please come
14 around. And what we'll do is have them, yeah, just
15 place him under oath and just allow him to be right
16 there in his chair.

17 DEAN HENRY COLE, after being duly sworn, testified
18 as follows:

19 THE CLERK: Please state your name for the Court.

20 THE APPLICANT: Dean Henry Cole.

21 MR. FOWLER: Your Honor, before we get started,
22 just to note for the record, Mr. Cole is in a
23 wheelchair, and he is not sitting in the witness stand.
24 There's a microphone in the witness stand. Is there
25 some way that we could put that microphone in front of

DEAN HENRY COLE-DIRECT BY MR. FOWLER

1 him so that he can be accurately be recorded?

2 COURT REPORTER: I don't think it's working.

3 THE COURT: Well, that's not -- the court
4 reporter's not relying on that microphone.

5 MR. FOWLER: Okay, so.

6 THE COURT: So we're good. I'll tell you what,
7 Mr. Cole, if we can get you, turn a little bit toward
8 me. And that way the court reporter can hear what you
9 have to say as well as the attorneys, okay.

10 MR. FOWLER: Okay. May I proceed, Your Honor?

11 THE COURT: Yes, sir, please.

12 MR. FOWLER: Okay.

13 DIRECT EXAMINATION

14 BY MR. FOWLER:

15 Q Mr. Cole, you're aware of the transcript of record
16 on August 7th, 2014; is that correct?

17 A Yes.

18 Q Okay. And there's several statements in there
19 where you and the Court and your attorney spoke; is
20 that correct?

21 A Correct.

22 MR. FOWLER: May I approach the witness, Your
23 Honor?

24 THE COURT: Yes, sir.

25 Q Okay. Mr. Cole, if you could read for --

1 MR. FOWLER: And this is -- before I get started,
2 Your Honor, this is already in the record. And what
3 I'm referring to is the transcript of record on
4 August 7th, 2013.

5 THE COURT: Okay. I have that.

6 MR. FOWLER: If you would like to follow along on
7 this case.

8 THE COURT: Okay.

9 Q Can you tell me what page I'm referring to there.

10 A Page four.

11 Q Okay, page four. And if you could take a look at
12 line five, what does -- well, let me back up to line
13 three. What does line three say and line four?

14 A I'd rather you read it because you can read it
15 faster than me.

16 Q So I'm --

17 A If you don't mind, sir.

18 THE COURT: Look, I've got the record, you can --

19 MR. FOWLER: Okay.

20 Q Okay. Well, isn't it true that on line three and
21 four, the Court says: All right. And he's going over
22 evidence in this case with you. Correct, that's
23 correct?

24 A Correct.

25 Q And lines five and six through seven says,

DEAN HENRY COLE-DIRECT BY MR. FOWLER

7

1 Mr. Cole: Yes. But I feel like that I need another
2 lawyer.

3 A Yes.

4 Q The Court: Well, that's not before me. I'm
5 asking you if he's gone over evidence with you.

6 Is that what it says?

7 A Yes, sir.

8 Q Okay. So at this point in this plea transcript,
9 you are talking about the need for another lawyer; is
10 that correct?

11 A Correct.

12 Q Okay. Why did you feel like you needed another
13 attorney?

14 A Why did I feel like I needed another attorney?

15 Q Yes, sir.

16 A Because I feel that -- that I didn't want the time
17 that he gave me, because I didn't do anything, I didn't
18 break any laws. He told me at the beginning that --
19 that -- excuse me, sir. He told me at the beginning
20 when I had a different solicitor that I wouldn't do any
21 time. And then afterwards when I got a different
22 solicitor, that's when he came at me with 30 years.
23 And I told him, you know, I didn't do anything for
24 that.

25 Q Okay. Well, continuing on in this line of

1 questioning, the Court said that that's not before the
2 Court at this time; isn't that correct?

3 A Sir?

4 Q Going back to line six --

5 MR. FOWLER: If I may approach again, Your Honor.

6 Q Well, that's not before me, is what the judge said
7 to you; right?

8 A Right, right.

9 Q And then basically he -- but you felt that at that
10 time that was an issue that the Court should address;
11 correct?

12 A Right, right, correct.

13 Q Okay. And then you did say that he went over the
14 evidence with you; correct?

15 A Right.

16 Q But just going over the evidence is not enough to
17 complete your defense; is that correct?

18 A Correct.

19 Q Okay. Let me draw your attention to another page.

20 MR. FOWLER: And if I may freely approach the
21 witness, Your Honor?

22 THE COURT: Yeah.

23 MR. FOWLER: If that's acceptable.

24 Q On page five, lines 14 through 25, and I'm going
25 to read that to the Court. Line 14, Mr. Cole: Yes,

DEAN HENRY COLE-DIRECT BY MR. FOWLER

9

1 sir. But am I too late to get another lawyer because I
2 feel it's not in the best of my interest?

3 A Yes.

4 Q 16, the Court: What's not in the best of your
5 interest? 17, Mr. Cole: I feel I need another lawyer.

6 18, the Court: What for? 19, Mr. Cole: Because.

7 20 -- so at that point it did come before the Court,
8 the Court started addressing your issue at that time;
9 correct?

10 A Correct.

11 Q All right. So at number 20, was this lawyer
12 appointed for you? 21, Mr. Cole: Yes, sir. 22, The
13 Court: Well, why did you not want this lawyer?

14 And at this point the Court is addressing your
15 request for a different lawyer; correct?

16 A Right, right, correct.

17 Q Okay. Picking up 23, Mr. Cole: Because I don't
18 want to go to trial.

19 A Right.

20 Q The Court, line 24: Well, I can tell you right
21 now you've got one of the most experienced trial
22 lawyers in the county.

23 And continuing on to page six: I'm not going to
24 give you another lawyer. That's on line one on page
25 six; isn't that what it says?

1 A Yeah.

2 Q Okay. How did that make you -- stopping at that
3 point, how did that make you feel that you were not
4 going to get another lawyer at that time?

5 A He told me that I didn't have enough time for
6 trial. And I said --

7 Q Now, you're referring to your attorney?

8 A Right, right.

9 Q Not the Court; correct?

10 A Right, right.

11 Q Okay.

12 A I didn't have enough -- well, the judge told me I
13 didn't have enough time, I only had three weeks, and I
14 didn't have enough time to get another lawyer. And I
15 didn't know it. If I had knew that I had time, I would
16 have went back to the county jail, I wouldn't have even
17 took the plea, period.

18 MR. FOWLER: Your Honor, I'd like to continue on
19 with page six, if you don't mind. I think it's
20 relevant to our discussion.

21 THE COURT: Yes.

22 Q Picking up on line one, and I'll -- I'm going to
23 read pretty much a lot of this page, and we'll stop at
24 intervals. Line one, page six: I'm not going to give
25 you another lawyer. If you want to go -- if you want

DEAN HENRY COLE-DIRECT BY MR. FOWLER

11

1 to go to lawyer -- to trial without a lawyer, I'll
2 qualify you on that. I just have to make sure that you
3 understand what you're doing. But I'm not going to
4 give you a new lawyer at this late date when we're
5 looking to go to trial in September. I'm not going to
6 do it. Now, do you reject this offer or not?

7 Okay. So the judge at that time basically said
8 that it was a time limitation that was keeping him from
9 appointing you another attorney; correct?

10 A Correct.

11 Q Okay. But you still feel like with that time
12 limitation that the judge put on you, you would still
13 like to have had another attorney; correct?

14 A Correct.

15 Q And how long had you been sitting in jail on this
16 case beforehand?

17 A You mean in J. Reuben, sir?

18 Q Well, this was on August 7th, 2013. How long have
19 you been in jail or how long have you had an attorney
20 before this?

21 A I had been in jail 16 months.

22 Q So a few more months wouldn't have hurt going for
23 you to get another lawyer and get your act together
24 with him or her?

25 A Correct.

1 Q Okay. Continuing on at line seven, Mr. Cole: If
2 I reject it, sir, what will happen?

3 So at that point you're asking the Court for legal
4 advice; correct?

5 A Correct.

6 Q Why did you feel like you needed to ask the Court
7 if you rejected it or not?

8 A Because I didn't understand why I had to get ten
9 years and the sentence only carried seven.

10 Q But I guess my point is you were asking the Court
11 for a clarification on what you were pleading to;
12 correct?

13 A Right, right.

14 Q Okay. Line eight, the Court: You're going to go
15 to jury trial or you're going to have a trial, and
16 you're going to be looking at 25 to 30 years. Line 11,
17 Mr. Cole: I'll take what you say, sir. Number 12, The
18 Court: You'll what? 13, I'll take the -- the -- line
19 14, The Court: Are you saying that you'll take the
20 plea? 15, Mr. Cole: So the plea is 15 to 10. 16, The
21 Court: 10 to 15 years, in that range.

22 So let's look at line 15 and 16 again. So the
23 plea is 15 to 10, 10 to 15 years, in that range.

24 Why were you asking the Court for what should --
25 why were you asking the Court those questions?

DEAN HENRY COLE-DIRECT BY MR. FOWLER

13

1 A Why was I asking the Court?

2 Q It seemed like that you had a confusion about how
3 long you were pleading to; is that correct?

4 A Correct.

5 Q So did your lawyer clarify that before this plea?

6 A He didn't. He just told me, you take the ten
7 years. If you don't take the ten years, you get -- if
8 you take it to trial, you could lose, it's a
9 possibility. And I asked him what's the percentage.
10 He said probably like 25 percent, that's as much as I
11 can give you. I said no. So that's why I did it,
12 because I didn't -- I didn't think that he would win
13 the case. I would end up doing 30 years, the rest of
14 my life, in prison.

15 Q But your lawyer did not adequately inform you, in
16 your opinion, of how much the plea was; correct?

17 A Right.

18 Q Okay. Let's just finish on down to the end of the
19 page, and we'll move on. Line -- I think we'll pick up
20 at line 17. Mr. Cole: So that's as low as it will go,
21 sir. 18, The Court: That's as low as it's going to
22 go, you will not be made another offer. Mr. Hyman's
23 boss, Mr. Richardson, requires him to make an offer,
24 and once that offer is made there's a deadline that's
25 set, and that deadline is today. If you do not accept

1 it today, the offer is withdrawn and you do not get
2 that offer or better offer again. Do you understand?
3 Now, what do you want -- okay. Now, do you want the
4 offer or not? Line 25, Mr. Cole: Can I speak with my
5 lawyer.

6 So basically at that time the Court was informing
7 you of issues with the solicitor's office in terms of
8 deadlines and things of that sort; is that correct?

9 A Correct.

10 Q So do you think it was your attorney's role to
11 tell you these things before court?

12 A Yes.

13 Q Did he -- referring to lines 18 and 24, did your
14 lawyer tell you these things before you went to this
15 plea on this date?

16 A No.

17 Q Okay. Do you think that was a deficiency in his
18 representation of you?

19 A Yes.

20 Q Do you think if he had told you what is in between
21 lines 18 and 24, that would have made a difference in
22 what you have pled to or done that day potentially?

23 A Yes.

24 Q Let's look at page nine of the same transcript,
25 Your Honor, and Mr. Cole. On page nine, lines 23

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15

1 through 25, or excuse me, line -- I apologize, line 21,
2 Mr. Cole: Do I know how a jury trial works? 22, The
3 Court: Do you know how it works, generally speaking?
4 23, Mr. Cole: I'm sorry, I've never been in a jury
5 trial. 24, The Court: All right. Let me tell you how
6 a jury trial works.

7 And then on the next page starting at line one --
8 well, let me back up just for clarification. On page
9 nine, lines 24 and 25: All right, let me tell you how
10 a jury trial works. We come into the Court and there's
11 a panel of jurors that are brought in, your attorney
12 and the solicitor both get to participate in the
13 selection of 12 jurors. Those jurors will decide your
14 case. The State will put up evidence to prove the
15 case. The State must meet its burden which is a burden
16 to convince each juror of your guilt beyond a
17 reasonable doubt.

18 You may testify if you wish, but you do not have
19 to testify in your case. You can remain silent. If
20 you choose to remain silent, I will tell the jury they
21 cannot use that against you. You can call any
22 witnesses that you wish to call in addition to that
23 during your trial. At the end of the trial I instruct
24 the jury as to the law, and they go back and determine
25 whether or not the State has proven that you are guilty

1 beyond a reasonable doubt. Do you understand how a
2 jury trial works? Line 15: Yes.

3 So the Court was explaining to you how the process
4 of a jury trial works; is that correct?

5 A Correct.

6 Q Okay. Did your attorney go over that with you
7 before you went to court this date?

8 A No.

9 Q Okay. Have you ever had an issue with -- where
10 you would go to a jury trial before, have you ever had
11 a jury trial or knowledge of it before?

12 A No.

13 Q Okay. So in your whole life you've never had an
14 experience where you would have had been in a situation
15 where you would have been familiar with a jury trial;
16 correct?

17 A Correct.

18 Q Okay. So do you think that instead of the Court
19 explaining this to you that your attorney should have
20 explained this to you?

21 A Correct.

22 Q Okay. So we've got a couple things so far, and
23 we're just about through with the transcript, we've got
24 a little bit more. But basically you've asked for
25 another attorney to the Court at this point, and you

DEAN HENRY COLE-DIRECT BY MR. FOWLER

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1 had a question about what you were pleading to; is that
2 correct?

3 A Correct.

4 Q Okay. And also the Court had to explain to you
5 what a jury trial was; is that correct?

6 A Correct.

7 Q All right. Let's look at page 15, line 17, or to
8 give it context, 15 -- 13. The Court: He had no
9 knowledge of it, he was simply there. Line 15, Mr.
10 Cole: Yes, sir. 16: Anything further? Number 17,
11 Mr. Hyman: Your Honor, could we inquire to his
12 relationship with Andre Henry. And number 19, The
13 Court: What's your relationship with Andre Henry?

14 So you were asked at that point what your
15 relationship with Andre Henry was; correct?

16 A Correct.

17 Q That had never come out before, your lawyer had
18 never brought that to the Court's attention?

19 A No.

20 Q Okay. Do you think that that's something that
21 should have been clarified with the solicitor's office
22 before you?

23 A Yes.

24 Q Do you think that if you had defined your
25 relationship with Andre Henry before, that may have

1 helped you in your case?

2 A Yes.

3 Q How so?

4 A He's my nephew, and he know that I didn't have
5 anything to do with it either.

6 Q Okay. One of the things that I noticed on this
7 was that the solicitor was Hyman and the judge was
8 Hyman; is that correct?

9 A Correct.

10 Q Did you know if there was a family relationship
11 between the two?

12 A No.

13 Q So your lawyer never went over the relationship?

14 A No, no.

15 Q Okay. If you had known that Mr. Hyman, the
16 solicitor, and the judge was named Hyman, would you
17 have perhaps objected to --

18 THE COURT: Is there a relationship there?

19 MR. FOWLER: I just think that he was unfamiliar
20 with Mr. Hyman's relationship with the judge, and that
21 was never spelled out.

22 THE COURT: Well, what is it?

23 MR. FOWLER: I don't know. I don't know. And my
24 client has indicated that he's never found out, as far
25 as I know.

DEAN HENRY COLE-DIRECT BY MR. FOWLER

19

1 THE COURT: Well, what relevance is there if there
2 is no relationship?

3 MR. FOWLER: Just that I think the judge had heard
4 some cases before, according to my client. And we're
5 going to get into a line of questioning about different
6 solicitors that he had discussed. So I just want to
7 throw it out there if there was a conflict, that it
8 should have been defined before he came to court.
9 Okay. If I may proceed?

10 THE COURT: Yeah.

11 Q So let me just finish up on that last line that I
12 stated, that if there was a potential conflict, you
13 would have asked for there to be a different solicitor
14 or heard before a different judge; is that correct?

15 A Correct.

16 Q Okay. Moving on to some of the matters that you
17 mentioned to me, on line -- on page --

18 MR. FOWLER: If I might have a moment, Your Honor.

19 THE COURT: Yes.

20 MR. FOWLER: I want to confirm our transcripts are
21 together.

22 Q On line 13 -- on line 14 through 16 of page 13 of
23 the transcript, it says three drug reports came back.
24 There were three best kits.

25 MR. FOWLER: And the exact weight of that, Your

1 Honor, was 1,169 grams. It comes out to over two and a
2 half pounds of cocaine. All right.

3 Q But then on your arrest warrant, arrest warrant
4 M-972249 which is also in the Court's record, and I'm
5 referring to today, there was a discrepancy that it was
6 approximately 1,269 grams; is that correct?

7 A Right.

8 Q All right. Did your attorney ever bring that to
9 your attention that there was a discrepancy on the
10 arrest warrant and what was pled to apparently or the
11 information in the transcript?

12 A No.

13 Q Excuse me. You mentioned earlier, we touched
14 briefly on the Solicitor Hyman. There was a solicitor
15 earlier in that case; correct?

16 A Correct.

17 Q Do you remember the name of that earlier
18 solicitor?

19 A No. I had the paperwork on it, but I went to
20 different prisons so I lost the paperwork. But at the
21 beginning, Mr. Fox told me that I would go home, it
22 wouldn't even go to trial or anything, everything would
23 be thrown out. But when I got a different solicitor,
24 that's when he told me I would do time.

25 Q Well, when was Mr. Hyman -- this was in -- the

DEAN HENRY COLE-DIRECT BY MR. FOWLER

21

1 transcript of record is on August 7th, 2013. How long
2 before that was Mr. Hyman assigned to the case or a
3 different solicitor than your original solicitor,
4 approximately, to the best of your knowledge?

5 A To the best of my knowledge, he didn't tell me
6 until like 14 months afterwards.

7 Q Okay. So you were under the impression that there
8 was a plea or a negotiation with the prior solicitor
9 that would have been more beneficial to you; correct?

10 A Correct.

11 Q And that prior solicitor, as indicated by your
12 attorney, said that you would perhaps go home?

13 A Yes, sir.

14 Q And not serve any time, okay. Now, you said that
15 you did not -- you went into -- in your mind there was
16 a discrepancy between the nonviolent and the violent
17 sentencing; is that correct?

18 A Correct.

19 Q Okay. So when did you find out about your actual
20 sentence and the actual time you would actually serve
21 and the percentage of that that you would actually
22 serve, when did you find that out?

23 A I found it out probably in like May of 2014.

24 Q Okay. Now, why did you find it out that late,
25 that far after you pled in August of 2013?

1 A Because I thought that he would give me the
2 paperwork. He didn't give me the paperwork showing
3 that I -- that it was violent and serious. He said
4 that it would -- it was nonviolent.

5 Q Who said that?

6 A My lawyer at the beginning.

7 Q So your lawyer basically said -- well, at the
8 beginning; when? Are you talking about August the 13
9 when you pled or earlier when you pled?

10 A Right, right. When I pled, he said that it wasn't
11 violent.

12 Q Okay. And just to repeat the issue just for
13 clarification, when you pled, you thought you were
14 pleading to a nonviolent sentence; is that correct?

15 A Correct.

16 Q But come to find out you pled to a violent
17 sentence?

18 A Yes, sir.

19 Q And there is a discrepancy in terms of how much
20 time you would serve between a nonviolent sentence and
21 a violent sentence; correct?

22 A Correct.

23 Q A violent sentence is up to 85 percent; is that
24 correct, or at 85 percent?

25 A 85 percent.

DEAN HENRY COLE-DIRECT BY MR. FOWLER

23

1 Q 85 percent. So do you think your lawyer had a
2 duty to tell you if you were pleading to a nonviolent
3 or a violent sentence?

4 A Yes.

5 Q And he did not do that; correct?

6 A No, he did not do that.

7 Q Okay. Something you had mentioned just for
8 clarification, that if you were to talk, you would
9 get -- if you were to talk you would not get 30 years,
10 something along those lines?

11 A Right.

12 Q Tell me a little bit about and explain that to the
13 Court, just I was going over my notes and I just want
14 to make sure we're clear on that. If you talk you
15 won't get 30 years, what do you mean by that in your
16 prior discussion?

17 A When the DEU officer arrested me, he pulled me to
18 the side and he said -- he asked me, he said, are you
19 sitting on any drugs or do you have any drugs in your
20 possession. I said, no.

21 MR. HUNTER: Objection, Your Honor. That's
22 hearsay.

23 MR. FOWLER: Your Honor, I think this goes to the
24 relationship.

25 THE COURT: Overruled.

1 MR. FOWLER: Okay.

2 Q Go ahead.

3 A He said, he asked me, did I have anything on me.

4 I told him no. He said that we know that Mike been

5 bringing drugs up here. And he said, if you tell me

6 what you know or anything, you won't do 30 years.

7 Q So you're saying that if you were to talk that you

8 would not get 30 years; correct?

9 A Yeah. I told him I didn't do anything, why would

10 I get 30 years.

11 Q So in your mind you felt like you didn't do

12 anything that rose to the level of a 30-year sentence;

13 correct?

14 A No.

15 Q Okay. Now, that's something that you had

16 mentioned to me, this previously about -- who was that

17 that told you, the drug enforcement officer?

18 A Yes, sir.

19 Q Okay. Was he ever mentioned as a possible witness

20 for you or any kind of this -- any kind of bringing

21 that out at a potential trial, these issues?

22 A No.

23 Q Okay. So your lawyer never interviewed the...

24 A I told him, but he never, never brought it.

25 Q So he never brought it up. Did the drug

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1 enforcement officer ever make any kind of statement
2 that you had access to, was there any kind of written
3 transcript or anything along those lines?

4 A No.

5 Q So you're indicating no; right?

6 A No.

7 Q Okay. Now, you also mentioned that there was a
8 potential confidential informant in this; is that
9 correct?

10 A Correct.

11 Q And you feel like that is relevant to your case as
12 well; right?

13 A Yes.

14 Q Tell me a little bit about what you know about
15 that confidential informant or what you can tell us in
16 your knowledge of that confidential informant.

17 A My knowledge is the guy came up here with Mike.
18 He was bringing the drugs to the confidential
19 informant, and the confidential informant was working
20 with DEU. But it was never brought up in the trial.

21 Q Okay. So there was never any request by your
22 attorney to do anything with that confidential
23 informant; correct?

24 A Correct.

25 Q Never any request to find that -- to provide that

1 confidential informant's name; correct?

2 A Correct.

3 Q Or provide the information that that confidential
4 informant had to you or to the Court; right?

5 A Correct.

6 Q Okay. Do you think that would have made a
7 difference in terms of how you pled to this or how you
8 reacted to this case?

9 A Yes, sir.

10 Q Okay. Why do you feel that?

11 A Because they told me that Mike was under
12 investigation. They were listening in to his calls and
13 he was -- he was bringing drugs here. I had never been
14 here in my life, it's the first time I had ever been to
15 Myrtle Beach.

16 Q And have you ever had a criminal record before or
17 anything along those lines?

18 A You mean here?

19 Q Yeah.

20 A No. Oh, when I was younger I made a mistake. I
21 was a teenager, I had a youthful offender charge.

22 Q But you're 56 now?

23 A I'm 58.

24 Q 58. And that was your only --

25 A That was the only thing when I was a teenager.

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1 Q Okay. So, so far we've got basically that you,
2 you and the Court had several issues back and forth
3 about knowledge of a jury trial. You've requested the
4 judge to appoint you another attorney, and he denied
5 that initially, and then he went into it in a little
6 bit more detail. And also the Court asked you --
7 informed you of various things.

8 And also you're saying that there were issues that
9 through the drug enforcement officer, the confidential
10 informant and the solicitor's office that you feel are
11 issues that were relevant that were not brought out; is
12 that correct?

13 A Correct.

14 Q Do you feel like your -- overall that your
15 attorney's representation of you was deficient?

16 MR. HUNTER: Objection, Your Honor. That's a
17 legal term.

18 MR. FOWLER: It's a term, in my opinion, Your
19 Honor, it's just asking him, did he feel like it was
20 a -- that he rose to the level of a duty representing
21 him.

22 THE COURT: Give me the question again, I'm sorry.

23 MR. FOWLER: I apologize. I asked him, did he
24 feel like his attorney's performance was deficient.

25 THE COURT: He can respond. It's his opinion.

1 Q Yeah. In your opinion, do you feel like your
2 attorney's performance was deficient representing you?

3 A No.

4 Q Do you feel he was deficient in his representation
5 of you?

6 A What do you mean, did he -- did he do the best of
7 his ability with me, no.

8 Q His -- okay. And do you think that if you had had
9 a different attorney, it might have been -- your case
10 might have turned out differently?

11 A Yes, sir.

12 Q And do you think how this attorney represented
13 you, in your opinion, that you feel like the results of
14 the proceeding would have been different?

15 A Yes, sir.

16 Q Okay. Is there anything else about this case that
17 you -- that in your opinion you feel needs to be
18 brought to the Court's attention at this time?

19 A Nothing I can think of.

20 MR. FOWLER: I have no further questions, Your
21 Honor.

22 THE COURT: Cross.

23 MR. HUNTER: May it please the Court.

24 THE COURT: Yes, sir.

25 CROSS-EXAMINATION

1 BY MR. HUNTER:

2 Q Good morning, Mr. Cole.

3 A Good morning.

4 Q Do you recall how many times you and Mr. Fox met
5 prior to your plea?

6 A Several times. I didn't count them.

7 Q What did y'all -- what did y'all discuss?

8 A We discussed the case and how many times -- how
9 many times we were coming, you know, back and forth.
10 And I was asking him, was I going home. I kept asking
11 him that.

12 Q Okay. And did --

13 A He told me everything was good, because he said I
14 didn't sign any -- I didn't sign any statements, and
15 they didn't have any video or anything of me.

16 Q Well, did he tell you that you were going to go
17 home?

18 A Yes.

19 Q He told you you weren't going to serve any time?

20 A Yes, at the beginning.

21 Q Okay. That was with the first solicitor?

22 A Yes.

23 Q And then when the second solicitor came on the
24 scene, he explained that, you know, new solicitor, new
25 deal, you're probably going to have to do some time?

1 A Correct.

2 Q Did y'all go over the evidence when you met with
3 him?

4 A Yes.

5 Q Okay. Did y'all develop any kind of strategy
6 should you decide to go to trial? Well, let me -- what
7 did you explain to Mr. Fox that your defense was
8 essentially, you know, that if you had gone trial, what
9 was going to be your argument?

10 A My argument was I was riding in the car, and I had
11 nothing to do with it. I was coming up here to see my
12 family.

13 Q But you admitted at your plea that the drugs were
14 found in your wheelchair; correct, or underneath?

15 A They were found in the cushion in the car.

16 Q Okay. What do you think Mr. Fox could have done
17 better?

18 A He could have been a better counsel at telling me
19 what I was going into with a jury trial which I
20 never -- I never went to a jury trial. When I came, he
21 said, the judge wants you to take ten years. And I'm
22 asking him why it's ten years, the charge only carried
23 seven years.

24 Q Well, he explained to you that the minimum was
25 seven years, right, but you could get more than seven?

DEAN HENRY COLE-CROSS BY MR. HUNTER

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1 A No. He just came to me with straight ten years.

2 Q With ten. So, I mean, you knew you were going to
3 be pleading to ten; right?

4 A Right, afterwards. And I didn't want to plead to
5 ten, that's why I asked for another lawyer.

6 Q Okay. Well, did you ever tell Mr. Fox that you
7 wanted a trial; did you say, I don't want ten years, I
8 want to go to trial?

9 A At the beginning I didn't want to go to trial
10 because I didn't trust him.

11 Q Okay. Now, you didn't trust him, or you felt like
12 the evidence against you was bad?

13 A Not the evidence against me, I didn't have any
14 evidence against me.

15 Q Okay. So when you say you didn't trust him, what
16 do you mean?

17 A I didn't trust going to trial with him because he
18 said he could only do -- he said it was a margin like
19 25 percent. And I said, no. If he had said it was 100
20 percent, I would have went to trial with him.

21 Q Well, he explained to you that if you went to
22 trial and you lost, you'd face what, up to 30 years?

23 A Correct.

24 Q Okay. And based on that you decided to plead
25 guilty because you didn't want to go for 30 years;

1 correct?

2 A With him as a lawyer, no, I wouldn't have went to
3 trial with him.

4 Q Okay. Now, when did you first start thinking that
5 Mr. Fox wasn't doing a good job? Was it right before
6 your plea, you know, was it a year before?

7 A It was -- it was when he came with the ten years.
8 Because he was telling me I wouldn't do that -- I
9 wouldn't do no time at the beginning.

10 Q Okay. But then did he explain to you that another
11 solicitor was on the job now, and everything changed?

12 A Yeah. And I'm thinking I'm going to go home. And
13 he told me that the solicitor, he has a job to do,
14 that he got his job and he wouldn't lose his job behind
15 that. And I'm asking him why am I not going home here.

16 Q Okay.

17 A I don't want to go to trial. I'm thinking I'm
18 going home.

19 Q Essentially you were upset because initially the
20 first deal was going to be for no time, and then it
21 changed?

22 A Right.

23 Q Okay.

24 A When I got a different solicitor.

25 Q Okay. Do you recall approximately how long before

1 you pled guilty that ten-year deal came?

2 A I had stayed in county jail 60 months.

3 Q Okay. So you had a long time to hire another
4 lawyer if you decided you wanted another lawyer;
5 correct?

6 A Yes. But I didn't -- I didn't feel I needed
7 another lawyer, because I thought he was going to be --
8 -- I thought he was going to represent me good. And
9 I'm thinking the solicitor was good, but the solicitor
10 was no good.

11 Q Okay. And you understand that Mr. Fox doesn't
12 have any control over what deals the solicitor offers?

13 A No.

14 Q He can't make the solicitor offer --

15 A I didn't understand that.

16 Q Okay.

17 A I didn't understand that.

18 Q He can only tell you what the solicitor has
19 offered, he can't say, you know -- I mean, essentially
20 Mr. Fox goes to the solicitor and the solicitor said
21 ten years. And you wanted Mr. Fox to come back and say
22 zero years; correct?

23 A No. What do you mean?

24 Q I'll move on. That was a confusing question, I'll
25 move on. Let's move on to your guilty plea.

1 A Okay.

2 Q Now, we've gone over fairly extensively, and Judge
3 Hyman did ask you whether Mr. Fox had explained the
4 offenses and gone over the evidence with you, and you
5 told him that he has; right, but that you still wanted
6 another lawyer?

7 A Right.

8 Q Okay. And you told the judge that Mr. Fox did
9 explain that you had a right to a jury trial; right?

10 A Yes.

11 Q And that you could plead -- that you did not have
12 to plead guilty?

13 A Yes.

14 Q Okay.

15 MR. FOWLER: Objection, Your Honor. Could he
16 rephrase that question. It sounded like a compound
17 question to me, could you rephrase that. What was the
18 question again, please?

19 MR. HUNTER: The question was essentially that.
20 Judge Hyman went over the fact that you didn't have to
21 plead guilty.

22 MR. FOWLER: Okay.

23 Q Right?

24 A Right.

25 Q Judge Hyman told you you could go to trial if you

1 wanted; correct?

2 A Correct.

3 Q Okay. And Judge Hyman went over the fact that you
4 were pleading to ten years; correct?

5 A Seemed like that was the only thing he was going
6 to give me, ten years. I asked for seven.

7 Q But you knew when you pled guilty that you were
8 going to get ten years?

9 A Instead of 30, yes.

10 Q Okay.

11 MR. HUNTER: Beg the Court's indulgence.

12 Q Do you recall --

13 MR. HUNTER: And, judge, this is on page 11.

14 Q Do you recall Judge Hyman asking you if there was
15 anything else you wanted Mr. Fox to do for you, and you
16 told him, no, sir?

17 A I don't remember that.

18 Q Do you recall telling Judge Hyman that Mr. Fox had
19 done everything you wanted him to do?

20 A I didn't really want him as a lawyer afterwards.

21 The only reason why I took it was because I felt if I
22 went to trial with him, I was going to get 30 years.

23 That's the reason why I took the ten years, or I would
24 have never took the ten years. I wanted another lawyer
25 and I wanted to hire a lawyer.

1 Q Well, well, do you remember telling Judge Hyman
2 that you had enough time with your attorney, that you
3 didn't need any more time to discuss it with him?

4 A I told him that, yes. But I told him that, but I
5 didn't mean like I -- I was -- I was going to trial
6 with him. I didn't want to go to trial with him,
7 that's why.

8 Q Okay.

9 A That's why I took the plea.

10 Q Okay. And finally on page 17, you also told Judge
11 Hyman, or Judge Hyman asked you, do you believe this is
12 the best way to resolve your case, and you said, yes,
13 sir. Okay.

14 And then lastly, do you recall the very end of
15 your plea on page 19, Mr. Fox informed the Court that
16 he had discussed with you that this was going to be an
17 85 percent sentence?

18 A No. No.

19 Q Okay.

20 MR. HUNTER: No further questions, Your Honor.

21 THE COURT: Anything further?

22 MR. FOWLER: Yes, sir.

23 REDIRECT EXAMINATION

24 BY MR. FOWLER:

25 Q Just because you go over your evidence with your

1 attorney doesn't mean that you go over other things;
2 correct, you didn't go over strategy or a
3 clarification?

4 A No.

5 Q Okay. You didn't go over a clarification
6 previously of how much time, the type of sentence you
7 would be going to?

8 A Right.

9 Q So earlier he mentioned that you had met with Mr.
10 Fox several times; correct?

11 A Correct.

12 Q Okay. But still that day in court when you did
13 plead, the first thing on page four is you did ask for
14 another attorney; correct?

15 A Correct.

16 Q So that was one of the first -- that was the first
17 thing practically that you asked the Court; right?

18 A Yes.

19 Q Then you discussed with the Court over how much
20 time you would get as a plea; correct?

21 A Correct.

22 Q And we discussed previously that there was a back
23 and forth between you and the Court of how much time
24 you were going to get; right?

25 A Correct.

1 Q And your attorney had not gone over that with you;
2 correct?

3 A No.

4 Q All right. Previously?

5 A Yes.

6 Q Okay, in discussions. And also you -- even though
7 you had spoke with Mr. Fox apparently several times,
8 the Court had to explain to you what a jury trial was;
9 correct?

10 A Correct.

11 Q Okay. Am I correct in saying that you were under
12 the impression that because the first solicitor
13 basically said that you would get no time, that you
14 were shocked by the amount of time that you eventually
15 got with the second solicitor?

16 A Yes.

17 Q Do you feel like your attorney had a duty to try
18 to keep the solicitor's office in on that initial
19 discussion for a potential no time of sentence?

20 A Correct.

21 Q So you felt just because the solicitor's office
22 changed solicitors, you should still get the same
23 deal --

24 A Same deal.

25 Q -- that the first solicitor mentioned?

1 A Correct.

2 Q Just because you plead to a -- and this goes back
3 to something I just mentioned, just because you plead
4 to a number of years, it doesn't necessarily mean you
5 understand how much of that -- whether it's going to be
6 a violent sentence or a nonviolent sentence; correct?

7 A Right.

8 Q And you didn't understand that before going to
9 court?

10 A No, I didn't understand it.

11 Q Okay. So --

12 MR. FOWLER: I have no further questions, Your
13 Honor.

14 THE COURT: Anything further of this witness?

15 MR. HUNTER: Just one question briefly. May I
16 approach, Your Honor?

17 THE COURT: Yes, sir.

18 RECROSS-EXAMINATION

19 BY MR. HUNTER:

20 Q Mr. Cole, do you recognize this?

21 A Yes.

22 Q And is this the sentencing sheet from when you
23 pled guilty?

24 A I don't know, I just signed it.

25 Q You just signed it?

1 A I didn't know it was -- that's the one I got from
2 the Court when I got -- when I sent in for it.

3 MR. FOWLER: May I see it, Your Honor.

4 THE APPLICANT: He didn't give to me the day I was
5 in court.

6 MR. HUNTER: It's the sentencing sheet, you should
7 have it in your...

8 MR. FOWLER: Okay.

9 THE APPLICANT: Right. He didn't give it to me
10 the day I was in court, so I didn't know it.

11 Q Okay.

12 A Was it violent or nonviolent.

13 Q So you didn't see that that box was checked
14 violent?

15 A No. No, sir.

16 Q Okay.

17 MR. HUNTER: No further questions.

18 THE COURT: All right. Thank you very much. All
19 right.

20 (Witness excused.)

21 THE COURT: Anything further?

22 MR. FOWLER: No, sir, we don't have any other
23 witnesses.

24 THE COURT: All right. Does the State have
25 anything?

ERIC FOX-DIRECT BY MR. HUNTER

1 MR. HUNTER: The State would call Mr. Fox.

2 THE COURT: All right. Mr. Fox, if you would
3 please come around and be sworn, sir.

4 ERIC FOX, after being duly sworn, testified as
5 follows:

6 THE CLERK: Please have a seat. State your name
7 for the Court.

8 THE COURT: Eric Fox.

9 MR. HUNTER: May it please the Court.

10 DIRECT EXAMINATION

11 BY MR. HUNTER:

12 Q Good morning, Mr. Fox.

13 A Good morning.

14 Q How long have you been practicing law?

15 A Since 1990.

16 Q Okay. And what portion of your practice is
17 devoted to criminal law?

18 A Since 1994 almost a hundred percent.

19 Q Okay. How did you become involved in this case?

20 A I was appointed. I'm currently employed by the
21 Public Defender's office in Horry County. I was
22 appointed to represent Mr. Cole in -- I'll tell you
23 exactly when -- in the spring of 2012, basically within
24 a few days after his arrest.

25 Q Okay. Did you file Rule 5 Brady motions?

ERIC FOX-DIRECT BY MR. HUNTER

1 A Yes. Those were filed immediately in May of 2012.

2 Q Okay. Did you have any trouble getting discovery
3 from the solicitor's office?

4 A No. We had it within, looks like about 60 days.

5 Q Did you go over all the discovery materials with
6 Mr. Cole?

7 A I did.

8 Q Okay. Do you recall how many times you met with
9 Mr. Cole?

10 A Looks like I met with Mr. Cole about every other
11 month. About six or seven times.

12 Q Okay. Now, did you and Mr. Cole discuss the
13 difference between a plea and a jury trial?

14 A Yes.

15 Q Okay. Did you describe, I guess I'll call it the
16 mechanics of a jury trial, how a trial works?

17 A Over the course of -- yes, over the course of our
18 discussions, definitely covered that in terms of
19 whether a trial would be a good idea to begin with, in
20 terms of the evidence that they purported to have
21 against him and so forth.

22 Q Okay. Did Mr. Cole indicate to you that he wanted
23 to go to trial?

24 A Yes.

25 Q Okay. At what point did the posture change from

ERIC FOX-DIRECT BY MR. HUNTER

1 preparing for trial to doing a guilty plea?

2 A Really at the arraignment. What you have to
3 understand is this plea came out of what was an
4 arraignment. That's why Mr. Cole was brought to court
5 on that day. It was a take it or leave it. The plea
6 offer had been out there since May of 2013, I think May
7 28th. This was a couple months later.

8 And the solicitor, which they sometimes will do,
9 is basically saying, look, we're going to arraign him
10 in front of, in this case, Judge Hyman, make sure he
11 understands his plea offer, and that there is a
12 deadline which was that week.

13 Q Okay.

14 A And that's what you see in the transcript Judge
15 Hyman going over with him. And it was during that that
16 then he -- we had discussed a plea before, but in terms
17 of his decision, that was the trigger with that
18 arraignment proceeding.

19 Q Was there ever any discussion of a plea or, I
20 guess, a plea or some -- you know, the solicitor
21 dropping the charges or something to the extent where
22 Mr. Cole would serve no time?

23 A No. I think, my recollection, I'm very sure, we
24 did discuss at the beginning what his charge was, what
25 he was facing. He was facing because of the weight,

1 which was well over 400 grams -- came back well over a
2 thousand grams, but once you get over 400 grams it's
3 trafficking, that's 25 to 30 years, we discussed that.
4 And I told him truthfully, and Martin Spratlin was the
5 solicitor initially assigned, and I said, well, I know
6 Martin, worked with him, he's a reasonable guy, that's
7 a good thing. You know, this is a solicitor I have a
8 good working relationship with. There never was any
9 kind of plea offer or discussion saying he would go
10 home or that it would be dismissed.

11 Q Okay. Did you think -- had he gone forward
12 towards trial and done a suppression hearing, did you
13 think your and Mr. Cole's chances would have been very
14 good to have the drugs suppressed?

15 A Well, it's hard to put, you know, like a Vegas
16 betting line number on that, but there were issues.
17 Because you had an informant, and the State would have
18 had to bring forth that that informant was reliable,
19 past history, that sort of thing, they provided
20 accurate, reliable information in the past.

21 They would at that point needed to have the
22 informant there, not beforehand. So there definitely
23 would have been issues about how the State even came to
24 be looking at that car that Mr. Cole was in. And as I
25 told Mr. Cole, it's an all or nothing, we win that

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1 suppression hearing, boom, the case is gone, the drugs
2 are out, there's no case against you. If you lose,
3 you're sitting on top of about a kilo of coke.

4 Q Okay. So that was my next question, you did
5 explain all of that to Mr. Cole?

6 A Yes.

7 Q Okay. Did you ever have any trouble with him not
8 understanding you as far as --

9 A No. I mean, certainly sometimes -- he was not a
10 lawyer, sometimes we went back over things. He
11 certainly would say, I don't understand why I'm even in
12 this position. But, no, in terms of understanding the
13 process, rights, it simply took explanation. He asked
14 intelligent questions about the situation.

15 Q Let me back up a little bit. Did you explain the
16 elements and nature of the charge?

17 A Yes.

18 Q Okay. Prior to Mr. Cole's plea, did you go over
19 the fact that he was -- or did you go over the rights
20 he was waiving by pleading guilty as far as the right
21 to challenge the evidence, right to a jury trial, all
22 that stuff?

23 A Yes.

24 Q And whose decision was it to plead guilty?

25 A Mr. Cole's.

1 Q Did you agree with that decision?

2 A I did in the context he was -- if he goes to
3 trial, he had -- plea offer was to a reduced charge
4 that carried between 7 and 25. The offer was to have
5 that sentence be between 10 and 15, so a cap in effect,
6 even less than he could get on the reduced charge.

7 If he went to trial, he was going to trial on the
8 original charge which was trafficking, 400 grams or
9 more. That carries a minimum mandatory sentence of 25
10 years if he lost. 25 is a lot more than ten, and I
11 felt there was certainly a substantial risk of being
12 found guilty at trial.

13 Q Okay. Would you have gone to trial if Mr. Cole
14 had indicated that that's what he wanted to do?

15 A Absolutely. And that's where we were headed.
16 Because for most of those 16 months, Mr. Cole was
17 indicating that he wanted a trial.

18 Q Did you explain that the charge he was pleading to
19 was violent and 85 percent?

20 A Yes. And I further explained -- there had been a
21 little misunderstanding -- no parole at 85 percent is
22 not dictated by whether a charge is violent or not.
23 You can conceivably have a charge that's violent that
24 is not 85 percent, it's whether it's an A, B or C
25 felony. In this case it is both violent and no parole,

ERIC FOX-DIRECT BY MR. HUNTER

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1 but I explained that distinction as well.

2 Q Okay. Do you think there was any conflict with
3 Solicitor Hyman and Judge Hyman?

4 A No. I'm not sure if there is a relationship
5 there. Hymans in Horry County are like Bellamys and
6 Richardsons, you can't swing a dead cat without hitting
7 one.

8 Q I believe he mentioned something about, he being
9 Mr. Cole, mentioned something about a discrepancy with
10 the arrest warrant. Do you recall what he's talking
11 about there?

12 A Not specifically. But the arrest warrant, of
13 course, isn't evidence.

14 Q Right.

15 A At trial what would matter would be the weight.
16 Because you often see that, that's sometimes done when
17 they field test something and they come up with a
18 weight. And that quite often is different from what
19 you get when they test at SLED, sometimes to your
20 client's benefit. So that's what's going to be
21 important.

22 Now, if there's a difference of, you know, it's
23 doubled or something like that, yeah, that's a big
24 issue and I certainly would look at that. But as I
25 recall, it was a matter of just a few grams.

1 Q Okay. So it wouldn't have made any difference?

2 A Not in terms of his charge, and I don't think it
3 would have made any difference in terms of evidence at
4 trial.

5 Q Okay. Have you explained that Mr. Cole that the
6 offer would be withdrawn?

7 A I did. And Judge Hyman certainly did that during
8 the arraignment.

9 Q Okay.

10 MR. HUNTER: I believe that's all the questions I
11 have. Thank you, Mr. Fox.

12 MR. FOWLER: If I might have just a moment, Your
13 Honor.

14 CROSS-EXAMINATION

15 BY MR. FOWLER:

16 Q Did Mr. Cole ever tell you that he wanted a
17 different attorney?

18 A I do not recall. He may have. I don't recall one
19 way or the other.

20 Q Well, I mean, if you aren't sure of it, don't you
21 think that after he expressed to the judge some
22 concerns that you should have took it upon yourself to
23 withdraw as his counsel?

24 A No. That -- boy, any client I represent for any
25 length of time facing any kind of sentence at some

1 point almost always wants to do that sometimes because
2 they genuinely don't think I'm doing a good job and
3 sometimes because it's a delaying tactic.

4 Now, I would never and have never stood in the way
5 of a client if they say, I want to talk to the judge
6 about you being removed. I'll always bring that to the
7 solicitor's attention to get it scheduled and let a
8 client do that. So I would say if he ever did, it
9 didn't go very far because I know I never made the
10 effort to have him in front of the Court for a judge to
11 decide.

12 Q But he indicated that in the plea transcript;
13 correct?

14 A Yeah. And at that point I would take it to be
15 between him and Judge Hyman. I said nothing in
16 response either way.

17 Q Okay. Do you feel like if he wanted another
18 attorney that you should have let him have another
19 attorney?

20 A It's not my call.

21 Q But if a client wants you to withdraw, then isn't
22 there a duty on you to withdraw as his counsel?

23 A Well, again, I can't make that call, I can't
24 relieve myself from clients. If it were that easy,
25 then I could pick and choose my clients.

1 Q But when it rises to the level of a client telling
2 a judge before he is sentenced to years in the
3 Department of Corrections --

4 THE COURT: Mr. Fowler, we got a situation where
5 this is an appointment, this is not a retained counsel.

6 MR. FOWLER: Yes, sir. I understand that, thank
7 you.

8 THE COURT: Mr. Fox has no authority or control
9 over that.

10 MR. FOWLER: Okay. Thank you, Your Honor.

11 Q You said that there's a lot of Hymans in Horry
12 County. But in this situation, the one being a
13 solicitor and one being a judge, did you ever find out
14 if there was a family relationship between the two?

15 A No.

16 Q Okay.

17 A I know it's not close as in he's not his son, it's
18 not his nephew, that sort of thing. And then based on
19 my experience dealing with both Judge Hyman and
20 Solicitor Hyman over the years, I had no reason to
21 think that that was any issue at all, never saw any
22 favoritism or collusion between the two, anything that
23 I thought that was funny.

24 Because I've done that in the past where there
25 have been relationships where victims have been related

ERIC FOX-CROSS BY MR. FOWLER

1 to solicitors, and I've had solicitors request that
2 they be recused. So I wouldn't have hesitated if I
3 thought there was any issue at all.

4 Q But it is true that even though you said you and
5 Mr. Cole went through several discussions, Mr. Cole did
6 that day of the plea ask the Court to go over what he
7 was pleading to; correct?

8 A Yes, he did.

9 Q Okay. And he also went over with the Court how
10 the jury trial functionality worked; is that correct?

11 A Well, yeah, I took that to be a normal colloquy
12 between the Court and the Defendant. And virtually
13 every plea has discussions along those lines. Do you
14 understand what a jury trial is, do you understand what
15 you're giving up, that's virtually at every plea that
16 I've ever been a part of.

17 Q And explain to me the distinct -- you said Martin
18 Spratlin was the original solicitor on this; correct?

19 A Yes.

20 Q Did he ever provide to you anything in writing
21 about what the plea might be --

22 A No.

23 Q -- in terms of that?

24 A No, it never got to that point. Solicitors are
25 initially assigned based on date of arrest, that for a

1 particular week they take the cases that week. Certain
2 types of cases, then sex crimes and certain others and
3 drug cases then go to a particular. And that was the
4 case here, Mr. Spratlin happened to have the draw. His
5 name is on things in the beginning. But being a drug
6 case that went in this case to Travis Hyman, but went
7 to the drug unit with solicitor's office.

8 So there never was any plea discussions with
9 Mr. Spratlin. If it had -- now, once in a while, do
10 they keep then, yes, and that's what I was indicating
11 to Mr. Cole was that like Mr. Spratlin, I have a good
12 relationship with him, but there never was any offer or
13 discussion with him.

14 Q Well, how long was Mr. Spratlin on the case?

15 A I don't know for sure.

16 Q Was it months or was it weeks, or how long was he
17 on the case?

18 A I would say that's -- well, hold on, I can tell
19 you in discovery -- and I don't want to say weeks, but
20 plea offer came from Mr. Hyman. And if you'll give me
21 just a moment, I'll look in to see who discovery came
22 from.

23 MR. HUNTER: Judge, I'm just going to object. I
24 think any talk about any solicitor prior to Mr. Hyman
25 is pretty irrelevant.

1 THE COURT: What's the relevance?

2 MR. FOWLER: The point is that he is saying that
3 it goes into the solicitor's office generally. And
4 then it flows down specifically to the drug department
5 or whatever department that it would happen. If
6 Mr. Spratlin was on this case for more than a few weeks
7 or a few days or a relatively short period of time, it
8 would indicate that there was more of a relationship
9 between Spratlin and my client's attorney as opposed to
10 it just automatically going down to the drug court.

11 THE COURT: Well, what's the relevance? He said
12 that there was no offer made.

13 MR. FOWLER: I just wanted to make sure that there
14 was no long-term, in-depth discussions between Spratlin
15 because he initially --

16 THE COURT: Well, ask him that.

17 MR. FOWLER: Yeah.

18 THE COURT: We're spending all morning looking
19 through papers. Ask him what was the conversation, or
20 did you have a conversation. Did you speak to Spratlin
21 on behalf of your client, did he make any offers?

22 MR. FOWLER: Yes, sir.

23 THE COURT: I mean, get to the point.

24 MR. FOWLER: I apologize, Your Honor. Thank you.

25 I thought it would be easier than this to get that

1 information.

2 Q So what were the conversations you had with
3 Mr. Spratlin on this case?

4 A Very general. Only in terms of -- there will
5 always be initial conversations and kind of posture is
6 just generally do we think this is a plea or a trial
7 kind of thing. But there was never a plea offer.
8 Didn't have drug reports yet. That was going to
9 influence a lot. What offer there may well -- may be
10 was going to be influenced on what the actual weight of
11 the drugs was.

12 So Mr. Spratlin had it, it looks like, for the
13 first three or four months. He wasn't in a position
14 himself to really have any discussions about that
15 because, again, one of the biggest factors in any offer
16 he would make, the weight of the drugs, was an known.
17 So there really weren't any discussions with
18 Mr. Spratlin.

19 Q Isn't it true that you told Mr. Cole that the plea
20 initially would be seven years?

21 A No. I was explaining -- well, the reduced charge
22 was 7 to 25, there was that explanation.

23 Q So you indicated to him that he might get seven
24 years on this; is that correct?

25 A Well, and he might get 25.

ERIC FOX-CROSS BY MR. FOWLER

55

1 MR. FOWLER: If I might have a moment, Your Honor.
2 I have no further questions, Your Honor.

3 THE COURT: Anything further?

4 MR. HUNTER: No, sir.

5 THE COURT: Thank you. Thank you very much, sir,
6 you may step down.

7 (Witness excused.)

8 THE COURT: Anything further from the State?

9 MR. HUNTER: No, Your Honor. That's the State's
10 case.

11 THE COURT: All right. Be glad to hear from you
12 with regards to -- Mr. Fowler?

13 MR. FOWLER: Closing statement.

14 THE COURT: Mr. Fowler on behalf of Mr. Cole.

15 MR. FOWLER: Yes, sir. I think that when I was
16 reviewing this case, Your Honor, one of the things that
17 kind of jumped out at me was the transcript of this
18 case, Your Honor. Not once, but I believe twice in the
19 transcript my client asked the Court for another
20 lawyer.

21 Also my client, Mr. Cole, asked -- had to confer
22 with the judge about the plea. And, you know, in my
23 understanding is that the jury trial should have been
24 explained not by the Court but by the attorney. Now,
25 all three of those things were in the transcript here,

1 Your Honor, and requesting another attorney. And those
2 are things that are relevant.

3 There was apparently a hand-off between
4 Mr. Spratlin and Mr. Hyman in terms of this case. I
5 don't know exactly what discussions were made, but
6 Mr. Spratlin was on the -- pursuant to Mr. Fox's
7 testimony, that there was several months of
8 Mr. Spratlin apparently having this case. And also
9 it's been my or Mr. Cole's contention that he did not
10 know exactly the difference between a hard sentence of
11 85 percent and a violent and a nonviolent, Your Honor.

12 So, even within the four corners of the
13 transcript, you know, I think it raises a lot of issues
14 in terms of where Mr. Fox's representation was
15 apparently deficient and the outcome would have been
16 different, that he would have -- that Mr. Cole would
17 have gone to trial. And when you add into that that
18 there was no suppression hearing, that there was no
19 conversations or discussions about the drug enforcement
20 officer that did this, and also the undercover
21 informant, there just seems to be a lot of smoke here,
22 Your Honor. And that just --

23 THE COURT: Why would you have those discussions
24 during a plea?

25 MR. FOWLER: Well, not during the plea but in the

1 background information of my client, whether his
2 decision to plead or not. So not only within the four
3 corners of the transcript at the plea, but also in the
4 background information that my client expressed and Mr.
5 Fox to a certain extent today.

6 It's my understanding that there is enough
7 evidence here that meets the Strickland burden of
8 proof, and we would like to ask for a ruling in our
9 favor on this, Your Honor.

10 THE COURT: All right. Mr. Hunter.

11 MR. HUNTER: Just very briefly, Your Honor. I
12 think the record before the Court clearly indicates
13 that Mr. Cole's plea was entered knowingly, voluntarily
14 and intelligently. The transcript reflects that Judge
15 Hyman went through a very detailed colloquy. He went
16 over Mr. Cole's right to trial, gave him multiple
17 opportunities to back out of the plea, go to trial if
18 he wished to. He explained that if he wanted to go to
19 trial with a different attorney, he couldn't do that
20 but he could go represent himself. Knowing all that,
21 Mr. Cole made his decision to plead guilty.

22 As far as Mr. Fox's testimony, I think it shows
23 that he was thoroughly prepared. He was very familiar
24 with the facts and evidence in this case. He met with
25 Mr. Cole multiple times, went over the evidence with

1 him. Mr. Fox's testimony is that he did explain the
2 mechanics of the jury trial to Mr. Cole despite what
3 Mr. Cole has testified to. As well Mr. Fox testified
4 that he explained that it would be a violent -- or a
5 plea to a violent offense as well as Mr. Cole would
6 have to serve 85 percent which is the violent nature of
7 the plea as reflected on the sentencing sheet.

8 As far as any duty to withdraw after Mr. Cole
9 expressed an unhappiness with Mr. Fox, I'm not aware of
10 anything that says that Mr. Fox has any kind of duty to
11 withdraw at that point, especially considering he was
12 appointed to the case.

13 The argument about the initial Solicitor Spratlin
14 being on the case, I think, is totally irrelevant to
15 Mr. Cole's plea. Mr. Hyman handled the case. As far
16 as a suppression motion or anything like that, the
17 colloquy clearly reflects that and Mr. Fox's testimony
18 reflects as well that Mr. Cole was aware of the fact
19 that he was waiving the right to challenge the
20 evidence, etcetera, when he entered his guilty plea.

21 Finally, the State would submit that Mr. Cole has
22 not shown any ineffectiveness on the part of Mr. Fox
23 and thus shown any resulting prejudice. And for that
24 reason we would ask that the PCR be dismissed and
25 denied. Thank you.

1 THE COURT: All right. Yeah, I'm looking at the
2 transcript and, you know, we get this often times. And
3 I don't know, this is not particular to Mr. Cole's
4 case, I see it routinely. And that is that people are
5 before the Court, they are placed under oath, and then
6 we proceed to ask questions, and hopefully they
7 understand that they're under oath and so they have an
8 obligation to be truthful and honest in their
9 responses. And so we assume that they are being that.

10 And as I go through this transcript, absolutely
11 Mr. Cole expressed concern and that he wanted another
12 attorney. But when the Court pressed him on it, and
13 I'm referring to page five, line 20, was this lawyer
14 appointed for you. Mr. Cole says, yes. The Court
15 says: Well, why do you not want this lawyer?
16 Mr. Cole's response is: Because I don't want to go to
17 trial.

18 And so the judge explains that he's appointed
19 counsel, and I'm not using the judge's words, but
20 essentially, you know, we explain to folks who have
21 appointed counsel that they don't necessarily get to
22 pick and choose their attorneys. But there was no
23 other reason given to the Court other than, I don't
24 want to go to trial. And so we proceed on, and there's
25 discussion about the plea offer.

1 And at every point throughout this colloquy when
2 Mr. Cole expresses the need to talk to his lawyer, the
3 judge gives it to him. And there's a conversation, of
4 course that's off the record, that's between Mr. Cole
5 and his lawyer. But then he comes back on the record
6 and the judge continues to ask appropriate questions,
7 and he gets the responses he gets.

8 The issue regarding the plea sheet, I look at the
9 plea sheet which is here in Horry County. And
10 sometimes, you know, a lot of pleas we see these things
11 are handwritten. Horry County does a good job, and
12 these are presented and they're typed. And Mr. Cole's
13 signature appears there along with the solicitor and
14 his attorney.

15 And it's clearly marked in the plea sheet that
16 he's pleading to the lesser charge of 28 to 100 grams
17 as a first offense and that it's marked that it's a
18 violent offense and it's a serious offense, and that
19 there's a recommendation by the State of 10 to 15,
20 which coincides with what the Court asked him in the
21 plea colloquy, his understanding of the plea.

22 Now, if I'm missing it, y'all can point it out to
23 me, but there's never any long discussion or any short
24 discussion between Mr. Cole and the Court that he was
25 supposed to be getting seven. It's not in there. The

1 judge informs him that the range is 10 to 15. Mr. Cole
2 asked him about that to clarify that range, and he
3 clarifies the range as being 10 to 15. He said, do you
4 understand that. He says, yes, sir. And it goes
5 through.

6 This all occurred on August the 7th. It was made
7 clear early in the plea colloquy here that if he did
8 not want to accept the State's offer that he'd go to
9 trial in September. So it wasn't one of these things
10 that either you take the plea offer today, or we're
11 going to tee up and pull a jury this afternoon. So he
12 wasn't under that kind of a threat or pressure. If he
13 did not want to plead, he certainly had every
14 opportunity to step away.

15 Now, I understand that the plea offer, that there
16 was a timeframe on that as to whether or not to accept
17 that, so he was under that pressure. But, you know,
18 according to Mr. Fox, he explained to him that even
19 though it wasn't what he wanted, that they reduced his
20 exposure down from 25 to 30 to 7 to 25 and even limited
21 it even further by doing a range of 10 to 15.

22 He indicates that he shared with him that the fact
23 that it's a non-parolable offense, it's an 85 percent
24 offense and that the 85 percent has nothing to do with
25 the -- what was it he testified to. In other words,

1 it's associated with the charge itself, not whether
2 it's violent or not violent. I think that was the
3 conversation they had. So that even if you have a
4 violent crime, it may not be 85 percent. In this case
5 it was 85 percent. And that was explained.

6 In the plea after the solicitor gave the facts as
7 the State had the facts, the judge asked him, you know,
8 with regards to those -- and those facts, and he asked
9 if he could speak to his attorney, again, the judge
10 took a break and allowed him to talk to his lawyer.

11 And after that he came back and said, no, he
12 understood. And I'm trying to see. Again, I recall
13 reading that the Court passed -- you understand that
14 you're charged with being in possession of these drugs
15 or at least knowing that the drugs were in the vehicle;
16 is that correct? He said, yes, sir, that's correct.
17 He admitted his guilt throughout. Even here today, it
18 appears that he was hoping to get a seven-year
19 sentence, and he didn't get that. But it doesn't
20 appear that that was an issue at the time of the plea.

21 And, you know, Strickland requires that the
22 Defendant show that counsel's performance was
23 deficient. I don't see that here. As a matter of
24 fact, it appears from everything here that Mr. Fox was
25 gearing up for trial and not gearing up for a plea and

1 had every understanding and belief that he was going to
2 be trying this case. And it resulted in this plea. So
3 I don't think there's been any showing that the
4 performance was deficient.

5 And then of course the second prong is that after
6 showing that, it requires that those errors were so
7 serious as to deprive the Defendant of a fair trial or
8 a fair hearing or result. And it just doesn't appear
9 to be the case.

10 I realize that there's conflicting testimony with
11 regards to Mr. Cole's responses to the questioning
12 today versus the questioning before Judge Hyman back in
13 2013. But I just don't find that he's presented
14 evidence sufficient to grant his motion. I'm going to
15 respectfully deny the application.

16 (The hearing concluded at approximately 1:00 p.m.)

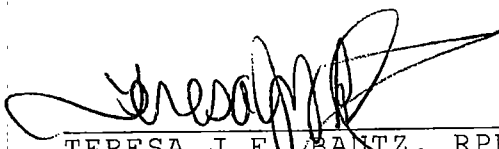
17 (End of Transcript of Record.)
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25

1 CERTIFICATE OF REPORTER
2

3 STATE OF SOUTH CAROLINA)
4 COUNTY OF HORRY)

5
6 I, TERESA J.F. BAUTZ, Official Court
7 Reporter for the Fifteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete Transcript
10 of Record of the proceedings had and evidence
11 introduced in the trial of the captioned case, relative
12 to appeal, in the Court of Common Pleas for Horry
13 County, South Carolina, on the 6th day of October,
14 2016.

15
16 I FURTHER CERTIFY that I am neither of
17 kin, counsel nor interest to any party hereto.

18
19
20 
21 TERESA J.F. BAUTZ, RPR
22 Official Court Reporter
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Dean Henry Cole, #081665,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-26-2366

ORDER OF DISMISSAL

HORRY COUNTY
2016 JAN 25 PM 2:12
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 21, 2013. Respondent made a Return on or about December 17, 2014. The Court convened an evidentiary hearing into the matter on November 12, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Eric Fox, Esquire, also testified. The Court had before it a copy of the transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter. 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 May 2013, the Horry County Grand Jury indicted Applicant for trafficking cocaine over four-hundred (400) grams (2013-GS-26-02010). Jonathan Eric Fox, Esquire, represented Applicant. On August 7, 2013, Applicant pled guilty to trafficking cocaine, 28-100 grams, in exchange for the State recommending a sentence range of ten

(10) to fifteen (15) years. The Honorable Larry B. Hyman accepted the recommendation and sentenced Applicant to ten (10) years imprisonment. Applicant did not appeal his plea or sentence.

II. ALLEGATIONS

At the PCR hearing, Applicant proceeded with the following allegations:

1. Involuntary Guilty Plea:
 - a. Applicant wanted but was denied a different attorney.
 - b. Counsel failed to thoroughly explain the trial and plea process with Applicant.
2. Ineffective Assistance of Counsel.

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. This Court finds Counsel's testimony credible and Applicant's testimony not credible. 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 (2003). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Involuntary Guilty Plea

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the

defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

1. Request for Another Attorney

Applicant testified at the PCR hearing that he requested another attorney prior to his guilty plea, but the plea judge denied his request. Applicant asserts this denial resulted in his guilty plea being involuntary. This Court finds that Applicant's claim that he should have been appointed another attorney is without merit. See State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) ("A motion to relieve counsel is addressed to the discretion of the [circuit court] and will not be disturbed absent an abuse of discretion."); State v. Childers, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007) ("The movant bears the burden to show satisfactory cause for removal."); United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (holding the Sixth Amendment provides that all criminal defendants shall enjoy the right to have assistance of counsel for their defense); Wheat v. United States, 486 U.S. 153, 159 (1988) ("[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate

for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.”); State v. Sanders, 341 S.C. 386, 389, 534 S.E.2d 696, 697 (2000) (recognizing that “the Sixth Amendment does not confer an absolute right to be represented by one’s preferred attorney”); State v. Sims, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991) (“In evaluating whether the [circuit court] abused [its] discretion in denying [the defendant’s] motion for substitution of counsel, the [circuit court] may consider several factors: timeliness of the motion, adequacy of the [circuit court’s] inquiry into the defendant’s complaint, and whether the attorney-client conflict was so great that it resulted in a total lack of communication, thereby preventing an adequate defense.”); United States v. Gallop, 838 F.2d 105, 109 (4th Cir.1988) (finding that once the circuit court has appropriately determined that a substitution of counsel is not warranted, the circuit court can insist that the defendant choose between continuing representation with his existing counsel or appearing pro se); Black v. State, No. 2013-UP-486, 2013 WL 8541663, at 1 (S.C. Ct. App. Dec. 23, 2013). This Court finds Applicant failed to meet the burdens necessary to show he should have been appointed another attorney prior to his plea. Furthermore, Applicant had sixteen months leading up to his plea in which he could have hired another attorney. This Court has no doubt Applicant waited to raise this issue until the day of the plea as a tactic to delay the inevitable. For the foregoing reasons, the allegation is without merit.

2. Failure to Thoroughly Explain the Criminal Process

Applicant testified at his PCR hearing that plea counsel did not thoroughly prepare him for his guilty plea. Specifically, Applicant alleged he did not understand what sentence he was potentially facing by pleading guilty. Applicant also alleged Counsel never explained his right to a jury trial, and the process by which a jury trial would take place. This Court finds Applicant’s testimony to be not credible. The plea colloquy is clear; the plea judge went over Applicant’s right to trial as well as

Applicant's potential exposure as a result of pleading guilty. Furthermore, Applicant told the plea judge he understood he was facing a sentencing range of ten to fifteen years by pleading guilty. Applicant specifically told the plea judge he did not wish to have a jury trial, and he wanted to give up that right and enter a plea of guilty. Additionally, plea counsel testified he went over all of those things with Applicant prior to his guilty plea. This Court has no reason to doubt plea counsel's testimony and finds it totally credible. Applicant is merely unhappy with the decision he made to plead guilty. The record and testimony before this Court leave no doubt Applicant was fully aware of his right to a jury trial and the consequences of his guilty plea. Applicant no doubt decided to plead guilty to the lesser included offense to avoid a potential minimum sentence of twenty-five years in prison if found guilty at trial. As this Court can find no evidence Applicant's plea was not entered freely, knowingly, and voluntarily, the allegation is without merit and must be denied.

B. Ineffective Assistance of Counsel

In this 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 trial counsel as a ground for relief, Applicant must prove trial counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial 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 trial 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 trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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.

This Court finds Applicant has failed to show Counsel's performance fell below an objective standard of reasonableness. Counsel's testimony indicated he was extremely familiar with the facts of Applicant's case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant's constitutional rights, and he explained the differences between going to trial and entering a guilty plea. Counsel testified Applicant initially wanted to proceed to trial, but after his arraignment Applicant made the decision to take the State's plea offer. Counsel testified that he discussed with Applicant the fact he would be pleading to a lesser charge than that for which he was indicted. Counsel testified he explained the reason for the plea to the lesser charge was to limit Applicant's potential exposure at sentencing. Counsel indicated he never had trouble communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations. Counsel testified Applicant made a fully informed decision to plead guilty, and Counsel agreed with the decision. Counsel testified he did not believe there was any sort of conflict with the plea judge being Judge Hyman, and the solicitor also being named Hyman. Finally, counsel testified he explained Applicant's plea would be classified as

violent. As such, Counsel's testimony indicated his performance was well within the range required under the law. This Court finds no reason to believe Counsel's testimony was not credible. Accordingly, this Court finds Applicant's allegations are without merit.

C. 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.

D. Overwhelming Evidence of Guilt

This Court notes that Applicant can show no prejudice in regards to any of the alleged allegations as there is clear overwhelming evidence of guilt. See Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

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. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

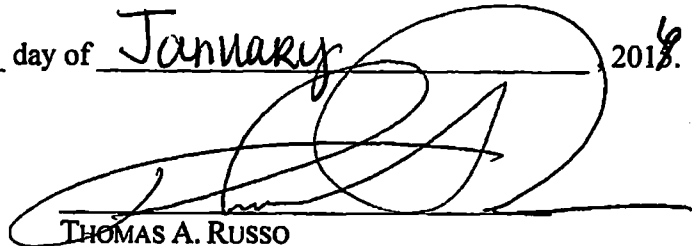
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to

appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, her post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and her attorney are 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 7th day of January, 2018.



THOMAS A. RUSSO
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina

WITNESSES

reddie Curry 15th Circuit Drug Enforcement Unit

The State of South Carolina

County of Horry

M. Travis Hyman

12H01548

COURT OF GENERAL SESSIONS

May, 2013 TERM

PREST WARRANT NUMBER

1972249

DR: 0281 44-53-0370(e)(2)(e)

OA: 4/15/2012

THE STATE

vs.

Dean Henry Cole

B/ M

Miami, FL 33131

DOB: 1

SSN:

ATTORNEY: Fox, J. Eric

Indictment for

TRAFFICKING COCAINE OVER 400 GRAMS

Jimmy A. Richardson, II, Solicitor

ORIGINAL

CTION OF GRAND JURY

oreperson of Grand Jury

JUN 27 2013

ERDICT

oreperson of Petit Jury

ate:

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT
TRAFFICKING COCAINE OVER 400 GRAMS

At a Court of General Sessions, convened on May 30, 2013, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE OVER 400 GRAMS

CDR: 0281 44-53-0370(e)(2)(e)

That Dean Henry Cole did in Horry County on or about April 14, 2012, knowingly sell, deliver, purchase or bring into this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of more than four hundred grams, the same being a controlled substance all within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized, and being in violation of Section 44-53-370(e)(2)(e), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

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



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR